CASE NOTES

THORNE v. UNIVERSITY OF LONDON[1]

Pleadings—Striking Out—Negligence—Mandamus—Negligent Examiner —Exclusive Jurisdiction of University

The plaintiff, Dr Carl Thorne, Ph.D., had occupied himself in the more practical studies of a law student at the University of London. One of the incidents of this course was that he sat for some examinations, taking the papers in Criminal Law, Trusts and Evidence. Unfortunately Dr Thorne did not meet with success in Criminal Law or in Trusts. Thereupon he commenced an action against the university claiming damages for negligently misjudging his examination papers and an order of mandamus commanding the university to award him the grade at least justified by his examination papers. The university took out a summons to strike out the writ and statement of claim and to dismiss the action on the ground, *inter alia*, that it disclosed no reasonable cause of action. The master acceded to the defendant's application and the judge in chambers (John Stephenson J.) affirmed his order.

The plaintiff appealed to the Court of Appeal where he conducted his own case. Dr Thorne met with the same lack of success in court as he had in the examinations, and his appeal was dismissed with costs. The reason given by Diplock L.J.[2] for the decision was that matters of this kind relating to domestic disputes between members of a university were matters to be dealt with by the Visitor of the university, and the court had no jurisdiction to deal with them. It is established that students and teachers are equally regarded as members of a university.[3]

In his judgment Diplock L.J.[4] relied upon the decision in *R. v. Dunsheath ex parte Meredith*[5]. That case involved an application by a member of Convocation of a university for mandamus directed to the Chairman of Convocation. Lord Goddard C.J. pointed out[6] that mandamus was neither a writ of course nor a writ of right, but would be granted if there was a duty in the nature of a public duty which especially affected the rights of an individual, provided that there was no more appropriate remedy. The case was considered to involve a domestic question which was essentially a matter for the Visitor and therefore the court would not grant mandamus. A denial of jurisdiction by the courts where there is a Visitor only in cases involving the discretionary writ of mandamus (and other like remedies) would seem a restriction that has much to commend it. However the judgment of Lord Goddard, C.J. does not so limit the principle. His Lordship points out that the refusal to issue mandamus where there is another remedy is 'one of the reasons, no doubt, why where

1 [1966] 2 W.L.R. 1080. Court of Appeal; Diplock and Salmon, L.JJ.

2 *Ibid.* 1080. The only other member of the court, Salmon L.J., concurred with the judgment of Diplock L.J.

3 *Thomson v. University of London* (1864) 33 L.J. (Ch.) 625 (student's right to a prize); Re Christ Church (1866) I Ch. App. 526 (professor's right to an increased salary).

4 [1966] 2 W.L.R. 1080, at 1082.

5 [1951] I K.B. 127 (D.C.).

6 *Ibid.* at 131-2.

there is a Visitor of a corporate body, the court will not interfere in a matter within the province of the Visitor'[7].

It therefore becomes necessary to examine the situation in which a Visitor is regarded as having exclusive jurisdiction. A line must be drawn between matters relating to a university which are within his province and those which may be heard by the courts[8]. The most comprehensive examination of this problem is contained in the judgment of Kindersley, V.C. in *Thomson v. University of London*[9].

The Vice-Chancellor stated:

'It is sufficiently established and well known that where there is a corporation of this nature . . . with respect to which and over which there is a Visitor of a corporate body, the court will not interfere in a questions which comes under the jurisdiction of the Visitor on the one hand, and that class of cases which comes under the jurisdiction of this Court, as a court of equity, on the other, is this,—whatever relates to the internal arrangements and dealings with regard to the government and management . . . of the institution, is properly within the jurisdiction of the Visitor, and only under the jurisdiction of the Visitor, and this court will not interfere in those matters; but when it comes to a question of a right of property, or rights as between the University and a third person *dehors* the University, or with regard it may be, to any breach of trust committed by the corporation, that is the University, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed this Court will interfere.'[10]

It could be argued from this discussion that the exclusive jurisdiction of the Visitor should be restricted to matters arising under the regulations in connection with the duties of the university's officers, with entitlement to its awards and with matters of internal discipline. It seems to be accepted that an officer of a university could bring a suit for wrongful dismissal. Why should not a tort committed by one member of a university against another be actionable in the ordinary way? The courts are usually anxious to avoid any exclusion of their jurisdiction[11] and it is hard to justify an extension of the somewhat historical role of the Visitor. There does not appear to be any advantage in respect of special knowledge or convenient procedure to support the vesting of jurisdiction in the Visitor in purely tortious claims[12]. Although the correction of examination papers does to some extent involve the personal opinion of the examiner, the court would not face any exceptional difficulty in deciding whether the assessment was unreasonable[13].

[7] *Ibid.* at 132.

[8] Diplock L.J. simply states that 'domestic disputes' are to be dealt with by the Visitor [1966] 2 W.L.R. 108 at 1082.

[9] (1863) 33 L.J. (Ch.) 625.

[10] *Ibid.* at 634.

[11] Cf. *The Fehmarn* [1958] 1 W.L.R. 159 (C.A.).

[12] This is especially so in England when the Visitorial jurisdiction is exercised on behalf of the Queen by the Lord Chancellor; Cf. Halsbury's *Laws of England* (3rd ed., 1953) IV. pp. 409, 414; Re Christ Church (1866) I Ch. App. 526.

[13] However Diplock L.J. commented that he was glad that the High Court did not act as a court of appeal from university examiners: [1966] 2 W.L.R. 1080 at 1083.

The conclusion is lent support by the facts of the two cases already referred to, which illustrate the restricted scope that has been afforded to the Visitorial jurisdiction. In *R. v. Dunsheath ex parte Meredith*[14] the claim for mandamus was based on the ground that the Chairman of Convocation was under a duty imposed by the universities statutes to call an extraordinary meeting upon the motion in question. This was held to be a matter for the Visitor. In *Thomson v. University of London*[15] the plaintiff claimed that he alone was entitled to the trophy for first place in the examination for a Doctorate of Laws. The argument on his behalf was that his right was derived from a contract made between him and the University and that therefore the case was not a matter for the Visitor. It was held that the only right to the trophy arose from the statutes of the University and the matter was thus one for the Visitor.[16]

Dr Thorne's case included a claim for damages for negligently misjudging his examination papers. It could be argued that a distinction should be drawn between disputes involving an alleged lack of care on the part of the examiner and those involving, for example, the right of the examiner to admit an honours candidate to a pass. It is submitted that the domestic disputes within the province of the Visitor do not include an action by a student for damages for negligence on the part of an examiner.

Finally it should be noted that the courts will control the exercise by the Visitor of his functions in a manner similar to that in which administrative bodies are controlled. Thus mandamus is available to compel a Visitor to exercise his jurisdiction[17]. Similarly in *University of Ceylon v. Fernando*[18] an analogous jurisdiction of the Vice-Chancellor of the University of Ceylon was held to be subject to review on the ground that the requirements of natural justice had not been complied with.

A. MOORE.

[14] [1951] I K.B. 127.
[15] (1863) 33 L.J. (Ch.) 625.
[16] *Cf.* further Halsbury's *Laws of England* (3rd ed., 1953) IV p. 412.
[17] *Per* Lord Goddard C.J. in *Rex. v. Dunsheath ex parte* Meredith [1951] I K.B. 127 at 134.
[18] [1960] I W.L.R. 223 (P.C.).