FOUNDATIONS SERIES

LAW OF TORT

John Cooke

Pearson

Fourteenth Edition

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CN v *Poole Borough Council* [2017] EWCA 2185

Facts

The claimants and their mother were placed by the defendant under its powers as the local housing authority, in an estate in Poole owned by the Poole Housing Partnership Ltd (PHP). Before the placement, the defendant was said to have been aware that a family lived in nearby accommodation that engaged persistently in anti-social behaviour. Predictably, that family and their associates repeatedly subjected the claimants to significant harassment and abuse. CN attempted suicide. The Home Office commissioned a review from an independent consultant and the report was critical of the defendant, PHP and Dorset police. The appeal, which was framed in negligence, concerned the existence of a tortious duty of care to children, on the part of a local authority, to protect them from harassment and abuse by third parties.

Issue

The claimants' difficulty was that any civil action against the police was blocked by ***Michael* v *Chief Constable of South Wales Police*** [2015] UKSC 2, and against the landlord or the local authority in its guise as housing authority by ***Mitchell* v *Glasgow CC*** [2009] UKHL 11. They argued that the local authority should have removed the children from the family home and taken them to a safe place, using its powers under the Children Act 1989. The negligence action was legally possible, the claimants said, because of the Court of Appeal's judgment in ***D* v *East Berkshire Community NHS Trust*** [2003] EWCA Civ 1151, in which a social services authority was held to be in principle liable in negligence for wrongly removing children from their parents. The Court of Appeal in ***D*** had declared the restrictive House of Lords decision in ***X (Minors)* v *Bedfordshire CC*** [1995] 2 AC 633 to have been superseded by the Human Rights Act 1998. The claimants said that ***D*** still bound the Court of Appeal. The local authority argued that ***D*** was incompatible with subsequent House of Lords and Supreme Court authority, especially ***Mitchell*** and ***Michael***.

As the case was a striking-out case, the issue was legal and not factual. Has the Supreme Court definitively held that no action in negligence is possible against a social services department for failing to exercise its powers to protect a child from injury inflicted by a third party?

Is it correct that public authorities cannot be liable for pure omissions, including failures to warn of dangers (***Mitchell***) and failures to rescue or protect people from third-party wrongdoers (***Michael***), unless the established exceptions apply, namely where the defendant had control over the third party or where the defendant had assumed a responsibility to safeguard the claimant?

Decision

The Court of Appeal held that ***Mitchell*** and ***Michael*** did establish such a principle. ***D*** had been wrongly decided and the claimant's action had been correctly struck out.

Significance

The application of the pure omission rule to the state could be based on: first, the view that people should stand on their own two feet and not presume that they are entitled to assistance from the state; and, secondly, the view that public authorities with limited budgets should not distort their priorities to reflect the risks of paying damages rather than meeting need.

The victims in this case were poor and clearly unable to stand on their own feet and it is clearly arguable that the defendants having to pay damages would support meeting need.

The probable reason for the decision appears to be that the Supreme Court, in ***Commissioner of Police for the Metropolis* v *DSD*** [2018] UKSC 11, decided that negligence and human rights need not be consonant. Where a right has been infringed an action can lie under the Human Rights Act without there being a similar action for damages in common law negligence.

NB: This case has now been appealed to the Supreme Court.

This case raises the question of whether a duty of care is completely blocked in these circumstances or whether two previous decisions would still be followed.

Barrett v *Enfield London Borough Council* [1999] 3 All ER 193

Facts

The claimant was aged ten months when a care order was made in favour of the defendant local authority and he remained in care until he was 17. The claimant claimed damages for personal injuries, alleging that the defendant was in breach of its duty to act as a parent and to show the standard of care that was required of a responsible parent. A number of factual allegations were made to support the claim.

The defendant applied to strike out the claim on the grounds that it disclosed no cause of action. This was refused by the district judge but upheld by the judge and the claimant appealed to the Court of Appeal, which upheld the judge, and the claimant appealed to the House of Lords.

Decision

The House of Lords allowed the appeal against striking out. Cases should only be struck out where it was *certain* that the claim would not succeed and was inappropriate for cases where the law was uncertain and developing, such as in this area. Such developments should be on the basis of actual facts found at trial and not on hypothetical (possibly wrong) facts assumed to be true for the purpose of the strike out.

The previous House of Lords decision in ***X*** was distinguished as there the question was whether the decision to take a child into care was actionable in negligence, whereas here the child had been taken into care and the local authority had clearly assumed responsibility for his well-being.

