Saleem Khalid

Author

Richard Collier

Author

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PUBLIC AUTHORITY BRIEFING

In this inaugural briefing for our Public Law Group, **Saleem Khalid** and **Richard Collier** take a detailed look at some of the key cases of the last twelve months affecting public authority liability. The Supreme Court's judgment in the case of *CN v Poole* is (surely!) due shortly, whilst permission to appeal to the Supreme Court has recently been granted in the leading vicarious liability case of *Barclays Bank*. In this briefing we focus upon a number of recent cases where it has been argued that the law on duties owed has been expanded through the law of negligence, or the Human Rights Act, to see where the law stands as of Spring 2019. We will try not to mention Brexit.

BARCLAYS BANK [2018] EWCA Civ 1670

In a group litigation action, 126 Claimants sought damages from Barclays Bank ("the Bank") in respect of alleged sexual assaults committed by Dr Gordon Bates - who died in 2009 - between 1968 and 1984. The Claimants were prospective or existing employees with the Bank who attended unchaperoned medical assessments at Mr Bates' home. A preliminary trial was ordered on whether the Bank was vicariously liable for his acts.

At first instance Nicola Davies J concluded it was. The Bank appealed to the Court of Appeal, represented by lead counsel Lord Faulks QC.

Irwin LJ gave lead judgment dismissing the appeal. The Judge below had been right to approach the matter by posing the two-stage test elucidated by Hughes LJ in the Court of Appeal in *Catholic Child Welfare Society,* first the relationship between the defendant and the tortfeasor and second the connection between that relationship and the tort. She was further correct, in respect of the first of those stages, to ask herself the five questions identified by Lord Phillips in *Catholic Child Welfare Society,* as affirmed in *Cox* and most recently in *Armes*), and Irwin LJ upheld her factual findings on all five.

i) Employer [or akin to] more likely to have means to compensate

The Bank was more likely to have the means to compensate the victim, and Irwin LJ rejected the Appellant's submission that this should be considered at the time of the torts (when Dr Bates' insurance could have funded recompense) as opposed to the litigation.

ii) Tort committed as a result of activity being undertaken by the employee on behalf of the employer

The activity was taken on behalf of the Bank, as the principal benefit flowing from the assessments was to ensure medically fit employees able to give long service to the Bank.

iii) Employee's activity is likely to be part of the business activity of the employer

In a somewhat cursory fashion Irwin LJ reasoned that the process in question was a part of the business activity of the Bank, stating "there could hardly be a clearer example of that than the selection of suitable employees for a responsible institution in the service sector".

iv) Employer created the risk of the tort

The risk of the tort arose from the arrangements made by the Bank because the Bank specified the nature of the examinations, as well as the time, place, and examiner.

v) Level of control

The level of control exercised by the Bank over Dr Bates was "perhaps the most critical factor". The first instance Judge found that the control argument was not negated by the fact of the examinations having taken place at Dr Bates' home. Rather the focus has to be the control in respect of the identified activity, which in his case was the carrying out of the assessments, for which the control exercised was "of a higher level of prescription than might usually be found in the context of an examination required to be performed by a doctor". This was principally because the Bank directed the questions to be asked and the physical examinations to be carried out for the purpose of completing the templated form. The Appellants criticised this reasoning, for example because deliberate torts by experts in litigation could be caught by the same logic. Irwin LJ however distinguished such examinations from the kind performed in the instant appeal, stressing how it would be rare for experts in litigation to: conduct a general health examination; do so against a standard formula set by the commissioning party; be asked to conduct intimate examinations, and do so for ostensibly fit individuals; conduct examinations other than on a particular part of the body; be told which tests specifically to do. Accordingly he accepted the findings of the Judge below on the control question.

In reaching his conclusion on the first stage, Irwin LJ rejected the Appellant's proposition that the so-called "independent contractor defence" remained good law. This is no longer the correct test, rather courts must ask themselves the questions laid down in *Cox* and *Mohamud*. If the Supreme Court would not have failed to say so, had it intended the old test to survive.

