ADVICE

Regarding the law of navigation on non-tidal inland waters in England and Wales

Summary

1. There is no general Public Right of Navigation (PRN) on English and Welsh non-tidal rivers for canoeists.
2. A PRN can only be established by long use of vessels on the relevant stretch of river, fulfilling all of the criteria below.
3. That use must have been regular and habitual, and must have made the river of substantial practical value as a channel of communication or transport.
4. The time for which that use must be established is "time immemorial."
5. The law is entirely clear on the above issues.
6. The law is, however, not absolutely clear on how long is required to establish "time immemorial", but it is likely that between 60 to 80 years of use needs to be established by those who assert a PRN.
7. Additionally, the use must also not have been under protest from the riparian owners, or by permission from them. On the contrary, use cannot be established unless it is shown that the owners have acquiesced with the passage of canoeists or other vessels throughout the period of use.
8. A PRN, if established, does not entitle paddlers to walk on the soil of the river bed or indeed go onto the river banks, again unless long usage of either has been established as against the owners.
9. In the absence of a PRN established by use, and assuming there is no agreed access, express dedication, or a statutory PRN, canoeists will be trespassing when they paddle in non-tidal waters.

Introduction

10. I am asked to advise Fish Legal (FL), a not-for-profit membership association, acting for itself and its members (including the Angling Trust), on some important issues of law which have arisen between FL members and paddlers, as to whether paddlers have the right to pass along all stretches of non-tidal waters in England and Wales without permission from the riparian owners.
11. The principal question of law is whether a Public Right of Navigation may exist over all non-tidal rivers and streams simply because they can as a matter of fact be navigated or whether such a PRN has to be established by "long user" as well as factual navigability.

12. I will then look at the question of what "long user" means in practice, not by reference to specific rivers or stretches of rivers, but in terms of the criteria which any claim for long user must satisfy.

Summary on the user question

13. The short answer to the first question is that one needs to show user as well as factual navigability. This emerges from cases in England and Scotland over the last 125 years, as well as textbook opinion, and I see no reason why the English courts would reach any different opinion if they were faced with this issue now. This means that canoeists in a particular river would have to show long user over the specified stretches concerned and at some stage in the history of the river if they wished to paddle over those stretches of the river in future without the permission of the riparian owners.
14. Canoeing interests refer to works of the Reverend Dr DJM Caffyn ('Dr Caffyn') in support of their position. I will address his main arguments below, but, insofar as they reflect a prediction as to how a court might decide a case today (and I am not sure that they aim to do this) I strongly disagree with them. In particular, it seems to me extremely unlikely that his arguments would persuade the court to modify what is now settled law. The length of this Advice derives from the detail of the arguments advanced by Dr Caffyn, even though, as I have advised, the main propositions governing the law of PRN are simple to state.
15. Dr Caffyn also asserts that PRN was ascertained in specific rivers either because of Navigation Acts in respect of those rivers or because there is historic evidence in relation to those rivers. If his first argument (automatic PRN if navigable) is wrong (as I advise), then it will be necessary to look in due course at this fall-back argument river by river, or rather more pertinently, stretch by stretch. This is because proving that there was a PRN over a lower stretch of river may establish nothing in respect of upper reaches which canoeists would now like to use. In addition, navigation carried out solely pursuant to a Navigation Act does not amount to long user for the purposes of establishing common law PRN.

The need for long user

16. The first question (whether user is required at all) arose directly in *Wills' Trustees v. Cairngorm Canoeing* [1976] SC 30, a decision under Scots law, by the House of Lords.
17. The unanimous decision of all five Law Lords was that long user was required as well as factual navigability.
18. Of those five Law Lords, Lord Wilberforce considered that "*there must be shown to be actual public use for a period of which the memory of man does not run to the contrary, in practice a period of 40 years…*": [126]. Lord Hailsham thought that use (as well as capacity) must be

shown, and that this conclusion at Scots law coincided with the position at English law: [147]. Lord Fraser stated that a PRN *"depends not only on the theoretical navigability of the river, but also on proof of its actual use for that purpose":* [164]. The period of use required was *"time immemorial"* [165], in practice 40 years under Scottish law, and the nature of use required "*regular habitual use."* (ibid). Lord Salmon agreed with Lords Wilberforce, Hailsham and Lord Fraser. Viscount Dilhorne dissented on the relevance of a 1781 decision on the same river in issue, but agreed with Lord Fraser that *"there must be proof of actual use for navigation"* [127].

19. Lord Hailsham referred to Jowitt's Dictionary of English Law in support of his contention that English law was the same as Scottish law on the user point: [147]. I note from the argument reported at [111] that other English textbooks such as *Coulson and Forbes 6th edition, Halsbury's Laws 3rd edition,* and the English first instance decisions in *Bourke v. Davis* (1889) 44 Ch. D 110 and *Attorney-General v. Simpson* [1901] 2 Ch.671 were put before their Lordships, in support of the argument that user was necessary – these are all referred to below. On the other side, arguments (in the event rejected by their Lordships) were put relying on Roman law (the views of Justinian, about perennial and non-perennial rivers), the feudal system and the vesting of all water rights in the King – all points which we will see emerging in Dr Caffyn's work.
20. The point was hardly unexamined, given that the hearing took 9 days in the House of Lords and the unsuccessful appellants advancing the "no need for user" argument were represented by a future member of the House of Lords, Jauncey Q.C.
21. It is difficult therefore to see that the courts today would be faced with substantive arguments on the issue of principle which were not in one form or another before the House of Lords in *Wills Trustees.* In practice, that is the first question which a judge will ask himself or herself today: what grounds are there for me not following the result in *Wills Trustees?*
22. The conclusion of the House of Lords has not been questioned in two English cases since, containing *obiter*[1] statements.
23. Most importantly, Lord Oliver in *Attorney-General (ex rel. Yorkshire Derwent Trust) v. Brotherton* [1992] 1 AC 425 summarised the common law requirements for PRN as being "*established either from express dedication or from dedication presumed from long-continued user.*" The case concerned the status of part of the Yorkshire River Derwent, over which the plaintiffs claimed a PRN. This view is consistent with the ruling at first instance in that case, (1990) 59 P&CR 60, 84, in which Vinelott J observed (following Farwell J in *A-G v. Simpson)* that though it was *possible* for boats of shallow draft to be taken up river from Sutton to Kirkham, "*there is no evidence that they were*" – a classic application of the