Significance

Lord Slynn was of the opinion that ***X*** did not conclude the case and that it was arguable that a duty of care was owed and was broken. On this basis causation came into play and Lord Slynn differed from the Court of Appeal who thought causation could not be established as the claimant would not be able to show that operational acts, even if negligently performed, either separately or cumulatively, caused the condition of which the claimant complained. Lord Slynn, however, stated that causation was largely a question of fact.

W v *Essex County Council* [1998] 3 All ER 111 (CA); [2000] 2 All ER 237 (HL)

Facts

A 15-year-old boy, a known sexual abuser, was placed with a foster family without their being informed of his full history. The children of the family were sexually abused.

➤ For psychiatric damage generally see Chapter 4.

Decision

The House of Lords refused to strike out the parents' claim for psychiatric damage allegedly suffered as a result of feeling responsible for the sexual abuse of their children. It was at least arguable that the parents had a claim.

Objective 4

7.6.2 The education cases

Litigation has also occurred in what are known as the 'education' cases. These cases usually involve assessment of children's educational needs by local authorities. In general terms a child can suffer if they are negligently diagnosed as having special needs and are placed in special needs education. Alternatively, a child may have special needs and be wrongly diagnosed, leaving them to struggle in mainstream education.

X v *Bedfordshire County Council and others* [1995] 2 AC 663

X was the headline case in a series of consolidated appeals heard by the House of Lords. The House of Lords also heard appeals in the following cases: ***E* v *Dorset County Council***; ***M* v *Hampshire County Council*** [1995] 3 All ER 353.

Facts

In the first action *E* sued the local authority for breach of statutory duty on the ground that they had failed to diagnose a learning disability which required special provision.

E was sent to a special school at his parents' expense. A claim for common law negligence was also made as the local authority was alleged to have failed to diagnose or make proper provision for his condition.

In the second case, *M* sued as the head teacher had failed to refer him for assessment of his learning difficulties, which were consistent with dyslexia.

Decision

In the education cases a local authority was under a duty of care to those using the service to exercise care in its conduct towards those using the service. Educational psychologists and other members of staff of an education authority owed a duty of care in the assessment and determination of a child's educational needs and the authority was vicariously liable for any breach of such duties by their employees.

The failure to refer for advice from educational psychiatrists (***Dorset***) and the allegation relating to inadequate advice provided by the headmaster (***Hampshire***) were allowed to proceed on the grounds that the conduct in question was sufficiently distinct from the underlying statutory scheme (this was later admitted to be wrong in ***Phelps***, below) and the advice in question would be provided by the educational psychiatrist and headmaster direct to the claimants. As such, it could be assumed that the local authority had assumed responsibility to the claimants.

A considerable amount of litigation was generated in the education cases in the context of liability for special needs assessments.

It is now clear that a local authority is vicariously liable for the negligence of educational psychiatrists who negligently fail to diagnose learning difficulties such as dyslexia.

The following case is dealt with at some length but is crucial in understanding the changes that have taken place in this area. The case was a consolidated set of appeals.

Phelps v *Hillingdon Borough Council* [2000] 4 All ER 504

Facts

The claimant in the first case, who was born in 1973, was in 1985 referred by her school to the defendant local education authority's school psychological service. An educational psychologist

employed by the authority reported that testing had revealed no specific weaknesses. Shortly before the claimant left school she was privately diagnosed as dyslexic. She brought an action against the authority claiming that they were vicariously liable for the psychologist's negligent assessment. The judge held that the psychologist had owed a duty of care to the claimant, that the adverse consequences of the claimant's dyslexia could have been mitigated by early diagnosis and appropriate treatment or educational provision and that, accordingly, the psychologist's negligence had caused the damage in respect of which the claimant's claim was made. He awarded her damages.

The applicant in the second case, born in 1979, was privately diagnosed in 1988 as being severely dyslexic. She contended that her severe speech and language problems had not been investigated adequately or at all by the defendant local education authority and that as a result of failure to make suitable educational provision for her she had developed, and suffered from, psychological problems.

The claimant in the third case suffered from muscular dystrophy. He was provided with a statement of special educational needs pursuant to the Education Act 1981 emphasising the need for him to have access to a computer and to be trained in its use. He contended that negligently and in breach of duty the defendant local education authority had failed to provide a proper education for him, in particular computer technology and suitable training to enable him to communicate and cope educationally and socially, and that as a result he had suffered damage in the form of lack of educational progress, social deprivation and psychiatric injury consisting of clinical depression.

The claimant in the fourth case was born in 1979. He had severe learning difficulties and his special educational needs were assessed under the 1981 Act. An educational psychologist's report did not refer to dyslexia. His mother felt that he should be placed in a unit specialising in dyslexia, but he was placed elsewhere. He issued a writ alleging, *inter alia,* negligence and breach of duty both by the psychologists for whom the local education authority was vicariously liable and by the authority itself for failing to provide competent advice through its educational psychology service.