In terms of the second stage, namely the connection between the relationship and the tort, Irwin LJ said the Judge below was: "… obviously correct that these medical examinations were sufficiently closely connected with the relationship between Dr Bates and the Appellants. They were the whole purpose of that relationship. Without them, the relationship would never had existed."

Discussion

CN v Poole type arguments on negligent performance of statutory duties are obviously not the only route to establishing liability. In one sense this judgment on vicarious liability is arguably helpful, in that it clarifies the state of the law and confirms that the correct approach is that of *Cox* and *Muhamud*. The correct approach is one of substance, and not form or definition, and it is now clear that the "independent contractor" defence has not survived the passage of time. In terms of legal principle, this case did not really fall victim to the voracious appellate judicial appetite for expanding the law of vicarious liability.

However, its application of these principles to the facts is more doubtful, however, and this case gives a worrying indication of how far courts may be prepared to stretch the principles to cover the facts of the case before them to allow the unfortunate claimants compensation. In particular the reasoning on why the medical examination process was part of the business activity of the bank unsatisfactorily conflates processes which are incidentally necessary for the conduct of the business activity (i.e. medical assessments as part of the recruitment process which provides the Bank with employees) with the business activity itself (providing banking services). Further the attempt to distinguish the examinations in question from those performed by experts in litigation was unpersuasive, and it seems distinctly possible that the necessary degree of control over the medical expert could be identified in such a situation.

ROBINSON [2018] UKSC 4

This is an important case, both in terms of the significance of the decision for local authorities and the much needed clarification on the law of negligence. In the opening paragraphs of his judgment Lord Reed comments that the facts of the case gave rise to issues of general importance which could be decided using long-established principles of negligence law, though which principles had been eroded in recent years by

uncertainty and confusion.

Mrs Robinson, a frail 76 year old lady, was walking along a shopping street when suddenly she was knocked to the ground by a group of men struggling with one another thereby causing her injury. The group consisted of two police officers attempting to arrest a suspected drug dealer.

At first instance the Recorder dismissed the claim. The Recorder found that the officers had acted negligently because - among other things - the principal officer, despite accepting he ought to have been taking care for the safety of members of the public in the vicinity, failed to spot Mrs Robinson despite her being less than a yard away and within his line of vision. The claim failed however because the police benefitted from immunity against claims in negligence by virtue of the decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

Hallett LJ gave lead judgment in the Court of Appeal. She considered that the three-stage *Caparo* test applies to all negligence claims, and that most claims against the police would fail the third stage of this test (fair just and reasonable). There may be exceptions to this general principle for example cases of outrageous negligence, cases which did not relate to core functions, and cases where police officers had assumed responsibility for a claimant. She went further and commented that had it been necessary she would have overturned the Recorder's finding of negligence, criticising him for acting as if he was an expert in the arrest and detention of suspects.

The Supreme Court allowed the Claimant's appeal. Lord Reed, with whom Lady Hale and Lord Hodge agreed, identified six issues (in bold):

(1) Does the existence of a duty of care always depend on the application of "the Caparo test" to the facts of the particular case?

No. It is only in novel cases that the *Caparo* test need be applied i.e. those situations where it has not been previously been established whether a duty of care is or is not owed. It does not need to be posed in every negligence claim.

When applying this test in a novel scenario, the correct approach is to develop the law incrementally and by analogy with established authority.

(2) Is there a general rule that the police are not under any duty of care when discharging their function of investigating and preventing crime? Or are the police generally under a duty of care to avoid causing reasonably foreseeable personal injuries, when such a duty would arise in accordance with ordinary principles of the law of negligence? If the latter is the position, does the law distinguish between acts and omissions: in particular, between causing injury, and protecting individuals from injury caused by the conduct of others?

The starting point is that public authorities are generally subject to the same liabilities in tort as private individuals and bodies. The police are no different, and the idea of police 'immunity' arises from a misunderstanding of Lord Keith's reasoning in *Hill*. This case is not – as had been understood by some - authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. There is disagreement between Lord Reed and Lord Hughes as to how the cases of *Hill*, *Brooks* and *Smith* can best be rationalised, though which for the sake of brevity shall not be explored here.