[1] *'Obiter'* statements are a judge's expression of opinion, not essential to the decision and therefore not strictly legally binding as precedent, although they can be very persuasive.

requirement for actual use rather than solely a requirement for theoretical navigability. This was in the context of the first preliminary issue ordered, and his ruling was not appealed. Note that all of the material cases, Scottish and English, were considered by Vinelott J, and that the first preliminary issue which Millett J (later Lord Millett) required the court at first instance to consider, made no sense at all if user was not relevant to the establishment of a PRN.

24. The most recent case concerns the PRN status of part of the River Thames, which has been subject to a succession of Navigation Acts since 1623. The issue was whether in the particular circumstances, the statutory PRN had been extinguished. In his judgment on this issue Lightman J in *Rowlands v. Environment Agency* [2002] EWHC 2785 (Ch) considered the common law relating to PRN. He stated at para.49 that to establish PRN in non-tidal rivers a *'prescriptive'* user has to be established – namely a user established by long use. As he summarised things, at para.48: *"Though uncertainties may have existed in certain areas in the past, the general principles governing PRN over the Thames were evolving in the 19th century and by 1880 were reasonably clear: see e.g. Coulson & Forbes on Waters 1880, 2nd ed. 1902. The principles are even clearer today: see Lord Wilberforce in Wills Trustees…"* This is a salutary reminder that the task of a judge today is not to revisit debates which may have been live in the 18th or early 19th century (if not earlier), but to assess the state of the law today with the benefit of all of the learning since those times.
25. Again, albeit obiter, the Court of Appeal in *Rawson v. Peters* (not fully reported), consisting of Lord Denning, Megaw LJ and Sir Gordon Wilmer, 1 November 1972, made the same point. An angling club sued a canoeist for paddling over the half of the river owned by the club and over which it had fishing rights. The Court of Appeal found an interference with the club's rights even though no members of the club were fishing at the time. In so doing, Lord Denning (p.5 of the transcript) said this "*To prevent misunderstanding, I must say this: There are many cases where people with canoes have a right to take their canoes up and down a river. They certainly have such a right in tidal waters. They often have a right in non-tidal waters. They may acquire it by long use, as where the public has passed up and down for a long time."*
26. Current textbooks, unsurprisingly, given these authorities north and south of the Border, say that long user is required for PRN. *Wisdom's Law of Watercourses,* 6th ed., 2011, at [6.10] says evidence of immemorial use is required, and see *Bates, Water Law* (2013 text), [13.15] and [13.22], and Halsbury's Laws, Vol.101, 5th ed.at [702]. *Sara* on *Boundaries and Easements,* 2nd ed (1996), at [379], considered that the position (as stated by Lord Oliver in *Brotherton)* was clear, but there was no clear authority about the length of user needed to establish a common law PRN. *Gale on Easements,* 19th ed. (2012) [6.79] states "*It seems that a public right of navigation in a non-tidal river depends upon (a) the navigability of the river and (b) proof of actual use since time immemorial*." *Coulson & Forbes on Waters and*

Land Drainage, 6th ed. (1952) – the last edition – states at [507] that the *"right of navigation in non-tidal waters is not a common law right but owes its origin to dedication of the riparian owners or presumed dedication from long user, or by Act of Parliament."*

27. Lord Hailsham in *Wills Trustees* was therefore right to equate the underlying law of the Scottish and English legal systems on this point.

Dr Caffyn

28. The question then arises – on what grounds are these legal conclusions challenged by canoeing bodies and canoeists? As noted above, the BCU's legal stance depends in large part on work done by Dr Caffyn, for his Master of Laws at Kent Law School. His 39,000 word dissertation of August 2004 is available on the internet, as are various summaries of his position, and his Ph.D thesis of 2010 leading to his doctorate (noting its assistance from Canoe England and Canoe Wales). I have therefore considered his position carefully, and respond below to the main legal points he makes. Dr Caffyn does not profess to be a qualified lawyer but it is evident from both works that he has sought to investigate this particular issue with some vigour and perspicacity. The later thesis seeks to apply his own hydrological and historical analysis to certain mediaeval rivers which may or may not be in issue between the anglers and the canoeists.
29. Dr Caffyn's legal views can be shortly summarised. He says that error on this topic arrived in the 19th century, when Woolrych, a textbook writer, reached the wrong conclusion, which has subsequently become wrongly adopted as the consensus view. The "true" position had, he says, been established much earlier, in that PRNs had been established in respect of all rivers between 1189 and 1600 and that PRNs once established, cannot be lost. As he summarised his dissertation when he returned briefly to the topic in his 2010 thesis: "*The contemporary lawyers Glanvill, Bracton, Britton and Callis all stated that usable rivers were public places. Magna Carta, other legislation and the Parliamentary Rolls are all evidence that rivers were considered to be public in the period 1189-1600.*"
30. I have already pointed out that this avowedly historical approach is very unlikely to be the way in which a court today will decide the underlying issue of principle. In fact, as I shall demonstrate, the position under the old pre-19th century law is nowhere near as definitive as Dr Caffyn describes it. Indeed other influential 17th century sources (Hale and Callis, in particular) support precisely the line which Woolrych adopted.
31. I turn now to the various sections of Dr Caffyn's dissertation which are said to justify a position contrary to that of recent House of Lords decisions. There are a host of questionable propositions in the dissertation, but I shall seek to concentrate on those which potentially

