

DAMAGE BY FISHING IN THE UK'S LYME BAY – A PROBLEM OF REGULATION OR OWNERSHIP?

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Since last year, fisheries management has undergone serious analysis under the lens of the Marine White Paper.¹ A change in the regulatory framework has been proposed, with the expansion of the jurisdictions of Sea Fisheries Committees, marine spatial planning and Marine Conservation Zones. This regulatory approach ignores developments elsewhere. In the European Union, the Directorate for Fisheries and Maritime Affairs has just finished a consultation exercise on rights based fisheries management.² At a national level nearly 20 years of fisheries regulation in the Northern Territories of Australia have been declared invalid³ for 5000 km of coastal and intertidal waters because the Fisheries Act 1988 (NT) failed to take into consideration pre-existing native title rights. The message is loud and clear; the legislators drafting the Marine Bill must take into consideration the rights and responsibilities of the parties involved in fisheries if the Bill is to make a significant difference to management and key into developments in European and the common law. This article will look at the current dispute between fishermen and environmentalists on the management of Lyme Bay from the perspective of property rights. It focuses on the competing rights of commercial scallop dredgers and the Crown Estate and assesses whether the rights of the fishermen extend to damaging the sea floor and attached marine life and, if not, whether the Crown Estate should take action to protect its property.

THE HISTORY OF FISHING IN LYME BAY

The seabed of Lyme Bay is made up of rocky reef with an east-west bedding plane. The reef is home to a broad variety of marine species, many of which are attached to the seabed. The most notable is the pink sea fan coral *Eunicella verrucosa*, which is a protected species under Schedule 5 of the Wildlife and Countryside Act 1981.⁴

Scallop dredging in Lyme Bay started about 30 years ago. The rapid development of reliable technology has led to a greater intensification of fishing methods and the opening up of more marginal areas. Fishing gear

can now be operated on the seabed and in habitats which would not have been accessible in the past. About 10 years ago, the Devon Wildlife Trust became concerned that the dredges employed by the fishermen were damaging the seabed and they started to monitor the activities of the dredgers and lobby for fisheries closures. In 2001 they successfully negotiated with the fishermen to designate two areas to be closed to mobile bottom gears measuring approximately 4.6 km² and 1.9 km². The scallop dredgers avoided the closed areas until the winter of 2005–2006.

It appears that the increase in the price of diesel, increase in scallop prices and the recent limitations under Common Fisheries Policy regulations for days at sea for the whitefish fleet, led to a rapid increase in localised unregulated scallop fishing in late 2005. Scallop fishing effort in Lyme Bay itself rose from 3–5 boats to 8–15 boats and the voluntarily closed areas were trawled.

Opinion is divided as to whether fishing effort has increased in Lyme Bay in recent years. The local fisheries organisation (the South West Inshore Fishermen's Association)⁵ says it has not, while the environmental campaigners believe that it has.⁶ Opinion is also divided on the extent to which the seabed of Lyme Bay has been damaged, but it is safe to say that concerns raised by conservationists⁷ and commercial⁸ divers seem to have firm foundations. Matters came to a head last summer when Natural England (the government's conservation adviser) raised concerns over damage to the pink sea fan,⁹ and requested that a much larger single area be closed to mobile gears under a ministerial stop order to prevent further damage to mapped pink sea fan-dominated reefs. Later on in 2006, SWISA and local fishermen proposed a new voluntary agreement with Defra to keep out of four small areas in Lyme Bay, which are significantly smaller than Natural England, commercial scallop divers and local environmental campaigners had wished for.

The new voluntary agreement is still in place but there are ongoing discussions with Defra and the relevant

1 'A Sea Change – A Marine Bill White Paper' Department for Environment HMSO 2007.

2 http://www.ec.europa.eu/fisheries/cfp/governance/consultations/consultation_260207_en.htm.

3 *Gumana v Northern Territory of Australia* [2007] FCAFC 23.

4 A chart of Lyme Bay benthic habitats and overlying pink sea fans is available at <http://www.devonwildlifetrust.org/champions/baywatch/lymebay.php?map=substrate>, together with a detailed description of its substrate and ecology.

5 Jim Portus interviewed on *The Food Programme* BBC Radio 4 3 June 2007.

6 Hमारुs Limited 'Estimate of Economic Values of Activities in Proposed Conservation Zone in Lyme Bay' (2007) Devon Wildlife Trust 7.

7 <http://www.devonwildlifetrust.org/index.php?section=places:lymebay:video>.

