

LEGAL ADVISORY COMMISSION OF THE GENERAL SYNOD

LIABILITY OF DACS AND THE CHURCH BUILDINGS COUNCIL: AMENDMENTS TO LAC OPINION

Diocese: liability of members of diocesan advisory committee and of members of church buildings council

Diocesan Advisory Committees

1. In considering whether members of a Diocesan Advisory Committee ('DAC') may be held liable in damages to a person who suffers loss through negligent advice given by the Committee, it is necessary to begin by examining the DAC's constitution and functions.
2. The DAC of each diocese is required to have a written constitution drawn in accordance with Schedule 1 to the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (s2(2)). Every DAC has as its members a chairman appointed by the bishop, the archdeacons of the diocese, at least twelve other members appointed in accordance with the provisions of Schedule 1 and any members co-opted in accordance with those provisions.
3. The duties and functions of DACs have been enlarged and increased by the 1991 Measure and are set out in Schedule 2 to that Measure. Under the Measure a DAC is required to act as an advisory body on matters affecting places of worship in the diocese (s2(5), Sch 2, para 1(a)). It is expressly required to give advice to four broad categories of persons or bodies:
 - (a) office holders, individual and corporate, viz, the bishop, chancellor, archdeacons and pastoral committee of, and PCCs in, the diocese;
 - (b) intending applicants for faculties in the diocese;
 - (c) persons engaged in the planning, design or building of new places of worship in the diocese, *not* being places within the jurisdiction of the consistory court; and
 - (d) such other persons as the DAC may consider appropriate (Sch 2, para 2).
4. The topics on which the DAC is required to give advice, when requested to do so, to the above persons or bodies, are expressed in the 1991 Measure to be:
 - (a) the grant of faculties;
 - (b) the architecture, archaeology, art and history of places of worship;
 - (c) the use, care, planning, design and redundancy of places of worship;
 - (d) the use and care of the contents of such places; and
 - (e) the use and care of churchyards and burial grounds (Sch 2, para 1(a)).

5. The following *duties* placed on a DAC may involve the giving of advice on matters other than those mentioned:

- (f) to review and assess the risks to materials or of loss to archaeological or historic remains or records arising from petitions for faculties;
- (g) to issue guidance for the storage of records relating to works to places of worship;
- (h) to publicise methods of repair, construction, adaptation and redevelopment of places of worship and their contents; and
- (i) to perform such functions as may be requested by the bishop, chancellor or diocesan synod of the diocese (Sch 1, para 1(b), (d) (f) and (g)).

6. The advisory *functions* of a DAC under the 1991 Measure fall into three categories:

- (a) Those directly connected with the judicial functions of the chancellor and the archdeacons of the diocese when exercising the jurisdiction of the consistory court, i.e. those within a 'judicial process'. In this category the duties are to advise the chancellor and the archdeacons when any of them is considering a petition for a faculty. The only exceptions to this duty are cases before the chancellor of extreme urgency or cases involving exhumation or the reservation of grave spaces. The category also extends to the power to advise applicants for faculties who, having filed their petitions and so becoming parties to proceedings, are within the 'judicial process'.
- (b) Those connected with the special jurisdiction given to archdeacons by section 21 of the 1991 Measure, to order that articles, appertaining to a church, of artistic and other value should be removed to a place of safety. In this category a DAC has the power to make representations, no doubt couched in the form of advice, to the archdeacon who, in exercising this jurisdiction, may be said to be exercising it as an officer of the court and quasi-judicially.
- (c) All other occasions on which advice is tendered pursuant to the duties mentioned in paragraphs 3 to 5.

7. The provisions relating to the *functions* of DACs are drawn so widely in Schedule 2 to the 1991 Measure that it is difficult to envisage any advice which a DAC might give as a body which could not fairly be described as being given in pursuance of its statutory *functions* under the Measure.