might arise if this central issue were litigated. I apologise for starting this review a very long time ago, but that is only because Dr Caffyn gains most of his support from this period.

1189-1830

32. Glanvill (c.1189), as summarised at p.56 of Dr Caffyn's dissertation, says no more than that it is wrong to obstruct watercourses held by the king. That does not help the current debate, because all are agreed that the current law is that non-tidal watercourses (unlike tidal ones) are not held by the Crown.
33. Bracton (c.1290) is an important element within Dr Caffyn's reasoning. Bracton says that navigation and fishing in "*perennial rivers are common to all persons, but that temporary streams may be private*" – and Britton says no more than Bracton. Bracton's general observations on seas and rivers were directly taken from Justinian (i.e. Roman Law referring to Roman rivers), and do not reflect the common law tradition in England and Wales, though it may well reflect the civil law tradition in other jurisdictions. The distinction on water law issues between the two traditions is well demonstrated by two much later cases, *Ball v. Herbert* (1789) 3 Term Rep 253 and *Blundell v. Caterall* (1821) 5 B & Ald 268. *Ball* concerned an alleged right to tow on the banks of navigable rivers, and *Blundell,* the alleged right of access to the beach to bathe. In both cases, elaborate arguments were mounted on the back of the same passage of Bracton, and in both cases (in *Blundell,* by a majority) the common law courts rejected the importation of Roman law principles into the English common law. Both alleged rights were dismissed.
34. Interestingly, *Blundell* was considered at length by the Supreme Court in *R (o.t.a Newhaven Port and Properties Ltd) v. East Sussex CC* [2015] UKSC 7, and the majority view in *Blundell* was summarised at [35] as being "*justified by reference to the well-established common law propositions that rights over land can normally only be obtained by grant, custom and usage, or prescription."* These are exactly the same well-established common law propositions which underpin the requirement for long user or similar in order to acquire PRN.
35. Dr Caffyn also relies on Magna Carta. Cap.23 of Magna Carta of 1215 (repealed in 1863) reads, in translation: "*All fish weirs henceforth are to be completely removed from the Thames and Medway, and throughout England, except on the sea coast".* Despite Dr Caffyn's views, this does not confer a PRN in respect of every river, used or unused, for navigation. It does not actually say anything expressly about navigation, other than to prohibit a certain kind of obstruction to it. Indeed, there is academic and judicial controversy as to whether the underlying purpose of this provision was to promote navigation, or deprive the king of the right to confer fishing on his favoured followers, or both. In *Williams v. Wilcox* (1838) 8 A & E 314, Lord Denman CJ (in the Court of Queen's Bench) said that the evil to be remedied by

Cap.23 of Magna Carta was "*the unlawful destruction of [fish]"* and hence it was of no relevance to the issue of public navigation which arose in that case.

36. However, as Denman LCJ added, later statutes about removing obstructions were expressly aimed at facilitating "*the common passage of boats and ships":* 25 Edw.3, Stat, c.4 of 1350. Note this phrase, when we come to the discussion of Hale, below. Apart from this, these and later statutes say nothing about the circumstances in which the public could exercise rights of navigation as and when rights of property held by riparian owners in non-tidal rivers came to be explicitly recognised. Tellingly, 25 Edw.3 Stat.c.4 identifies the mischief as relating to "*the great Rivers of England*", suggesting that both statutes had in mind rivers of similar magnitude to the Thames and the Medway named in Magna Carta. Even if Dr Caffyn's conclusions lead to the general rights which he asserts (which they do not), they could not in any event apply to <u>every</u> river of every size, as Dr Caffyn suggests.
37. By the 16th century, it is plain that English common law is recognising the balance between land ownership and public rights or interests, in a way inconsistent with Bracton. So in 1581, those exercising a right of fishery had no right to land on the banks of a river or spread their nets thereon: see the view expressed in *Inhabitants of Ipswich v. Browne* (1581) 123 E.R. 985 noted in Woolrych at [133].

Callis

38. Dr Caffyn summarises his views on Callis in his thesis by asserting that Callis (a 17th Century Sergeant or senior barrister) stated that usable rivers were public places. This is a considerable over-simplification of Callis's views, as we shall see, though <u>some</u> usable rivers were and are public places <u>because</u> there has been long-standing public navigation upon them.
39. First of all, a bit of context. Callis gave various lectures in 1622 about the statute of sewers, which was thereafter published as a very early law textbook. In our terms, the (1523) statute of sewers, concerns land drainage and flood defence. Commissioners of Sewers were appointed by this 1523 Act to ensure that local landowners kept up dykes and flood banks, and took them to court if they did not. It was of considerable significance in terms of its revenue-raising abilities and it is not surprising that it generated a certain amount of litigation and consequential professional endeavour in the years to come.
40. Much of Callis's work is about construing the extent of the Commissioners' powers, under the statute, and old authority suggests that those powers were not limited to navigable rivers: see footnote on Callis [79]. So one has to be very careful about taking propositions about the precise terms of the 1523 statute (and what it meant by Rivers, Streams, Walls, Banks, Sewers, etc) and reading them as indications as to what the common law as to PRN was at the time. An example of this is Dr Caffyn's citation from p.29 of Callis ([78] of the dissertation)

to the effect that the law "giveth redress and remedy…"; Callis actually says "this law", i.e. the particular statute, and hence something very different from what Dr Caffyn suggests.