8 Darren Brown interviewed on *The Food Programme* (n 5).

9 'Baywatching' (Spring 2007) Devon Wildlife Trust.

parties about putting the closure on a binding footing either by passing a by-law with the local Sea Fisheries Committees or a ministerial order, or by amending fishing vessel licences. As yet no firm decision has been forthcoming about the best way to give these areas enforceable statutory protection.

PROPERTY ISSUES

It is not the purpose of this article to investigate these matters from the perspective of the regulatory measures, but to look at the underlying rights of the parties to this dispute. In doing so a little more understanding is needed about the mechanics of scallop dredging itself. A scallop dredge is a steel bag with sprung loaded teeth, which is dragged along the seabed. Like a plough on land, the teeth dig into the sea floor and pick up the scallops so they (together with anything else in the dredge's path) are scraped from the seabed, and deposited into the steel bag, which is ultimately hauled to the surface. It is an inefficient fishing gear, and often requires repeated trawls to gather every last scallop (fisheries experts estimate the success to be something in the region of 33 per cent – ie only one in three legal-sized scallops is caught per trawl). As such, it is common practice for scallop boats to work together in areas. When one vessel is seen to work an area of seabed, others follow. This has most recently been observed in the Fal and Helford Special Area of Conservation over the autumn and winter of 2006. There have been scientific papers¹⁰ which relate scallop dredging to damage to the seabed. Divers allege that the dredges break pieces off reefs and push rocks about on the seabed, which causes further damage to the fragile benthic species that live there.¹¹ Repeated dredging over many years homogenises the substrate leading to flattened gravel-dominated substrates, devoid of upright surface fauna and flora.¹²

Ownership and management of the seabed

Out to the 12 mile limit, it is now settled law that the seabed is owned by the Crown Estate.¹³ As stated on its website¹⁴ 'there is no organisation in the world quite like the Crown Estate'. The Crown Estate comprises personal property of the monarch, the income of which is surrendered to the Treasury in exchange for the monarch receiving a civil list payment. The Estate is managed by the Crown Estate Commissioners under the Crown Estate Act 1961. This is not the place to discuss the constitutional question of whether the Crown Estate is a private estate or a public body and for the purposes of this article it is considered to be a public body.

10 C Bradshaw, L O Veale, A S Hill, A R Brand 'Changes in Irish Sea Benthos: Possible Effects of 40 Years of Dredging' (2001) *Hydrobiologia* 465 1-3, 129-38. J H Hall-Spencer, P G Moore 'Scallop dredging has profound, long term impacts on maerl habitats' *ICES Journal of Marine Science*, 57 1407-1415, 2000.

11 Hector Stewart interviewed on *Caught in Time* Community of Arran Seabed Trust 2006 DVD.

12 In terms of assessing property rights it is relevant to understand the activity by looking at video footage (www.youtube.com/watch?v=gKqM3hXwcRs).

13 G Marston 'The Crown's Seabed Estate – A valuable prerogative' (1991) 50 *CLJ* 384, 385.

14 http://www.thecrownestate.co.uk/about_us.htm.

Under the common law, land includes, for legal purposes, all plant life attached to the land.¹⁵ The language of land law does not entirely fit marine species, but it is assumed that sedentary species of marine life attached to the seabed also belong to the Crown Estate. Theoretically the seabed out to 12 miles should be treated like any other land save that it is covered by the sea and subject therefore to public rights and other unique uses, as discussed below.

The Crown Estate Commissioners must manage their estate so that they '... maintain and enhance its value and the return obtained from it, but with due regard to the requirements of good management'.¹⁶

It would appear that the mechanics of scallop dredging mean that significant damage is being caused to the Crown Estate's seabed and its natural life. The requirements of 'good estate management' are loose and not defined in law; however, the recent case of *Capita Trust Co (Channel Islands) Ltd v Chatham Marine B3 Developments Ltd*¹⁷ demonstrated that the courts, while not prepared to define the term itself, were able to decide upon an instance where the principle of good estate management had not been adhered to. There is a question whether, in permitting the damage to the seabed and attached natural life caused by dredging, the Crown Estate is adhering to this principle.

In the past the Crown Estate sought to balance the interests of its marine estate against those of the general public. There is, for instance, no public right to bathe in UK waters;¹⁸ it would be folly for the Crown Estate to insist that the public had no access to the foreshore, to sunbathe or to swim in the sea and so in this context it is appropriate for the Crown Estate to tolerate what would otherwise be a trespass 'so long as no mischief or injury was likely to occur'.¹⁹ The same argument could logically be extended to marine damage caused by fishermen. In attempting to protect valueless species on the seabed the Crown Estate would be taking action against members of the public and affecting their livelihoods, while not obtaining any particular benefit.

