

Report of Bernard Atha to Scrutiny either for incorporation in the main report or to stand alone as a minority report

Finding 1

The Committee found it hard to believe that a senior officer could not remember even after six months interval if he had prepared a written brief for the QC or even if the QC had provided any written advice.

On 6th September 2007 the officer wrote in a Note to the Scrutiny Board members: "He (Counsel) did not give any written advice and was not asked to do so". The officer later said: "Even if there had been a written opinion that would have been legally privileged" words which reinforce the statement that there was no written Counsel's opinion/advice.

On 28th September the chairman again asked the officer if there were written instructions to Counsel and a note or report of the Counsel's advice. The officer replied that there were no such written reports according to the evidence of the chairman. The officer said he could not remember "off the top of his head" whether he had prepared formal instructions. He further said that there was no note of the meeting endorsed by Counsel. On Saturday 29th September in an e mail to the chair the officer said he remembered "that I did prepare written instructions and asked Counsel to advise in conference". He conceded further in the same e-mail that Counsel did provide further advice and hence to that effect there is something in writing from Counsel"

The brief for Counsel which he said he could not remember preparing consisted of six sheets of A4 paper and the written briefs he termed "something in writing" which he had said did not exist and could not remember consisted of seven pages dated 21st March 2007 and sixteen pages dated 28th March 2007.

The officer attributed the confusion to not being clear as to what Scrutiny required and it appeared that the request for this information had not been transmitted in the clear and precise manner Scrutiny had required.

The Committee expressed its great concern that experiences like this can cause acute concern that Scrutiny could be misled, that requests for information are not treated with the respect they require and that officers could be wrongfully thought to be not acting at the level of probity to which we have become accustomed .

Recommendation

That requests by Scrutiny are made precisely, as they were in this case in writing, and followed precisely so that specifically worded requests are not amended or translated and that this particular matter and the concern it has aroused be drawn to the attention of the Chief Executive Officer.

That Counsel's Opinions and advice should be sought on the basis that these are paid for by the public and should be accessible to the public except in those cases where ethics, personal or commercial or financial sensitivities or the needs of the

effective dispensation of justice require secrecy or confidentiality. The presumption should be – “open to the public”.

The reasons for non disclosure should be made clear by the monitoring officer who should deal on a case by case basis with requests for public access or release.

Finding 2.

The Committee agreed with Cllr Harris’s public statement that the matter had not been handled effectively. In areas of great sensitivity particularly in the outer areas of the 120 square miles of the City of Leeds where communities feel distanced from the Centre greater care should be exercised in ensuring that there is full and open consultation over a period which is commensurate with the deemed importance locally of the issue in question.

The fact that there has been a major petition, a major protest group established, a constant blizzard of e mails and letters to the press and from the local MP indicate that the consultation carried out on this occasion was quite inadequate to the requirements of the particular case.

Recommendation

Council Departments must always consult with residents in localities specifically affected by their plans in an open and timely manner over a period sufficiently extended to ensure that the consultation is genuine.

Finding 3.

The Scrutiny Members sympathise with officers who are concerned that they might be made scapegoats for accidents or incidents which may occur as a result of their actions or inactions. In this case from whatever source the notion arose officers could have been led to believe and Councillors were led to believe that the responsibility for a death or accident might fall on their shoulder if such an eventuality occurred. The same applies to Executive Board Members when they are told or are led to believe that they could face charges of corporate homicide. It may be that if their attention had been properly drawn to the dicta of the highest leading legal authorities namely the Law Lords in the House of Lords in the case of Tomlinson instead of being directed to the Court of Appeal decision the policy which emerged would not have needed to be so expensive and extensive.

The following are sample dicta in the Tomlinson Case which could have informed the legal opinion and go to the root of the duty of care owed; namely “such care as in all the circumstances of the case is reasonable”.

Lord Scott:” Why should the Council be discouraged by the law of tort from providing facilities for young men and women to enjoy themselves in this way. Of course there is some risk of accidents arising out of the joie de vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone.”

Lord Hobhouse referring to the use of the lake in the case in question:

“It is necessary to put these few incidents in context. The park had been open to the public since 1982. Some 160,000 people visited the park in a year. Upto 200 would be bathing in the mere on a fine day. Yet the number of incidents involving the mere were so few. It is a fallacy to say that because drowning is a serious matter that there is a serious risk of drowning. In truth the risk of drowning was very low indeed.”

Lord Hoffman at section 13 of his judgement pointed out that the duty to a trespasser under the 1984 Act was a lesser duty to a visitor under the 1957 Act.” I can see no difference between a person who comes on land without permission or invitation and one who having come on land with permission does something which he has not been given permission to do”.

At S34 he said :” The Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury the Council was under a duty to do what was necessary to prevent it. But this is in my opinion an oversimplification. Even in the case of the duty owed to a lawful visitor under the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to “such care as in all the circumstances of the case is reasonable” depend on upon assessing, as in the case of common law negligence, not only the likelihood of that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measure. These factors have to be balanced against each other.”

At s 37 He said referring to previous cases: “And it may lead to the conclusion that even though injury is foreseeable, as it was in Bolton v Stone (case of a cricket ball being hit out of the field into someone’s garden) it is still in the circumstances reasonable to do nothing about it.”