41. That said, as well as construing the 1523 statute, Callis from time to time summarised what he understood to be the law on related issues of water rights, and his observations have generally been well regarded by judges thereafter (though like all such writers are by no means binding upon them).

42. At [256], in an important passage not set out by Dr Caffyn, Callis is considering the 1350 statute we noted above at paragraph 36. He states *"for thereby it appears, that weres* [i.e. weirs] *erected in navigable rivers, where ships and boats were wont to sail should be extirped, because they were a hindrance to navigation; but this only extends to navigable streams which have been made navigable by use and custom."* In other words, Callis said that weirs should be removed only where navigable streams have actually been used for navigation.

43. The words underlined point to the same accommodation as has been reached between riparian owners' rights and claimed public rights under the current common law of PRN. You need to show navigability and use, before navigation rights can be acquired against riparian owners. Theoretical navigability by itself is not enough. Callis certainly does not say, here or elsewhere, that "usable rivers were public places" as Dr Caffyn claims.

44. Callis also plainly recognises private rights in his discussion of Commissioners' powers and the rights flowing from riparian ownership. At [77]-[79], he discusses the common law of non-tidal rivers. It is plain from this discussion that by Henry VII's reign (if not before), the common law was drawing a distinction between tidal waters carrying (in most circumstances – see below for the caveat) the right to PRN, and non-tidal waters not generally carrying a PRN. In those circumstances, it is hardly surprising that the law decided that there was not an unqualified PRN for all rivers, but that there had to be some reason (i.e. evidence of long user) why private rights should be affected by the interests of the public.

45. Callis also discusses the statutes which followed the 1350 statute about fish-weirs etc. 4 Hen 4 Ch.11 (1399-1400) repeats the intent of the 1350 statute, and again is applicable to "*the waters of the Thames and other great rivers through the realm, for common passage of ships and boats be disturbed*." Note that the protection outside the Thames is aimed at other "great" rivers, and the provision hardly could be contemplated as applying to small canoeing streams which had not hitherto been used for such purposes.

46. In summary, Dr Caffyn (2.11.2) seeks to draw from Callis the proposition that rivers without PRN were those which were not physically navigable, and that there was a PRN on those which were physically navigable. Callis does not say this anywhere, and [256] is a strong pointer against that being his view.

Lord Hale

47. In his dissertation at 2.11.3, Dr Caffyn also discusses Lord Hale's views. Lord Hale was Chief Justice from 1671 to 1676, and wrote a work entitled *De Jure Mare,* albeit not published until the 1780s by Hargrave. The long-delayed publication has given rise to a certain amount of suspicion as to whether the work was indeed written by Hale (as Dr Caffyn points out), but the text is much cited and reasonably regarded, by later judges considering the common law in this field.
48. At p.8 of Hargrave's edition, Lord Hale draws a distinction between some streams or rivers which *"are private not only in propriety or ownership, but <u>also in use,</u> as little streams and rivers that are not a <u>common passage</u> for the king's people"* and other rivers *"fresh as salt, that are of <u>common or public use</u> for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow or reflow, are prima facie publici juris, common highways for man or goods or both from one inland to another"*. He gives examples of the latter, namely the "Wey" (in fact the Wye), the Severn, the Thames "*and divers others*".
49. The distinction between the two types of streams is whether or not there is "common passage" or "public use" amounting to a "common highway". That is precisely the user criterion. Nowhere in this description is theoretical navigability made the touchstone of PRN.
50. Dr Caffyn says the first passage concerning private rivers/streams is unclear, but does not cite the second, which makes the meaning of the first clear. Hale's note on the river Wye, which Caffyn cites on p.81, particularly when read with the above passage, makes it clear beyond doubt that the difference between the two types of rivers is whether they have been subject to common or public use. In those times it was a matter for the jury to decide whether the given river has been "commonly passed" by boats, because it is that evidence which determines whether the stream or river is "common" or "public"; that issue would now be decided by a judge.
51. Hale's third case, of the privately constructed private stream made navigable ([9] of Hargrave's edition), is plainly additional to the distinction clearly drawn by Hale which I have set out above. And one of the ways in which such a private stream may become *juris publici* i.e. a common highway is *"that by long continuance of time it hath been freely devoted to public use*."
52. A judicial pronouncement from Hale supports the proposition that he was using the word "private" by contrast to tidal and thus public waters, and not by reference to the small sub-set of private waters which were actually constructed by riparian owners (which is Dr Caffyn's view). In *Lord Fitzwalter's case* (1674) 1 Mod. 174, LCJ Hale is reported as saying this: "*In case of a private river, the lord's having the soil is good evidence to prove, that he has the right of fishing; and it puts the proof on them that claim liberam piscarium* [a free fishery].