Laissez faire for scallop dredging may no longer be an acceptable approach. Increasingly the collateral effects of many fishing methods are linked to environmental damage,²⁰ which reduces both biodiversity and the long-term sustainability of the industry itself. In that context the very basis of good estate management has changed. It may no longer be morally acceptable for a public landowner to stand idle while its property is being damaged. These environmental mores have been put on a legislative footing in s 40(1) of the Natural Environment and Rural Communities Act 2006 (NERC Act), which states:

15 *Monsanto plc v Tilly* [2000] *Env LR* 313 at 322.

16 Crown Estate Act 1961 s 1(3).

17 [2006] *EWHC* 2596 (Ch).

18 *Blundell v Catterall* (1821) 5 B & Ald 268, 106 ER 1190.

19 T Bonyhady *The Laws of the Countryside* (Abingdon 1987) 8.

20 Royal Commission on Environmental Pollution 'Turning the Tide' (2004) 220.

Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

Defra is not in any doubt that, despite the Crown Estate's seabed unique constitutional status,²¹ its management is covered by the NERC Act:²²

One of the most direct impacts that public authorities have on biodiversity is through the management of their own land and buildings. Leading landowners include: [inter alia]

The Crown Estate, which covers some 160,000 hectares in the UK, including 110,000 hectares of agricultural land, as well as extensive areas of forest, parkland, rural estates, commercial and retail sites. The Crown Estate also owns 55% of the UK's foreshore and the entire seabed out to the 12 nautical mile limit (spanning some 50,000 square miles).

The biodiversity obligations in this context are two-fold. First, there is a duty to conserving biodiversity itself, which in this context the term has been interpreted by Defra to mean:

... the whole variety of life on Earth. It includes all species of plants and animals, but also their genetic variation, and the complex ecosystems of which they are a part. It covers the whole of the natural world, from the commonplace to the critically endangered.

While there is undoubtedly now a role for the conservation of the variety of life in the natural world, it also extends well beyond maintenance of signal species in a form of zoological garden. The NERC Act states: 'Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population of that organism or habitat'.²³

In addition there is a UK biodiversity action plan,²⁴ which was compiled in response to the United Nations Convention on Biological Diversity and signed at the Rio Summit in 1992. In Lyme Bay the rocky reef habitat, pink sea fan and other species have been identified as part of the biodiversity action plan. The Devon biodiversity action plan records that in respect of the rocky reef located in Lyme Bay the target is to: '... maintain the [rocky reef] and the wide variety of plant and animal communities it supports'.²⁵ Furthermore, the Biodiversity Action Plan for the pink sea fan states that action should be taken to:

Investigate causes of decline and take the appropriate management response where human activities are implicated (action 5.3.1)

and:

Undertake management measures to ensure human activities do not compromise known populations of the species (action 5.2.3).

The NERC Act would seem to have changed the principles of good estate management for public bodies. The effect is that the maintenance of the rocky reef in Lyme Bay should now concern the Crown Estate in a way it did not in the past.

In one respect the Crown Estate fulfils its biodiversity functions through the sponsorship of dialogue and marine conservation in its marine stewardship grants.²⁶ However laudable the organisations it assists in this fashion, there remains a fundamental question as to what direct action the Crown Estate should take to protect its seabed. Given the new biodiversity duty of the Crown Estate, this is a question it should seek to resolve as quickly as possible.

THE RIGHTS OF THE FISHING INDUSTRY

There are four possible sources for the authority of commercial fishermen to operate in Lyme Bay.

Fishing vessel licences

Section 4(1)(a) of the Sea Fish (Conservation) Act 1967 states:

... in any specified area ... fishing by fishing boats is prohibited unless authorised by a licence granted by one of the Ministers.

Defra commonly interprets the Act to give it the power to license the vessel rather than the activity of fishing and this is probably the better view, although it is interesting that the Act seems to refer to licensing fishing itself rather than the boats.²⁷

If the licence is the authority for the activity it raises questions about whether Defra has the right to license as owner or as regulator. It is not clear in which Crown body (if any) the UK's fishing rights now vest.²⁸ In either case, on the basis of *nemo dat quod non habet*,²⁹ a licence from Defra would not permit the interference with others' property beyond that which was permissible under the public right to fish.