8. The first question which arises in connection with potential liability for the exercise of statutory functions is whether the legislature intended to confer a right of compensation on individuals for breach. Even the fact that a particular power was intended to protect certain individuals is not of itself sufficient to confer a right of action on them (*R v Deputy Governor of Parkhurst Prison ex parte Hague* [1992] 1 AC 58 at 170; *Stovin v Wise* [1996] AC 923 at 952). Where the statutory function is a duty, it will be less likely that a right of compensation was intended than where the statutory function is merely a power. This is because, there being no obligation to exercise the power, the decision to exercise it more readily constitutes a voluntary assumption of liability for the consequences of negligently exercising that power. On most occasions that a DAC gives advice it will do so under a duty rather than a power.

9. So far as is known no DAC has been sued for damages on the ground that a claimant suffered loss through negligent advice given by the Committee. Until such a case has been heard and decided it is impossible to give confident advice on the question whether a DAC would be held to be liable in law. It is important to remember that, if the advice turns out to be wrong, it does not necessarily follow that the Committee which gave it is liable for the loss caused by its imperfection. A DAC is not under any absolute duty to be right though it *is* under a duty to exercise reasonable care and competence. Nevertheless there may be those who, applying the modern law of negligence to advice given to them by a DAC, will claim that they have suffered loss through that advice because the DAC was neither competent nor careful in giving it. For example, a PCC may allege that a new heating system commended to it by the DAC is thoroughly unsuitable and that the DAC failed to make the reasonable enquiries which would have shown it to be so. Or petitioners for a faculty may contend that costs have been wasted because the DAC did not advise them at an early juncture that their proposal had no realistic chance of success.

10. The general rule applied by law is that anyone holding himself or herself out as possessing reasonable competence in his or her avocation and undertaking to give advice owes a duty to advise with reasonable competence and care. The duty is owed to anyone the adviser should foresee may suffer loss if the duty is breached. If, in breach of that duty, the adviser fails to exercise reasonable competence or care and as a result the person to whom the duty is owed suffers damage, the adviser is liable to compensate that person for the damage suffered: per Lord Salmon, *Saif All v Sydney Mitchell & Co* [1980] AC 198 at 230, HL. The person advised will be able to recover damages only where the claimant relied upon the advice and took some action, or refrained from taking action, in consequence of the advice. There must also be a relationship between the claimant and the DAC of sufficient 'proximity' that it imposes upon the DAC a duty to take care to avoid or prevent that loss which has in fact been sustained. Briefly stated, the questions in each case where there is potentially a right to compensation will be: was the claimant entitled to rely on the impugned advice, and was it within the reasonable contemplation of the DAC that the claimant would rely upon it? See the speech of Lord Oliver in *Murphy v Brentwood District Council* [1991] 1 AC 398, HL.

11. In the case of advice given pursuant to a statutory duty, a DAC cannot qualify its advice by stating that it is given without accepting liability. It is implicit in the statutory obligation that advice must be the best advice, that the members of the DAC, pooling their skill and knowledge, can give and that the members giving it accept responsibility for their advice. By the same token the responsibility cannot be avoided or reduced because the advice is given gratuitously and not for valuable consideration or in discharge of a contractual duty. The statutory obligation is to give gratuitous advice. But where there is only a power to advise there appears to be no reason why, in principle, a DAC cannot protect its members by making it plain that no liability is accepted.

12. As the law stands it follows that no DAC can be assured that, if it is sued for damages on the ground that the claimant has suffered loss through its advice, the claim will fail because it is not sustainable. It has to be accepted that a risk of a DAC being found liable does exist in law. The degree of risk will vary as between the categories of business referred to in paragraph 6 and (as stated above) will be greater in the relatively few cases where the advice is given pursuant to a power rather than a duty.

13. As regards the functions under the first two categories in paragraph 6, which are mainly duties:

- (a) In discharging these functions DACs are exercising a function which is by statute an integral part of the judicial process of the consistory court and of the exercise of the statutory

jurisdiction of the archdeacon. In exercising the faculty jurisdiction of the consistory court the chancellor and the archdeacons are bound by section 15 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 to seek the advice of the DAC upon every petition, except in the limited classes of cases mentioned, viz, those relating to exhumation and reservation of graves and, in so far as the chancellor is concerned, cases of extreme urgency.