But in case of a river that flows and reflows, and is an arm of the sea, there, prima facie, it is common to all…"

53. Dr Caffyn seeks to gain support for his reading of Hale principally by reference to a gloss on Hale's views to be found in the writings of Angell. Angell was an American 19th century lawyer and reporter at the Rhode Island Supreme Court (and believer in ubiquitous PRN, as certain US states were and are). Angell says that rivers "subject to public use" are subject to PRN.[2] Dr Caffyn says that this is in line with Bracton. On my reading of Hale, Hale does not say the same as Bracton. Whether there is or is not PRN on a privately owned river depends on whether it is shown that the public has used the river. The Caffyn/Angell view harnesses the ambiguity of the word "use" in the phrase "subject to use", and this is plain from a full analysis of Chapter XIII of Angell's *Law of Watercourses, 7th ed,* (1854). But Hale himself talks about whether the river is or is not in common use, and the frequent analogy drawn by Hale (and Callis before him) in respect of highways (dedicated by use, not theoretical usability) reinforces this reading of Hale.
54. Summarising Hale's view (rather than Dr Caffyn's or Angell's views), a natural river and an artificial river can both become a common passage or public highway as a result of common or public use.
55. As we shall see, this reading of Hale was adopted by Farwell J in *Attorney General v. Simpson,* so I am not alone in my interpretation. The reading is also confirmed by a very recent (2015) US academic study in the Cardozo Law Review Vol. 36:1415, entitled *"Defining "navigability": Balancing State-Court flexibility and private rights in water ways",* by Maureen Brady.
56. Brady's summary is as follows: "*The leading seventeenth century English water law treatise also defined navigable water as water <u>used</u> for commercial transport. De Jure Maris by Sir Matthew Hale, described "little streams and rivers that are not a common passage" as private waters, and those in "common or publick use for carriage" as public waters. For Hale, the allocation of rights thus depended on the water's <u>use</u>; if the water was navigable by boats carrying men or goods from place to place, it belonged to the king, and thereby could freely be used by the people."* (my emphasis). As we will see, she is not alone amongst US practitioners and academics in her account of Hale.

Woolrych

57. Given this context, it is not surprising that when the first full-length textbook on water rights (*A Treatise on the Law of Waters and of Sewers)* came to be published by Woolrych in 1830,

[2] Dr Caffyn also relies on commentaries by Kent and Wellbeloved, who are also American lawyers part of the same tradition.

he was of the view that actual public use played a part in deciding whether there was or was not PRN in rivers privately owned, even though there was no decision of the courts directly on point in non-tidal waters. Hence, at p.31 of the 1st edition, a river is "*public, as where there is a common right of navigation exercised....*" and public navigable rivers are those "*where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary....*"

58. Dr Caffyn seeks (at pp.115-118 of his dissertation), unconvincingly to my mind, to identify multiple errors in the relevant passages from Woolrych, none of which in any event go to the root of his opinion that use is a necessary criterion for PRN. In any event, it is far from clear that Woolrych is wrong about anything.

59. Importantly, the supposed third error (p.117) shows that Dr Caffyn has not understood Woolrych's opinion. Woolrych [31] says that use is the most "*unfailing test"* to apply, whereas "*others have been attempted, and frequently without success*." Dr Caffyn says Woolrych has failed to state which other tests have been applied. Far from it; what Woolrych means is absolutely plain from [33]. "*The circumstance, therefore, of the flow and reflow of the tide is one of the strongest in support of a public right, but so far from being conclusive, we have mentioned a case in which such a test has been found fallible. Public user for the purposes of commerce is, consequently, the most convincing evidence of the existence of a navigable river, and that fact being established, the accompanying rights of fishery, and of ownership of soil, etc are easily defined."* Dr Caffyn quotes the second of these sentences but not the first, but it is the first which answers his question. The "case" in which the "test" has been found to be fallible is *The Mayor of Lynn, w*hich is noted at [32] as identifying the "fallacy" that all tidal areas are automatically regarded as being navigable rivers. So this test Woolrych then rejects, preferring the test of user.

60. Two of the supposed errors (his fourth and fifth) are recording accurately statements of Lord Mansfield in *Mayor of Lynn v. Turner* (1774) 1 Cowp 86 and of Bayley J in *R v. Montague* (1825) 4 B&C 598, suggesting that, whilst "*rivers*" subject to the tides are prima facie subject to PRN, that status does not necessarily follow; it all depends on the nature of the river and the extent of its navigability. The "error" appears to be no more than that Dr Caffyn disagrees with the 18th and 19th century eminent judges who said what they said. As a matter of legal principle, the judges appear to be absolutely correct – one should not be dogmatic in asserting that a specific small tidal creek has a PRN over it, not least because it is unlikely (if only because of its size) to have had user within it. From an academic's perspective, that may be Dr Caffyn's privilege to disagree, but a more conventional legal approach might be to recognise what the judges had said and then to incorporate their views into one's legal analysis of the law as it emerged.