In general, the terms and conditions of fishing vessel licences are of very little use here because although they often contain specific area and gear-type restrictions, they do not attempt to define the overall limitations on fishing. That would seem to have been left up to the common law. However, specific vessel licences may contain limitations, which if breached would lead to a suspension of the public right to fish for that breach and thereby cause a potential tort (see below). In that case it would be useful if the Crown Estate had input into fishing vessel licences to ensure their content minimised damage to Crown Estate property.

The public right to fish

The authority for the commercial industry to carry out the activity of fishing is probably under the ancient

21 NERC Act 2006 s 40(4)(c).

22 'Guidance for Public Authorities on Implementing the Biodiversity Duty' <http://www.defra.gov.uk/wildlife-countryside/pdfs/biodiversity/pa-guid-english.pdf> 23.

23 NERC Act s 40 (3).

24 <http://www.ukbap.org.uk>.

25 <http://www.devon.gov.uk/dbap-sea-rocky-2.pdf>.

26 http://www.thecrownestate.co.uk/msf5_terms_reference.

27 D Symes, S Boyes *Review of Management Regimes and Relevant Legislation in UK Waters* (University of Hull 2005) 58.

28 Bonyhady (n 19) 253.

29 Literally, 'no one can give what one does not have'.

common law or public right to fish.³⁰ Under the public right, fishing is limited to what is legal, reasonable³¹ and activities which do not interfere with the rights of the owner of the 'solum' or seabed.³²

There are specific problems associated with scallop dredging in Lyme Bay. First, while it is possible that scallop dredging may well cause minimal interference when it takes place on a sandy seabed, there is a question when carrying out the activity on adjacent rocky reefs and interface between these two habitats. The bedding planes of the reefs in Lyme Bay mean that dredges can physically be operated on an east-west axis. The use of dredges in this environment means that the reefs are broken up and rocks rolled about on the seabed and that the dredges themselves by their nature damage the natural life attached to the reefs. Scallopers use sophisticated echo-sounders to target this interface area between rocky reef and sandy areas where scallops are relatively abundant. Lyme Bay is fairly unique in the UK in having a fairly flat bedrock reef adjacent to the sand/sediment plains of deeper waters, which allows the passage of scallop dredges without the risk of snagging the gear. If the rocky habitat were comprised of large faces and boulders (more than 3m tall), which is a more common feature of most inshore south-western rocky reefs, then the dredgers may get snagged. So the fairly flat nature of the bedrock reefs adds to the vulnerability of the ecosystem owing to its accessibility by this particular fishery.

The fishing industry is attempting to be more sustainable in its approach to stock management and the impacts it has on biodiversity and the environment. As such, SEAFISH (the quango promoting the UK seafood sector) has published a 'Responsible Fishing Scheme' in which there is a section on mobile fishing gear. It states (at Annex E 'Dredge harvest of live bivalves guide' p 26):

Effort should be deployed in such a way as to allow dredged areas to recover before being dredged again. Where effort is regulated in a formal management structure this occurs for the whole fishery. In unregulated fisheries economic catch levels tend to regulate the amount of applied effort in a given area. Thus when catch per effort falls below an economic level, vessels move to other grounds.

As much information on seabed composition should be used to target effort specifically on substrates containing the target species whilst avoiding damage to other habitats. The means to do this vary between fisheries from simple reference to a chart, through interpretation of echo sounder returns to sophisticated ground discrimination systems.

Dredges should be made as selective as possible using current technology. This reduces stress on those animals selected at the seabed rather than on deck.

This would imply that the fishery should seek to avoid damage to vulnerable habitats such as biodiversity rocky reefs. SWISA has signed up to this scheme.

30 Fisheries Act 1701 in Scotland.

31 *Whelan v Hewson* [1872] IR VI 283.

32 *Attorney General for Canada v Attorney General for Quebec* (1921) 56 DLR 358.

The specific question here is whether significant seabed damage can be authorised by the public right.

This can be presented in the law in four ways. First, in private easements there is the doctrine of 'excessive use'. If there is an original grant of an easement, demands placed on that easement are substantially increased and if this increase radically changes the nature of the original agreement, it can void the easement.³³ Fishing rights are profits à prendre rather than easements but it is logical that at some stage use of the public right goes beyond the scope of its original grant. It is clear that the public's right to take fish from the sea is 'without stint',³⁴ but it is not so clear that the right to cause damage to others' property in doing so is also unlimited.