The law does distinguish between acts and omissions, and the police (like anybody else) are not generally under a duty to protect individuals from the acts of third parties. There are of course recognised exceptions to this principle, such as where there has been an assumption of responsibility.

(3) If the latter is the position, is this an omissions case, or a case of a positive act?

Positive act. Cases like *Hill* and *Michael* involved omissions, where "the defendant played no active part in the critical events". The complaint of Mrs

Robinson however was not that the officers failed to protect her against the risk of being injured, but that their actions directly resulted in her being injured.

(4) Did the police officers owe a duty of care to Mrs Robinson?

Yes. In the circumstances, on a moderately busy shopping street with pedestrians passing in close vicinity, it was reasonably foreseeable that if the arrest was attempted at a time when pedestrians were close then they might be knocked into and injured. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards pedestrians in the immediate vicinity when the arrest was attempted, including Mrs Robinson.

(5) If so, was the Court of Appeal entitled to overturn the Recorder's finding that the officers failed in that duty?

No. Lord Reed stated emphatically that the Recorder was entitled to find negligence on the sole basis of the officer failing to spot Mrs Robinson (as described above), regardless of the soundness of his other criticisms of how the arrest was carried out. Lord Hughes appeared more tentative, expressing doubts but ultimately resisting the urge of the appellate judge to overturn the findings of a first instance judge who heard the evidence live.

(6) If there was a breach of a duty of care owed to Mrs Robinson, were her injuries caused by that breach?

Yes, the suspected drug dealer's decision to resist arrest did not break the chain of causation. The voluntary act of a third party, particularly when it is of a criminal character, will often constitute a novus actus interveniens, but not when that act is the very one which the defendant was under a duty to guard against.

Discussion

This appears at first blush to be an especially worrisome decision for police forces and local authorities, which has the potential to generate lots of future negligence claims. Nevertheless, upon closer inspection it is not that radical, and in reality simply a return to basics for the law of negligence. The correct approach to considering whether a duty of care is owed has been clarified following some unhelpful diversions in recent years, and Lord Reed has confirmed the (largely anticipated) death of police 'immunity'.

One lingering nugget of doubt is the sanctity of the acts/omissions divide, and the extent to which this can be used to rationalise the law of negligence. As Lord Hughes observes there is no firm line capable of determination between a case of omission and of commission, indeed the great majority of cases can be analysed in terms of either. *CN v Poole* contained a sharp contrast in the approach of both parties. The Appellants were anxious to persuade the Supreme Court that any purported omission can be classified as a positive act. For example, a failure to take into care could be considered an improper performance of a care assessment. It is expected that the Supreme Court will settle the argument and therefore confirm if the distinction between acts and omissions remains valid (outside the HRA field).

DARNLEY [2018] UKSC 50

The Claimant was assaulted and sustained blow to head. He attended A&E complaining about worsening headaches, where he was told by the receptionist that he would have to wait for up to 4 or 5 hours before getting looked at. He left after 19 minutes, without telling anyone, because he was feeling too unwell and wanted to go home to take paracetamol. His condition worsened shortly after returning home and he was taken back to A&E in an ambulance, though suffered a haematoma and was left with permanent brain damage. The receptionists' evidence was that their usual practice with a person suffering a head injury asking about waiting times was to tell them to expect to be seen by a triage nurse within 40 minutes.

He brought claim against the relevant NHS Trust, alleging breach of duty by the non-clinical reception staff concerning the information he was given about the time he would have to wait. At first instance HHJ Robinson dismissed the claim on the basis there was no duty. A majority of the Court of Appeal (McCombe LJ dissenting) refused the appeal, finding there to be no duty to advise about waiting times. Such a duty would add a new layer of responsibility on staff and a new head of liability for NHS trusts, which would be undesirable. Jackson LJ stressed that we must remember the difficult conditions in which such departments work, astutely observing that they are not always "havens of tranquillity". In the same vein Sales LJ rather acutely highlighted that if there is such a duty, to provide "precise and accurate information", it is difficult to see that this does not include an obligation to correct such information as changing pressures on resources arise. Both Jackson and Sales LJJ expressed concern that the proposed duty would lead to reception staff being instructed to say nothing to patients, causing the withdrawal of information which is helpful to the public. In the alternative the Claimant's decision to leave broke the chain of causation, and he should take responsibility for his own actions.