Decision

The House of Lords considered these cases in the context of whether they should have been struck out or not as disclosing no cause of action and concluded that they should not have been struck out as there was an arguable case that the defendants owed a duty of care. (See the judgment of Lord Slynn for the detailed reasoning.)

Lord Slynn:

> It does not follow that the local authority can never be liable in common law negligence for damage resulting from acts done in the course of the performance of a statutory duty by the authority or by its servants or agents. This House decided in ***Barrett* v *Enfield London Borough Council*** [1993] 3 WLR 79 that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them. It is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion.

Significance

Lord Slynn's very humanitarian judgment indicates a shift away from the complex network of tests set up in ***Stovin* v *Wise*** [1996] 3 All ER 801 and a move towards more orthodox negligence principles of foreseeability, proximity and policy. Where a public authority has decided to exercise a statutory discretion then it should take reasonable care in doing so. If there is a specific nexus

between the authority and its employees such as that in ***Phelps***, this may serve to establish proximity based on either assumption of responsibility or specific reliance. It is, however, still open for the courts to find no duty as it would not be just and reasonable to do so after weighing up the policy considerations involved.

A claimant still faces formidable obstacles in these cases. As Lord Slynn points out, the claimant still has to establish breach of duty and causation. An example of this came in a claim for occupational stress within the context of the exercise of statutory powers.

SUMMARY

This chapter deals with the special rules on the liability of public authorities in negligence.

- Liability for the negligence of public authorities is very complex because: (i) the loss involved is generally pure economic loss; (ii) the breach of duty in question is frequently an omission to act; (iii) the breach may well take place against the background of statutory powers and raise questions of whether tort law has a role or whether public law remedies are appropriate; (iv) as the action is against a public authority, the Human Rights Act 1998 may well have a role to play.
- *Omissions* – There was no liability on a public authority for a pure omission. The mere fact that a claimant's harm was foreseeable did not create a duty of care. Where a statutory power was conferred, the fact that the public authority was acting under a statutory power did not generate an analogous duty to act.
- *Exceptions* – (i) where the claimant suffers harm as a result of the actions of a third party over whom he alleges the defendant has carelessly failed to exercise control, proximity of relationship can be established by reference to the nature of the relationship between the defendant and the third party; (ii) where a public authority undertakes to act in a particular way and the claimant relied on that undertaking. The second exception may apply to the emergency services.
- The Human Rights Act 1998 may impose positive obligations on the emergency services but only where there is a 'real or immediate risk'. (***Van Colle* v *Chief Constable of Greater Manchester Police***.)
- The second category of cases is where the claimant alleges carelessness in the exercise of a statutory power rather than loss caused by failure to exercise it at all. In these cases the claimant must prove the usual factors in duty of care including: (i) proximity; and (ii) policy – the court may find that there are policy reasons for not imposing a duty of care.
- A distinction has been made between policy and operational decisions. In the former it would rarely be correct for a resource-allocating decision by a public authority to be challenged in a civil action for damages. In the latter it may be. The language used has now changed to decision making/implementation. In the case of decision making, a stringent application of justiciability and public interest will be applied. A three-stage test is applied: (i) whether the exercise of the statutory discretion in question would have involved policy considerations such as resource allocation, priority management, etc. (if so, no action in negligence should lie on fundamental justiciability lines and usurping Parliament's authority); (ii) whether, exercising the (justiciable) statutory discretion, the public authority had done so in a way that took it outside the discretion Parliament was assumed to have conferred (to do so the court was to apply the ***Wednesbury*** unreasonableness test); (iii) the court must then decide

whether it was appropriate to impose a duty of care. This is the conventional third limb whereby it has to be fair, just and reasonable.

- These principles are illustrated by the cases involving the emergency services and the education and child abuse cases.

Further reading

Bailey, S. (2006), 'Public Authority Liability in Negligence: The Continued Search for Coherence' 26 LS 155. Argues for the removal of the 'justiciability' proposition.

Goudkamp, J. (2015), 131 LQR 519 (***Michael* v *Chief Constable South Wales Police***). Case note.

Harris, D. (1997), 113 LQR 398 (***Stovin* v *Wise***). Case note.

Howarth D. (2018), 'Fear and Loathing in Dorset: No Public Duty to Protect' 77(2) Cambridge Law Journal. Case note on ***N* v *Poole BC***.

Morgan, J. (2005), 'Slowing the Expansion of Public Authorities Liability' 121 LQR 43.

Mullender, R. (2009), 'Negligence, Neighbourliness and the Welfare State' 68 CLJ 507.

Steele, I. (2005), 'Public Law Liability – a Common Law Solution?' 64 CLJ 543.