Secondly, some case law deems activities such as access to the foreshore³⁵ and bait digging³⁶ as 'ancillary' to the public right to fish. The law has tended to interpret ancillary as a 'subordinate or incidental activity'.³⁷ In their natural state the rocky reefs of Lyme Bay support a wide variety of species, which are particularly vulnerable to dredging, as they tend to be attached to the seabed and do not have evolutionary defences to this sort of man-made interference.³⁸ As can be seen from the video footage (n 12), the damage is therefore potentially intensive. It is difficult for such destruction to be merely incidental or subordinate.

Thirdly, there is a point at which interference is so substantial that it can only be authorised by an owner of the seabed. Attaching fixed salmon traps³⁹ falls into this category, as does licensing dredging for marine aggregates.⁴⁰

Fourthly, if the SEAFISH guidance represents a code of acceptable conduct, the question is whether breaching that code is so unreasonable as to take the activity beyond the public right, in the same way that breaches of the Highway Code are used to determine negligence on the highway.

In lay terms these approaches are similar ways of saying the same thing – how far does fishing extend with respect to damage to others' property?

Interface between Wildlife and Countryside Act 1981 and property rights

Even if the activity is permitted by the public right to fish, under the Wildlife and Countryside Act 1981 it is a criminal offence to damage certain scheduled species (of which the pink sea fan present in parts of Lyme Bay is one). Section 9(1) of the Act states:

Subject to the provisions of this part, if any person intentionally kills, injures or takes any wild animal included in Schedule 5, he shall be guilty of an offence.

33 *McAdams Homes Limited v Robinson* [2004] EWCA Civ 214.

34 *Goodman v Mayor of Saltash* (1882) 7 App Cas 633–46 (Lord Selbourne).

35 *Baggot v Orr* (1801) 126 ER 1391.

36 *Anderson v Alnwick DC* [1993] 3 All ER 613.

37 *Pearce v London and South West Railway* [1900] 2 QB 130.

38 http://www.bbc.co.uk/devon/outdoors/nature/2003/lyme_coral.shtml.

39 *Attorney General for Canada v Attorney General for Quebec* (n 32).

40 http://www.thecrownestate.co.uk/40_aggregate.

The test for intention is a two stage process. First, damage to the pink sea fan must be 'virtually certain'. Secondly, the defendants must appreciate that is the case.⁴¹ This is a very high hurdle for a successful criminal prosecution. Furthermore, there is a defence contained at s 10(3)(c):

... if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided.

Mounting a criminal prosecution under the Act would be technically very difficult because of the logistics of obtaining evidence against an individual. However, there is a relationship between the Act and the public right to fish. The public right to fish does not apply where such an act is illegal. Damaging pink sea fans is potentially illegal, if the 'lawful operation' of fishing could reasonably avoid damaging it. Commercial diving for scallops is viable up to a depth of 20 metres. It is also possible to target species other than scallops, without interfering with the sea fan. Whether it is reasonable to do so would be a matter for the courts to decide. If it is reasonable for fishermen to use different methods or target other species, then it would be possible that the public right to fish using this gear in an area inhabited by pink sea fans would be suspended. The effect is that damage to the pink sea fans (which are attached to the seabed and therefore are the Crown Estate's property) would be beyond the public right to fish and therefore potentially a tort.

Prescriptive rights

A third method of authorising scallop dredging is from the development of prescriptive rights. The law of prescription is complex and it not the purpose of this article to explore it fully; however, there are a number of reasons why a claim for prescription is unlikely to succeed. For a successful claim of prescription the claimant must have a recognisable right, carried out over a number of years, without permission, openly and as of right.⁴²

First, the claimant needs to have an established identity. The fact that numerous different fishermen may have been operating dredges on the Crown Estate's property for 30 years does not mean that there is a single entity or person who can claim that he has the right.⁴³ Even in the interesting Victorian case of *Goodman v Mayor of Saltash*,⁴⁴ which marked the apex of successful public rights claims, the court implied the existence of a charitable corporation which could hold fishing rights on behalf of an identifiable population who had fished in the area since 1189. This case must be distinguished here, because while with *Goodman* fishing rights were held for public enjoyment, in Lyme Bay any organisation could only claim to represent commercial interests and could not qualify as a charity, and while in *Goodman* that charitable

corporation represented the interests of a locality claiming rights over adjacent waters, in Lyme Bay a disparate group of fishermen from up and down the south coast would be claiming rights.

Secondly, it is necessary to identify what type of right is being claimed. Fishing is a profit à prendre, a right to take something from someone else's land. However, the right to fish is not at issue here, given that fishing is already authorised by the public right. The question is whether there is an additional right to fish in such a manner as to cause damage to the seabed. In that case there is a question of whether what is being claimed is an easement or a profit. For an easement to exist it needs to be attached to some dominant land, as an easement under English law cannot exist 'in gross' (not related to some adjacent land) while a profit à prendre can; however, this additional right to cause damage in harvest would create a new species of profit.