61. Dr Caffyn also misunderstands (the 6th supposed error) the second and underlined sentence in my quotation from [33]. Woolrych is plainly not saying that the existence of a PRN *determines* whether there is a right of fishery or ownership of the soil (as Dr Caffyn suggests), for the very simple reason that he goes on in the rest of the chapter to address those issues accurately (riparian rights depends on whether the river is tidal and prima facie rights of fishery likewise).
62. Woolrych also raised the analogy of the law of highways (on which Woolrych wrote a separate textbook in 1829) as indicating the circumstances in which a public right may be established. This is Dr Caffyn's seventh supposed error attributed to Woolrych. There is some support for this analogy in Comyns' Digest of 1764, pre-dating Woolrych, as there is in Hale (cited at [35] of Woolrych), and Coke (at [33], ditto). The typical way of establishing a highway is to show that it has been in long use, and thus dedication can thus be presumed. Whilst cases from the 18th century to the 20th century (*Ball v. Herbert* in 1789 to *Mayor of Colchester v. Brooke* (1846) 7 QB 339 to *Brotherton* in 1991) have emphasised the differences as well as the similarities between the law of PRN and highways, those similarities still remain, and it is far from surprising that the common law should seek to draw an analogy between the respective rights when deciding how they should be acquired. Woolrych was not wrong to do so.
63. The above analysis points out that far from being an error-strewn work, Woolrych provided a helpful summary of the cases and learning on water rights for practitioners, and in the light of that gives a view on the issue of PRN in line with the learning available to him at the time. That view was that use was required to establish a PRN.

Woolrych's reception and succeeding cases

64. Dr Caffyn's hypothesis assumes that the Woolrych view was then unquestioningly and wrongly accepted by all later judges and textbook writers. This imputes a surprisingly uncritical approach adopted by judges, practitioners and academics alike over the last 185 years, which is by definition unlikely. It is plain that Woolrych played a part in further academic thinking, but by no means the dominating view which Dr Caffyn claims. Indeed, the judges who were to consider the issues in the later reported cases do not expressly rely upon Woolrych's views.
65. I have examined the modern cases and learning above, particularly the *Wills* case in which precisely this point arose, and the House of Lords, in effect, roundly rejected Dr Caffyn's hypothesis.

66. There are also decisions between Woolrych and *Rawson v. Peters* in 1972 which are entirely consistent with the views of the later courts. And, tellingly, there has been no decision of the courts between 1877 and today in which Dr Caffyn's view has prevailed.

67. The first case of importance is *Orr-Ewing v. Colquhoun* (1877) 2 AC 839. The claim was for a declaration that (1) the (Scots) River Leven was a navigable river, and that (2) a bridge being erected over it would obstruct the navigation. In the Inner House of the Court of Session, it was firmly an issue as to whether the Leven was a "*river…which has been used by the public as a navigable river beyond the memory of man*" – per Lord President at (1877) 4 R 344 at 350, and the right of navigation "*arises from use only"* per Lord Deas at [354], with Lord Mure agreeing with both other judges on this point.

68. By the time the argument in *Orr-Ewing* reached the House of Lords, the real argument was over obstruction under (2). However, Lord Blackburn at [848], agreeing with the judges in the lower court, regarded the navigation user in that case "*at least as living memory extended*" was relevant to the establishment of a PRN. He added that *"the very able counsel who argued for the Appellants felt it so impossible to deny that there was evidence of user in this water-way by vessels, such that similar evidence if the question had been as to the user of a land-way by carriages would have established the public right, that he abandoned this point.*" At [854] a PRN is said to be acquired by the public "by user". So these are statements of significance, (albeit not necessary for the particular decision) particularly given Lord Blackburn's reputation as a notable exponent of the common law, and his history of practising at the English Bar and then being appointed to the Scottish Bench.

69. Lord Blackburn's view in *Orr-Ewing* was followed by Kay J in *Bourke v. Davis* (1889) 44 Ch. D 110*,* in the English courts. The question of a PRN did arise and was necessary for the decision. The Defendant had argued that the river was the King's river, and that there was an automatic PRN; he also argued that user was made out on the facts. Kay J examined the evidence on user and found that it was not made out on the facts. Dr Caffyn attacks elements of the decision, but many of his attacks are irrelevant to the decision on the central issue.

70. The last case of importance between Woolrych and *Rawson* is *Simpson v. Attorney-General* [1901] 2 Ch. 671, [1904] AC 476. Farwell J found that a given stretch of river was subject to PRN at a certain date in the past (1618). In so ruling, he said that a finding of PRN "*depends, not on the question of possibility of navigation, but on the proof of fact of navigation*" [687]. In so concluding, he considered Hale, in a separate passage to that which I cited above, but to the same effect: so Farwell J appears to have read Hale the way I have (and contrary to Dr Caffyn's view).

71. *Simpson* went to appeal. The finding of PRN as at the date of 1618 in the case was upheld by the Court of Appeal and the House of Lords (see Lord McNaghten at [481]), without adverse comment on Farwell J's view of the law. The House of Lords reversed Farwell J and the

Court of Appeal on an entirely separate point as to the status of certain locks which were installed after 1618.

19th century American views

72. Dr Caffyn cites various US opinions which are supportive of the view taken by many US states that user ought not need to be established before PRN may be found to exist. US courts were faced with a rather different factual picture in the early 19th century; many substantial rivers were unoccupied (at least by white colonists) and therefore it would have appeared difficult if not impossible for long user to be established over the property rights which would be asserted as settlers moved west and settled along the many and large rivers in the US. (As Brady points out helpfully at [1417], some 2% or 86,000 sq.m of the US now consists of inland waters – excluding the Great Lakes).
73. But US academics, interested as they were in water rights, and to a greater extent than UK academics, wrote a number of works during the 19th century. No mention is made by Dr Caffyn of Dr Houck's views in his *Treatise of Law of Navigable Rivers* (1868), Boston, Little Brown, who notes on p.20 (concerning English law) that "*the history of the Common Law in this respect, and that the position assumed by Woolrych, that immemorial public user is the only infallible test of navigability and a public right, is correct….."* Ditto re Dr Gould in his *Treatise of the Law of Water,* 3rd ed. (1900) Chicago, Callaghan, who considers the problem at length in his chapter 3, but sums the position up in a sentence in para.86 in Chapter 4: *"In England, the right of navigation is public in tide* (sic) *waters, but depends upon user in the case of navigable fresh waters."* Dr Caffyn references an earlier edition of Gould in his bibliography, but does not summarise his considered opinion.