Lord Lloyd Jones gave the unanimous decision of the Supreme Court, allowing the Claimant's appeal and finding a duty to exist. There was no need to identify a new duty, rather this fell within the same old duty for clinical care i.e. the duty to take reasonable care not to cause physical harm to the patient. This duty clearly extends to not providing misleading information which may foreseeably cause physical injury. This relationship of health care provider and patient was formed as soon as the Claimant presented himself and was 'booked in', and - citing *Kent v Griffiths* - it is inappropriate to distinguish between medical and non-medical staff. The Court of Appeal had considerably overstated the 'resources argument', and the finding of causative break in the alternative was wrong. This ignored the trial judge's factual findings establishing a clear causal chain, in particular his finding that it was reasonably foreseeable that the Claimant would leave having been told of a 4/5 hour wait.

Although Lord Lloyd Jones' judgment is characteristically rational and well-written, one does have sympathy with the Court of Appeal's concerns. In particular the concern that hospital reception staff will stop providing this useful information. It seems to be the case – and this is arguably true of all the decisions discussed in this briefing, indeed public liability generally – that appellate courts are compensating the few to smite the many. The reality is that public liability is being expanded at the same time as funding is in real terms being cut, and it's arguably irresponsible to perpetrate the former in full knowledge of the latter.

It also seems to somewhat defy common sense that the Claimant's decision to leave could be deemed reasonably foreseeable; surely the sicker someone feels the more likely they are to stay *inside* a hospital?! At the very least one could reasonably and realistically expect such a person to inform hospital staff of his or her decision to leave.

BRIEFING'S CONCLUSION

Whilst it has been a busy twelve months full of developments in the field of civil duties owed, it has not necessarily been as expansionist as some have argued in terms of established legal doctrines.

The Cliff Richard case concerning his Article 8 privacy rights against the BBC might be one of the more expansionist in recent times under the HRA but then again it does not appear to be quite as exceptional as much of the media claimed.

In the news that did not mention Brexit there was seldom a day that has passed without some sad story of Abuse or a new redress scheme.

We have seen a significant rise in Abuse related cases brought directly under the HRA in the field of social services and care. These can be the failure to take into care cases or, on the other hand, the alleged unlawful breach of family life by taking the

children into care. The positive obligations enshrined in the ECHR were illustrated clearly in ***DSD v Commissioner for the Metropolis*** [2018] UKSC 11. That case highlighted that Article 3 encompassed an operational duty on the police to investigate complaints but that argument has since been employed frequently as justification for quite different pleadings to those that we were used to in negligence and under The Children Act 1989. Clearly there are quite different considerations regarding damages in a HRA case: just satisfaction is the apposite term.

The Children Act (and the ECHR) naturally featured heavily in the news with the tragic Alfie Evans case – especially section 1 thereof. Yet it was another provision of the Children Act, namely Section 20, that was cited in 2018 by the Supreme Court in ***Williams v Hackney Borough Council*** [2018] UKSC 37. The Court confirmed that if a parent delegated the exercise of their parental responsibility for a child to the local authority under s.20, such delegation had to be real and voluntary, though interestingly not necessarily pursuant to the express provision of information to them about s.20 or express consent thereunder.

Again, ***CN v Poole*** should provide clarification on the role of assumption of responsibility in this field (quite removed from the facts of *Hedley Byrne*) since that issue was argued as a ground by the Appellants in the Supreme Court and has been invoked frequently in these cases.

We cannot have long to wait for ***CN v Poole***, which had so many of these arguments raised. Will the final judgment extend the law as the Appellants therein wish or will it uphold the Respondent's more conservative position? Perhaps such language is itself unhelpful. In any event, given the length of time waiting for this judgment, it may well be that the Supreme Court is not in full agreement as yet. In this season, hope still Springs eternal that the judgment will resolve many of the outstanding issues that we have highlighted above.

But probably not Brexit.