Thirdly, there is the question of legality. Although potentially illegal acts such as criminal damage by the disturbance to the Crown Estate's property caused by the dredge can now become legitimised by prescription,⁴⁵ some illegal acts cannot be the subject of prescription, where they are outside the grant of the owner. In this case infringement of s 9 of the Wildlife and Countryside Act 1981 is likely to defeat a claim for prescription, where damage to pink sea fan or other protected species is at issue, if there is another reasonable method of fishing available.

Fourthly, even if prospective claimants could be found, they would need to adhere to the timescales. There are two frameworks for claiming prescriptive rights: the doctrine of lost modern grant, which would require the claimant to have exercised his right consistently for 20 years and the Prescription Act 1832, which for profits requires a time limit of 30 years.

Fifthly, there would be the issue of establishing the appropriate geographical area over which to claim a prescriptive right.

These are just some of the flaws. In reality there are so many potential problems with a claim for prescription that it is highly unlikely to succeed.

Customary rights

Fishermen often claim that customary rights in some way authorise their activities. Customary rights relate to the inhabitants of a locality who have had consistent rights which are ancient, certain, reasonable and continuous.⁴⁶ These have been held to relate to rights to hold a fair, access to a church yard⁴⁷ and the drying of fishing nets.⁴⁸ However, in this context there are two legal hurdles for any successful claim. First, the right to dredge would need to be a custom of a particular local community. Secondly, dredging would need to be an ancient activity in Lyme Bay. Not only would 20 years' consistent use need to be proven by a community but

41 *R v Woollin* [1998] 4 All ER 10.

42 K Gray, S Gray *Elements of Land Law* (OUP 2005) 694.

43 *Johnston v O'Neill* [1911] AC 552; *Harris v Earl of Chesterfield* [1911] AC 623.

44 *Goodman v Mayor of Saltash* (n 34) at 665 (Lord Watson).

45 *Bakewell Management Limited v Brandwood* [2004] 2 WLR 955.

46 K Gray, S Gray (n 42) 334.

47 *Brocklebank v Thompson* [1903] 2 Ch 344 at 354.

48 *Mercer v Denne* [1905] 2 Ch 538 at 581, 584.

there would need to be no evidence that the use started after 1189. Dredging only commenced in the 1970s, so there is no possibility of claiming custom.⁴⁹

EFFECT OF ACTIVITIES BEYOND THE PUBLIC RIGHT TO FISH

There are a number of interesting consequences in tort if scallop dredging is deemed to be unauthorised by licence, public right, prescription or custom.

Trespass

Trespass 'is the act of unauthorised and unjustifiable entry upon land in possession of another'.⁵⁰ It applies equally to possessions as well as land and therefore the natural life attached to the seabed could also be the subject of a claim for trespass.⁵¹ The lack of authorisation has already been assessed, but whether a trespass can be justified for other reasons needs further examination.

It is possible that trespass may be permissible on the basis of public interest and loss of employment. In the past the courts have construed public interest narrowly.⁵² However, in the Canadian case of *Videotron Telecom Ltd v OPGI Management Limited Partnership*⁵³ a large landholder had refused to allow connections from a telecommunications company. 'The social and commercial imperative of communications efficiency trumped even the inviolate nature of property'.⁵⁴ It is questionable whether such an approach by the fishing industry would succeed. In the *Videotron* case the benefits to the public at large are substantial and there are no significant disbenefits. In the case of scallop dredging, scientific opinion seems to indicate that the activity in the long term causes harm to fish stocks and the environment. Indeed bottom trawling of all kinds is increasingly being banned.⁵⁵ It would be hard to mount a claim that dredging should be justified on the grounds of public interest if in the medium to long term the activity damaged fish stocks and the viability of the commercial industry itself.

Some Australian cases have lent credence to a claim that very large tracts of land are indefensible to the trespasser because the scale of the land holding is so great that it could not have been intended to have been exclusory.⁵⁶ The Crown's seabed estate is a land grant of Australian proportions. However, the activity complained of is not entirely about access, which is permitted by the public's rights to fish and navigate, but accessing in such a way as to cause damage.

If neither justification applies, the Crown Estate could seek an injunction against the continuance of the activity (see below).

Negligence

Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.⁵⁷

In simple terms, there must be a duty of care and breach of that duty, from which foreseeable damage must result.