- (b) There is a general principle that immunity from civil liability attaches to many persons who take part in proceedings before a court of justice: judges, court officials and witnesses (but not now the parties' counsel and solicitors (*Arthur J S Hall & Co v Simons* [2002] AC 615). The immunity of witnesses exists for the benefit of the public since justice would be greatly impeded if witnesses were to be in fear of disgruntled persons against whom they had given evidence subsequently involving them in litigation (*Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435). An instance of its application occurred in a case in 1981 when Drake J struck out a claim for negligence against a pathologist who was alleged to have been careless in giving advice to the police in relation to a possible prosecution against the claimant (*Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184). In *Jones v. Kaney* [2011] 2 WLR 823 the Supreme Court placed a limit upon the immunity doctrine by holding that a party's own expert witness might be sued by that party for negligent acts or omissions in the course of the process of litigation.
- (c) The immunity of those involved in the administration of justice for actions and words done and said in the execution of judicial office is established. The underlying principles of public policy are:
 - (i) that those concerned must be free from the anxiety of possible action in discharging their office; and
 - (ii) that another court with a co-ordinate level of jurisdiction should not be asked to review previous decisions by means of an allegation of negligence against the previous court.
- (d) In exercising its statutory duty to advise the chancellor or an archdeacon, a DAC is assisting in a judicial function even though the decision is that of the chancellor or archdeacon and not the DAC. In this field the DAC has an obligation to give advice, and there is here an analogy with compellability of witnesses, where on the authorities the obligation to give evidence is one of the factors in granting immunity to witnesses. Also the chancellor may require the DAC to nominate a member to give evidence in court in support of any advice tendered.
- (e) It is considered therefore that the principle of immunity from suit of those concerned with the administration of justice will in principle afford a defence to a DAC alleged to have given negligent advice in the discharge of duties in the first two categories mentioned in paragraph 6. The decision in *Jones v. Kaney* does not affect the position of the DAC, which has a wholly independent role not to be confused with that of an expert witness instructed by a party to litigation.

14. As regards duties under the third category in paragraph 6, the defence arising from participation in the judicial process will not be available if no proceedings in the consistory court have been commenced or are immediately contemplated. However, in cases where an intending applicant for a faculty is required by rule or practice to seek and obtain the advice of the DAC before commencing

proceedings the defence may be available. In any claim for a breach of duty under this category the other defences mentioned in paragraph 15 should be considered.

15. The limits of the defence of participation in the judicial process must be borne in mind. The defence will be available to a DAC or any member of it when advising or giving evidence within a judicial process as mentioned above. But advice given to a person, e.g. to a PCC, before proceedings are begun or actually proposed (and pursuant to a power and not a duty) will not be given retrospective immunity simply because it is repeated to the chancellor, archdeacon or, by way of evidence, in court. Claims that such earlier advice has given rise to loss must be met in the light of the points mentioned in the following paragraph.

16. Even if a right to compensation exists in certain circumstances, in order to succeed in recovering damages a claimant alleging loss through reliance upon the negligent advice of a DAC would have to prove not only that in the particular case a duty of care was owed but that the duty had been broken. The fact that the advice in question was given pursuant to a statutory duty would be material in deciding the scope of the duty; what, in the circumstances, is the reasonable care required; and whether or not on the facts there had been a failure to discharge the duty. Until the facts proved in court in relation to any individual case are established it cannot be foreseen what weight any argument or factor would carry. It might be open to the DAC to argue that the loss occasioned to the claimant was due to 'inevitable accident' or to some cause other than the negligence of the DAC. Again, the DAC might be able to establish that the effective cause of the loss was some act or omission by the claimant or that the claimant materially contributed to the loss by an act or omission (partial defence of contributory negligence). In a small category of cases the defence of voluntarily accepting the risk (*volenti non fit injuria*) might be available.