Historical records and Acts referring to navigation

74. A significant part of Dr Caffyn's dissertation (and indeed thesis) consists of a historical analysis of records (including Navigation Acts) showing that many rivers had commercial activities on them during mediaeval times. Whether any of that historical evidence is of direct relevance to the stretches of rivers at issue between Fish Legal members and BCU members, or indeed anglers/riparian owners and canoeists more broadly, I do not know, though it is possible (for reasons I shall explain) that it might be if the river was shown to be consistently navigated at some point in the past, and the river remains substantially as it was. But it certainly does not follow that, because there was a PRN at one stretch on a given river established by past user, the whole of the river, including its upper stretches, was similarly subject to a PRN.

75. Caution also needs to be adopted when seeking to construe an old private Navigation Act. It may record the state of navigation at the time of the Act; equally, it may say no more than that it is to improve navigation. Little can be inferred from the latter. This may mean no more than that there was no extant commercial navigation, hence the wish to improve it. In other circumstances, it may be consistent with there being an existing PRN which it is intended to improve, by the provision of locks or other infrastructure. For the various permutations, see *Halsbury's Laws*, vol.101, at [702], footnote 6, but again this will be a river-specific, if not stretch-specific, exercise if canoeists seek to argue that a PRN was established either prior to a Navigation Act or by that act, assuming of course in the latter case that the Act is still in force.
76. It is a hopeless contention (if this be made) to say that the existence of a Navigation Act means without more that there was a PRN and is now a PRN. A perfect example of the complexities which will affect many rivers and stretches of rivers is the *Brotherton* case, in which Vinelott J found that there had been no PRN before the 1702 Derwent Act. The 1702 Act said that the river was "capable" of being made navigable between Scarborough Mills down to the Ouse. The 1702 Act created a statutory PRN. Works were then carried out, but the statutory PRN came to an end when the 1702 Act was repealed in 1935. The effect was (i) no common law PRN before 1702; (ii) a statutory PRN between 1702 and 1935; ergo (iii) no common law PRN on repeal of the Act.

The length of user

77. The next question is for how long must user run before a PRN is established. It is plain that both under English and Scottish law (Lord Fraser at [165] of *Wills Trustees*) the answer is "*since time immemorial*", or 1189 in legal theory. But what does that mean in practical terms?
78. Under Scottish law, as established in the *Wills Trustees* case, "time immemorial" means 40 years, an answer drawn from Scottish customary law (Lord Fraser, ibid).
79. Under English law, the length of "time immemorial" in this context is not so clear in the absence of a specific decision on the point, though the fact that it will be a long time will be readily apparent to anyone.
80. The theoretical answer is that the user must have continued since 1189, but the practical answer the law has taken is to fix this by reference to "*a time preceding the memory of man.*" Academic opinion, given man's longevity, is that this period is 70 to 80 years (per *Wisdom on Watercourses* at 6-07) or 60 to 70 years (per *Bates* at 13-22), and see *Wolstanton Ltd v. Newcastle-under-Lyme Corp* [1940] AC 860 at 876: *"the presumption should in general be raised by evidence showing continuous user as of right going back as far as living testimony can go*." This is reasonably clear, and explains why the current view is that 60 to 80 years is

the "memory of man". There is an old case *(R v. Joliffe (1823)* 2 B & C 54, about "immemorial" customs of jury appointments in a court leet[3] – far removed from PRN) in which a judge did not reject the finding of a jury that 20 years user was enough. The decision is likely to be more a reflection of the roles of jury (finder of fact) and judge (finder of law), respecting the former's role in that case, than a ruling of law with wider impact.

81. This position at common law should be distinguished from various statutory provisions and other rules of law which have set a period of user at 20 years in slightly different contexts. The most obvious of these is the 20 year period laid down by s.1(1) of the Rights of Way Act 1932 after which a "*way upon or over land*" shall be deemed to have been dedicated. This does not apply to a PRN for the reasons given by the House of Lords in *Brotherton*, namely that a river is not "*a way upon or over land*". A period of 20 years has also become the starting point for the acquisition of prescriptive rights over land (including the right to take water), in the various, and confusing, different ways in which these can be acquired (prescription at common law, via lost modern grant, and under the Prescription Act 1832). But the acquisition of a *Public* Right of Navigation is not the obtaining of a prescriptive right in the narrow sense, namely the acquiring of a *private* right by an individual landowner over the land of another, and therefore the 20 year period arising through that form of prescription does not apply to PRN.

The type of long user

82. There are a number of further aspects as to whether a given long user can establish a PRN. The first relate to the quantum and nature of the use said to give rise to a PRN. The second turns on the attitude of the riparian owner to that user, in short, whether he acquiesced in such user.

Quantum and nature of user

83. The underlying test for user capable of establishing PRN is set out in Lord Fraser's formulation in *Wills' Trustees,* [165]. There must be *"regular habitual use, not necessarily throughout the year, but at least for a sufficient part of normal years to make the river of substantial practical value as a channel of communication or transportation".* Lord Wilberforce came up with a similar formulation at [126], as did Lord Hailsham at [145].
84. Lord Hailsham adds (at [148]) that whilst an existing PRN may be exercised via the use of canoes, it does not follow that "*a new and limited public right of navigating canoes can arise in a river not otherwise navigable".* So if a river has in fact been navigated by larger vessels

[3] A court leet was a local manorial court.

or (on the facts of that case) logs, canoes may *continue* such user, but canoes may not establish that user in the first place if the river cannot otherwise be navigated.