The owners of property in the immediate vicinity will be among those to whom a duty of care is owed. In *Southport Corporation v Esso Petroleum Co*⁵⁸ the owners of an oil tanker were found liable in negligence after their vessel broke up and deposited a slick on the plaintiff's foreshore.

There is ample material for saying that persons who use the highway for purposes other than passage owe a distinct duty to prevent damage from their activities ... it would seem that the same liability should attach to those who use a navigable highway as a dumping ground for quantities of oil.⁵⁹

In terms of importance the public right to fish is junior to the rights to use the highway and navigate. So it is not a great step to assume that those exercising the public right to fish should do so in a way as to prevent damage from their activities.

Whether there is a breach will depend on two things. First, if the public right to fish has not impliedly authorised damage to the seabed and, secondly, whether the scallop dredging does cause damage. Despite the increasing scientific information on the subject, it is possible that little evidence would be needed for this beyond the video evidence available, because it is clear that by its very nature scallop dredging interferes with Crown Estate property.

Most negligence claimants seek damages. It would be difficult to link existing damage to any individual. Unusually for a negligence claim the Crown Estate would need to seek an injunction against further activities. Causation would be linked not to whether the *individual has caused* damage – but whether the *activity would cause* damage.⁶⁰ This test is on the balance of probabilities using available evidence.

Remedy for trespass and negligence

There remains the question of whether, under the particular circumstances, a court would be willing to grant an injunction. In the past courts were inclined to grant injunctions as a matter of course⁶¹ but increasingly they have sought to impose a social accommodation.⁶² There is a four part test set out in *Shelfer v City of London Electric Lighting Co*:

49 *Simpson v Wells* [1872] LR 7 QB 217.

50 K Gray, S Gray (n 42) 255.

51 *Mills v Brooker* [1919] 1 KB 555.

52 *Monsanto v Tilly* [2000] Env LR 313.

53 [2003] OJ 2278.

54 K Gray, S Gray (n 42) 238.

55 <http://www.chron.com/disp/story.mpl/ap/fn/4878832.html>.

56 *Wik Peoples v Queensland* (1996) 134 ALR 637.

57 *Blythe v Birmingham Waterworks Company* (1856) 11 Exch 781.

58 [1953] 3 WLR 773.

59 F H Newark *The Modern Law Review* 17 (1954) 6 579–81.

60 *Redland Bricks Ltd v Morris* [1970] AC 652.

61 *Shelfer v City of London Electric Lighting Co; Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, 64 LJ Ch 216.

62 *Bracewell v Appleby* [1975] Ch 408, 1 All ER 993.

- if the injury to the plaintiff's legal right is small
- is one which is capable of being estimated in money
- is one which can be adequately compensated by a small monetary payment
- is one which would be oppressive to a defendant to grant an injunction.

Using the *Shelfer* tests

In respect of the first test, the relative value of the Crown's seabed estate in monetary terms is not large; the Crown tends to get value from aggregates dredging, mooring rights and foreshore rather than owning the seabed per se. So it could be argued that the injury to the claimant in monetary terms is slight. However, since the passage of the NERC Act that argument is likely to be less persuasive than it was in the past. Increasingly biodiversity has a perceived value, even if that cannot be expressed easily in financial terms. On that basis scouring and damaging the seabed and attached natural life could be seen as an appreciable injury to the claimant's right.

In respect of the second test, biodiversity damage would be difficult to quantify in money terms.

In respect of the third test, compensation for this type of damage is often dealt with by formation of a suitable habitat elsewhere, rather than financial compensation.⁶³ In Lyme Bay that would be exceptionally difficult.

In respect of the fourth test, 'oppression' needs some further explanation:

Oppression must be judged as at the date the court is asked grant the injunction, and the court cannot ignore the reality with which it is then confronted.⁶⁴

It is likely that by granting an injunction against the use of this gear in this area the courts would be having a dramatic and harmful effect on the livelihoods of those engaged in the activity in Lyme Bay. However, if the science is to be believed,⁶⁵ the long-term effects of dredging are harmful, not just in terms of biodiversity protection, but also in terms of the long-term viability of sustainable fishing.⁶⁶ This will ultimately affect all those wishing to exercise their public right to fish, including those same fishermen operating dredgers. In that context it remains to be seen whether an injunction is 'oppressive' or just protecting people from themselves. As Scottish fisherman Donald McCrindle said 'medicine daes nae taste nice'.⁶⁷