At s41 “I do not however regard the financial cost as a significant item in the balancing exercise which the court has to undertake. There are two other related considerations which are far more important. The first is the social value of the activities which would have to be prohibited in order to reduce or eliminate the risk from swimming. And the second is the question of whether the Council should be entitled to allow people the full capacity to decide whether to take the risk”.

At s45 “I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake on the land. Of course the landowner may for his own reasons wish to prohibit such activities. But the law does not require him to do so.”

At s 46 “I think there is an important question of freedom at stake. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. A duty to protect against obvious risk or self inflicted harm only exists in cases in which there is no genuine informed choice as in the case of employees, or some lack of capacity such as the inability of children to recognise danger”.

Recommendation

Assurances to the staff of the Council's support to prevent any unfair scapegoating should be made public.

Robust detailed and sound legal advice should be obtained and recorded for their protection.

Finding 4.

This case indicates the weakness of the Scrutiny system in which a scrutiny exercise is being conducted after the issues under Scrutiny have been settled. A case of considering the possibility of closing the stable doors long after the horse has gone.

Recommendation

In cases where there is a period of extensive consultation on a matter which might be contentious or where there is that likelihood the matter should be referred to Scrutiny before a decision is made.

Finding 5.

A substantial responsibility for health and safety falls on the shoulders of the Leisure Services staff in nearly all the aspects of their work in parks, events sports etc. In particular the case of safety of individuals relative to water features is particularly taxing.

Recommendation

A water safety policy should be devised which accepts where there is water there will be accidents including fatalities and that it is impossible to prevent such sad events occurring. In devising the safety strategy the following inter alia should be considered and incorporated: visual amenity, effect on the environment, statistics of accidents and fatalities, obvious danger of the water, public access, the use of adequate signage, sense of proportion, alternative uses of resources and above all a full and detailed legal explanation of the Council's obligations under the law.

The Water Safety policy of the Leisure Services be referred to the members for their comments.

Finding 6

The decision to fence was taken initially at the February 2007 Board based on a fundamentally wrong interpretation of the law. This interpretation was not corrected. It is reported that Board members were warned of dangers of charges of corporate homicide and a statement to this effect was made in Council. For whatever reason Councillors Proctor and Downes both referred to the danger of their being made

liable for someone's death on a corporate manslaughter charge, and attributed their decision to fence on this fear. This would appear to be an entirely false understanding of the law as it is and will be if the current Bill is passed.

Recommendation

That Legal services review the advice given in this and future cases to ensure upto date advice is given though it be noted that the legal officer concerned has denied making any statement which could lead to the conclusion that corporate homicide was a realistic possibility which one is reasonably constrained to believe to be the case.

Finding 7

Waga the local pressure group complain with validity that the hearings they have attended have been heavily weighted against the public voice. "We have not been invited to be present when certain officers and perhaps other witnesses have been questioned by the Scrutiny Board Working Party. When we made our initial submission to the Board, Councillor Procter and the Chief Recreation Officer were given immediate rights of reply and made assertions that have not been challenged subsequently as far as we know, This is not a level playing field"

There is no doubt that many people in Otley feel that the decision making process was flawed, that the views of the residents of Otley have been ignored, that the Council Officers and Executive Board members have had an undue influence on proceedings and that Scrutiny has not provided the kind of scrutiny for which they hoped.

Whether these views are justified is a matter of opinion. That they are held is a cause for concern as such wide spread views damage the good relations which should exist between the residents and the officer and executive cadre who are seen rightly or wrongly by some to be arrogant and dismissive of the views of the local community.

Finding 8

The following are excerpts from the verbatim report of Council held in February 2007

Councillor Downes Verbatim Report.

"The recommendation from ROSPA, the legal advice taken- and I sought to check this- was that if the Council did not accept the recommendations from ROSPA it would mean that senior Councillors and senior officers should – this is in the legal advice given – if there was a tragic accident in the River Wharfe, if the recommendations had not been followed then those people who had taken the

decision not to implement the recommendations could be charged with corporate manslaughter under the laws of this land.
The result would mean that they could end up in prison”.

Cllr Procter Verbatim Report

“There were many people who were prepared to say very bold things at Exec Board. When they realised that actually suddenly it was the members of the Exec Board that could be in the Coroner’s Court facing action, facing corporate manslaughter charges in the future, suddenly some voted in favour of it and I can understand why. Because it is a very tricky issue.”

Councillor Downes described the proposals as crazy and such as no one in Otley supported them yet even he was clearly and honestly believing that the threat of corporate manslaughter charges was real.

Councillor Procter spent even more time outlining this danger, the above quote being a fragment of his speech stressing the threat was real.

The lawyer involved in the case denies any responsibility for such fears and does not know the source. It could be based on the ROSPA report which totally misrepresented the law as outlined in Thompson. It could be that it was not a real threat in the minds of those desiring to justify the proposals who were using the alleged threat as a device to excuse or justify the fencing.

No evidence has been adduced of any legal advice which said there was such a real threat. Only Councillor Procter and Councillor Downes could explain the cause of their concerns.

Recommendation

That in future where this danger is discussed and is likely to influence Executive Board decisions appropriate advice be sought from lawyers eminent in this field of the law who have briefed themselves on the current legal situation.