85. This raises a potentially important hurdle in a case where there has been no mediaeval user which canoeists can identify and rely on. It means that canoeists may not be able to establish a PRN over very shallow or very 'white' waters, even if user were to date back to "time immemorial".
86. Subject to the general navigability of the river, the use (though it has to have been regular) does not necessarily have to be commercial. So, in the *Wills Trustees* case, regular canoeing trips throughout the summer season were capable of amounting to continuing use, but the significant difference between that instance and the more typical English and Welsh set of facts, is that the PRN in *Wills Trustees* had only been established as a result of the far longer period for which the River Spey had been used to float logs downriver, starting in the 17th century and continuing until about 1885. It is not a case where PRN was being established by canoeing; it was just that canoeing was capable of continuing user under the PRN which had already been established by 200-odd years of log-floating.

Acquiescence

87. In the obtaining of a PRN (just as in obtaining a private prescriptive right), the user relied upon must be, in the traditional Latin "*nec vi, nec clam, nec precario.*" *"Nec"* means "neither" or "nor", "*vi*" means with violence or contention, "*clam*" means in secret, and "*precario*" means "*with permission.*" In modern legal terms, the Latin phrase means *"without force, secrecy or permission."*
88. As in the *Wills Trustee* case, there are two potential periods of long or "immemorial" use which might give rise to a PRN, ancient use, principally for commercial use, and modern use for pleasure boats or canoes.
89. The first ("*vi")* and the third ("*precario"*) requirements are likely to be of particular importance in respect of modern canoeing.
90. The first is likely to arise because canoeing in the face of protests from the riparian owners or others acting on their behalf will be held to be "contentious" within the meaning of "*vi*". Two forcefully written letters complaining about the use of a right of way led to user thereafter being contentious (*Smith v. Brudenell-Bruce* [2002] 2 P & CR 4), though on the facts of that case the right of way had in fact been established prior to the letters being written. And repeated protests by a home-owner at being over-flown by Harrier jump jets, met by the RAF's insistence that the jets had to continue to fly, prevented any prescriptive right accruing in *Dennis v. Ministry of Defence* [2003] EWHC 793 (QB). Notices objecting to paddlers

using a stretch without permission may also be of relevance to the question of whether the user is contentious: *Betterment Properties v. Dorset CC* [2012] EWCA Civ. 250.

91. Assuming that canoeing happens openly during the day, the second ("*nec clam*" or "not secretly") is unlikely to arise.
92. "*Nec precario*" or "not with permission" is likely to be of relevance, where from time to time, paddlers or their representatives have signed access agreements, or otherwise acknowledged in some way the rights of the riparian owners or simply received permission (whether sought or not and whether granted to specific individuals or groups or the world at large).
93. A period of contentious use and/or of permissive use within living memory prevents immemorial use being established via canoeing.
94. As I have touched on above, use during a period when the sole ground for such use is the authority conferred by a Navigation Act cannot be used to establish implied dedication by the riparian owner: Vinelott J in *Brotherton.* In those circumstances, the owner is not acquiescing because the statute automatically affects his rights, for as long as the statute remains in force.

PRN and how it can be lost

95. It is important to note how a PRN can be lost.
96. The basic rule, like highways, is that once a PRN, always a PRN, in that a PRN cannot be lost through disuse: *Wills Trustees*, *Attorney-General v. Simpson* (ibid), and *Rowlands* at para.50.
97. However, if a river irreversibly silts up or changes so significantly that it cannot pass the traffic which established the PRN in the first place, then the PRN *is* lost: again *Rowlands* at para.50. So if certain stretches of rivers for which there may be some mediaeval evidence of long-term water-borne commerce silted up or became very shallow as a result of the removal of dams or weirs, then they may have lost their PRN for that reason, but this would depend on river-specific, if not stretch-specific evidence.

Conclusion

98. Consistent case law since 1877 has endorsed the textbook view expressed in 1830 that user is a fundamental element of establishing a PRN. This includes statements in three House of Lords cases to that effect, (*Orr Ewing, Wills* and *Brotherton)*. The prospect of the courts today taking a different view, based upon a highly controversial view of the pre-1830 law, is slim indeed. The law is therefore clear.
99. In particular, the *Wills' Trustees* case requires canoeists to establish that a strong 1970s House of Lords (4 English and 1 Scots judges) had gone wrong after 9 days of argument, or equally fancifully, that the common law of PRN in England and Wales should differ from the common law of Scotland.[4] And courts in England have endorsed *Wills Trustees* since.

100. So user is required. Without a statutory PRN affecting a specific stretch of water, canoeists cannot simply say they are entitled to use the water without establishing user.

101. I have also summarised the main legal issues which are likely to arise as and when any claims are made by canoeing interests that there is long user qualifying as PRN on specific stretches of rivers.

28 September 2015 **DAVID HART Q.C.**

[4] The common law in Scotland was affected by statutory changes in 2003. That itself is of significance. On Dr Caffyn's view, this was unnecessary, and it is an indicator that if change is to come, it should be by the legislature rather than by the courts. It is no part of this Advice to say anything on the rival policy arguments on this issue.