There is a further defence in that the Crown's seabed estate is not a private estate but performs a public function and is subject not just to the established rights of fishing and navigation but also a plethora of

other undefined public uses such as access to the foreshore, bathing and diving, which enable the public to carry out their open enjoyment of the property. Kevin and Susan Gray call this 'quasi-public' land.⁶⁸ Unlike a private land owner, the quasi-public landowner must exercise his power reasonably and 'with due regard to the persons affected by its exercise'.⁶⁹ An injunction in this matter would therefore be subject to a reasonableness test. Once again, as the new NERC provisions are important here, this imparts the Crown Estate with the authority to take into consideration biodiversity in the way it assesses its management practices and decides whether it would be reasonable to single out scallop dredging as something that should not be permitted on its property.⁷⁰

Finally, there is a possible defence to an injunction in the Crown Estate's inaction thus far. In the case of *Armstrong v Sheppard and Short Ltd* a landowner agreed to the laying of a sewerage pipe without realising he owned the land it crossed. This will be a matter of evidence as to whether permission has ever been sought.

MANAGEMENT OF LYME BAY

If scallop dredging is shown to be tortious, then it has implications in the management of Lyme Bay. Defra, while weighing up the merits of the various arguments put forward by dredgers, divers and environmentalists, would be unable to support the continuation of dredging in Lyme Bay, if in doing so it was permitting a damaging trespass.

BROADER LESSONS

This analysis assesses the interface between the public right to fish and the Crown Estate's private rights. It is an area which, to date, has escaped the decision of the courts. Dredging and bottom trawling are carried out in many common law jurisdictions. Outside 12 mile limits there is no freeholder to take any action but within 12 mile limits there is a freeholder and it is a matter which needs resolution. It may be that not all seabeds are so susceptible to damage as the unique geography of Lyme Bay,⁷¹ but that is a matter ultimately for the courts to decide unless action is taken in the Marine Bill.

Part of reason for the Marine White Paper was to resolve the overlapping and complex nature of marine legislation.⁷² The public right to fish, as the prime authority for one of the most significant acts, which affects the marine environment, is overdue for review. At the very least it needs to be put on a statutory basis with clear limitations on its nature and extent and the degree to which ancillary activities can affect seabed and foreshore owners.

63 See Conservation (Natural Habitats etc) Regulations 1994, reg 53.

64 *Jaggard v Sawyer* [1995] 2 All ER 189 (Sir Thomas Bingham MR).

65 S Lokkeborg 'Impacts of trawling and scallop dredging on benthic habitats and communities' United Nations Food and Agriculture Organisation 2005

66 C Bradshaw et al 'To what extent does upright sessile epifauna affect benthic biodiversity and community composition?' (2003) *Marine Biology* 143: 783–91.

67 Interviewed in *Caught in Time* (n 11).

68 K Gray, S Gray (n 42) 282.

69 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 285 (Murphy J).

70 *Connors v United Kingdom* (ECtHR decision, Application No 66746/01, 27 May 2004).

71 See S Lokkeborg (n 61).

72 *A Sea Change* (n 1) B Bradshaw MP Foreword.

The investigation has also revealed a deep-seated confusion as to whether Defra is licensing as owner or regulator. A discussion of rights based fishing is beyond the context of this article, but it is interesting to note nonetheless.

CONCLUSIONS

If scallop dredging is beyond the public right to fish then it is likely to amount to a tort because of the inherent damage to the Crown Estate's seabed and natural life attached to it. The new biodiversity duty in the NERC Act, which appears to apply to the Crown Estate, gives it the authority and potentially even the duty to take action to protect its natural life and habitat. The Crown Estate should actively manage its marine estate to protect biodiversity. This includes litigation, where necessary, but also liaising with Defra and the Sea Fisheries to stop damage to its marine estate, through measures such as ministerial orders, by-laws and vessel licence terms.

In the broader context this demonstrates the need for Defra and the Sea Fisheries Committees to understand that the public right to fish and its ancillary activities are not limitless.

Setting aside the need for a rights based approach to fisheries management the Marine Bill should seek to redress some of the grey areas which exist in an unwritten public right, by putting it on a statutory basis, with limitations as to reasonableness, excessive use and damage to the environment.

The unlimited right given at the common law in the absence of prescription, to all the public to fish would be ... likely to destroy the oysters. It affords an excellent reason why the mayor and aldermen, if they had the power, ... should put an end to the practice, or put it under such restrictions as will prevent the oysters from being extirpated; just as it affords a reason why the legislature should put restrictions on the common law right ...⁷³

73 *Goodman v Mayor of Saltash* (n 34) at 654 (Lord Blackman).