17. For convenience the previous paragraphs have discussed the liability of DACs as though there might be liability in a DAC as such. It must be borne in mind, however, that DACs are not bodies corporate; their members are appointed for limited terms. Members of a DAC are not agents for one another, as are partners in a firm. The individual members of a DAC therefore cannot be liable for negligence arising from a decision of the DAC unless the decision was that of the Committee formally arrived at and expressed in its recommendation or report. Even so, members not present when the decision was taken, or members voting against the proposal, cannot be liable. It is therefore not strictly accurate to speak of the liability of a DAC in negligence; rather, individual members, shown to be responsible for a decision, would be jointly and severally liable for it. Any action would have to be against the individual members and not the DAC as a body, and each member sued would only be liable if it were proved that that member failed to exercise the care which was to be expected, having regard to the member's own particular skill, knowledge and experience, or that the member formally adopted the negligence of another member of the DAC, e.g. by voting to support a negligent decision when a responsible member of a DAC of ordinary competence ought to have realized that it was unsafe to do so. This principle might protect non-specialist members of a DAC, if the negligent advice given was in a specialist field (such as organs or bells) and the advice given by the specialist was of such a nature that a non-specialist could not be expected to take part in giving it. However, it is considered that this argument would not assist in the majority of cases where the advice given is in areas in which all members of the DAC have competence and all members present at a meeting of the DAC concur in the advice.

18. Where an individual member of the DAC offers negligent advice on his or her own account, say on a site visit, it may be easier for a person to whom such advice is given and who relies on it to his or her detriment to establish liability.

19. In summary, it must be repeated that the circumstances certainly exist in which it is possible for members of a DAC to be held liable for negligence, but that in individual cases particular members may well be able to show that no liability is established against them either because of the facts of the particular case or because of the legal principles. Therefore individual DACs may wish to consider taking out insurance cover against any claims which may be brought against their members for negligence.

20. Complaints are sometimes made by parishes that advice from the DAC has been unduly delayed and that this has caused loss to the parish. It is important that the advisory functions of DACs are performed with reasonable expedition to prevent potential litigation on account of excessive delay.

The Church Buildings Council

21. The Church Buildings Council ('CBC') is an unincorporated organ of the Church of England operating at national level, the functions of which are set out in Sections 55, 56 and 57 of the Dioceses, Pastoral and Mission Measure 2007. In so far as these functions involve administration, the promotion of specified policy objectives, or co-operation with other bodies, it is highly unlikely that their performance is capable of giving rise to any liability in negligence. Within its range of functions there are, however, specific areas in which the CBC is given powers or duties to advise broadly matching those of a DAC at diocesan level. They involve the provision of:-

- (a) advice to the Archbishops' Council and the General Synod in matters relating to churches (Section 55(1)(a));
- (b) advice to the ecclesiastical courts in relation to faculty cases or proceedings for injunctions and restoration orders (Section 55(1)(b) and Rules 15, 22 and 23 of the Faculty Jurisdiction Rules 2000);
- (c) advice to persons or bodies involved in the use, care, conservation, repair, planning, design and development of church buildings or certain other places of worship (Section 55(2)).

22. In its provision of material for use in the ecclesiastical courts, whether in the form of reports, witness statements or oral evidence, the CBC enjoys precisely the same level of immunity as that of the DAC described previously. Once again, the *Jones v. Kaney* exception has no bearing because the status of the CBC is independent of the parties.

23. While any claim in respect of allegedly negligent advice given to the Archbishops' Council or to the General Synod is inherently unlikely to be made, the CBC is at somewhat greater risk when giving advice outside the context of legal proceedings to persons or bodies in connection with particular buildings (the third category in paragraph 18). In such cases the CBC has a power to advise but no duty to do so. If advice is given in such circumstances, the inclusion of a suitably worded disclaimer ought to be considered.

24. Where negligent advice is given by an individual member of the CBC on, say, a site visit, the considerations in paragraph 18 above apply.

25. Wholly exceptionally, the CBC may itself discharge the functions of a DAC in relation to a place of worship. Thus by virtue of Section 3(5) of the Care of Places of Worship Measure 1999 the CBC is to assume the responsibilities of a DAC in respect of the chapels of Lambeth Palace. In that

and any similar case it will stand in exactly the same position as a DAC as regards liability in negligence.

26. The considerations relating to undue delay in paragraph 20 above apply equally to the CBC.

27. It is of course open to the CBC to take out insurance cover for its members.