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PERSONAL INJURY BRIEFING

Recent developments in the duty of care owed by local authorities and public bodies

Are police officers immune from claims in negligence when discharging their functions of investigating and preventing crime?

Elizabeth Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4

Two police officers were trying to arrest a suspected drug dealer in a busy shopping centre when a struggle took place. During the course of the altercation, the three men knocked over the Claimant (a relatively frail lady) causing her to sustain personal injuries. The Claimant then brought a claim of negligence against the chief constable.

At first instance, the judge found that there was a foreseeable risk to the officers that passers-by could be injured and that the officers had failed to adequately consider this risk when apprehending the suspect. However, in light of the decisions of *Hill v Chief Constable of West Yorkshire [1989] AC 53 and Desmond v Chief Constable of Nottinghamshire Police [2011] PTSR 1369* the judge found that the police had immunity against such claims in negligence.

The Court of Appeal dismissed the Claimant's appeal. Applying the third limb of the *Caparo* test it was held that no duty of care was owed by the police in cases such as the present. Hallett LJ *did* accept that there might be a number of possible exceptions to the general principle such as cases of outrageous negligence, cases which did not relate to core functions, and cases where police officers had assumed responsibility for a claimant. However, she held that the present case did not fall into any of those categories.

The Claimant then appealed to the Supreme Court which unanimously upheld the appeal. Lord Reed (with whom Baroness Hale and Lord Hodge agreed) provided an extensive analysis of the preceding case-law as well as the law of negligence more generally. He averred that once the existence or non-existence of a duty of care had been established at common law, a consideration of justice and reasonableness was unnecessary. He maintained that the *Caparo* test should be reserved for novel cases only. In such cases, he held that the courts should consider the closest analogies in the existing law and weigh up the reasons for and against imposing liability in order to decide whether the creation of a duty of care would be just and reasonable (paragraph 29).

He held that the present case did not require an extension of the law of negligence; all that was required was an application of the common law principles to the particular facts. He accepted that the proceeding authorities had established that police officers engaged in the investigation and prevention of crime did not generally owe a duty of care to victims, or suspects or witnesses. However, he stated

that the reason for this was not founded on mere policy considerations, instead, it was based on the fact that there has never been a liability to protect persons against harm caused by third parties (in the absence of clearly recognised exceptions such as the voluntary assumption of responsibility).

Importantly, he provided clarification in relation to the decision of *Hill v Chief Constable of West Yorkshire*. He held that it is not 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 (para. 55). On the contrary, the police had always owed a duty of care to members of the public in circumstances where their positive acts had caused damage/loss (as did any other member of the public) and the decision in *Hill v Chief Constable of West Yorkshire* explicitly supported that principle (at paragraph 59).

He did not wish to interfere with the factual conclusions made at first instance and accepted that the present case was concerned with a positive act (rather than an omission) by the police officers. This was because the Claimant's complaint was not that the police officers failed to protect her against the risk of harm, but rather that their actions directly resulted in her being injured which was foreseeable in the circumstances. Lord Mance and Lord Hughes agreed that the present case concerned a positive act and that the finding of the trial judge on negligence should be restored. However they reached the same conclusion through slightly different reasoning.

This is landmark decision. It has dispelled the popular belief that *Hill v Chief Constable of West Yorkshire* was authority for the proposition that the police enjoyed blanket immunity from negligence actions. Clearly, they do not. Instead, it is clear that they are subject to the same duties and obligations as any member of the public.

The focus in future cases is likely to shift from an analysis of the policy considerations to a detailed scrutiny of the operational decisions made by officers. Whether this will lead to defensive policing/satellite litigation (concerning whether conduct amounts to an act or omission) remains to be seen. More generally, the decision also elucidated the limited context in which the judiciary should resort to an application of the *Caparo* test. The decision is therefore likely to have a wider application in negligence cases generally.

Is the Ministry of Justice responsible for the negligent provision of healthcare services in prisons?

Benius Razumas v Ministry of Justice [2018] EWHC 215 (QB)

Between 2010 and 2013 the Claimant was incarcerated in one of the Defendant's prisons. During his incarceration the Claimant received medical treatment for cancer from the NHS. It was accepted between the parties that the provision of this care was lacking in many respects and unfortunately led to him having his left leg amputated above the knee. The Claimant brought a claim in negligence against the Defendant.

In deciding whether the Defendant was negligent, the Court had to consider the following questions: (a) whether there was any breach on behalf of the Defendant (b) whether the Defendant owed a non-delegable duty of care in respect of those who provided healthcare services (c) whether the Defendant was vicariously liable for the clinical negligence.

Cockerill J found that the direct duty of care

owed by the Defendant to the Claimant was limited to matters arising out of his custody and that, whilst such a duty extended to *accessing* healthcare services, it did not extend to the *provision* of healthcare.

In light of *Woodland v Swimming Teachers Association [2013] UKSC 66*, **Cockerill J** found that this was not a case in which a non-delegable duty arose. In particular she found that there was not a special relationship antecedent to the act of negligence. Further, the mere fact of incarceration was not sufficient to establish any such relation as the provision of negligent healthcare was not one of the particular types of risk which the Defendant had undertaken to protect the Claimant from. Additionally, she held that the provision of healthcare services was not part of the prison's mainstream or essential function.

In terms of vicarious liability, Cockerill J placed much weight on the five factors identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1.* She found that several of the factors were missing. In particular, it was apparent that there was not a relationship of employment (or akin to employment) and there was a lack of control by the Defendant over the provision of the healthcare services.

In light of the foregoing, she concluded that there were no grounds for the imposition of liability on the Defendant.
Apart from providing clarity on the scope of the Ministry of Justice's duty of care, the decision provides a useful analysis/application of the case-law and principles which underpin the doctrines of vicarious liability and non-delegable duties.

Is it negligent to encourage children to run in school?

Hannah Pook v Rossall School [2018] EWHC 522 (QB)

The Claimant was a pupil at Rossall Girls' School. Prior to starting her PE lesson she was actively encouraged to run from the changing rooms to the hockey pitch. As she approached the hockey pitch, she decided to race her friend and run over a muddy area to get ahead (rather than staying on the tarmac path). In the course of changing paths she slipped and sustained an injury to her right elbow.

The Claimant's claim was pleaded in negligence. It was alleged that the PE lesson was not properly supervised, there was no fencing or barrier around the muddy area and that there was no regime to ensure that pupils did not walk there. The Defendant denied that the Claimant was running when she fell and, in the alternative, maintained that even if she was running that this was not causative of the accident. It was further denied that there was any duty on the Defendant to fence off the area in question and it was averred that the lesson was properly supervised/adequately risk assessed.

The Judge at first instance found that the Claimant had failed to prove her case on balance. She accepted as a fact that the Claimant was running at the material time (albeit that she had fallen *forwards* rather than *backwards* onto the kerb). However, she found that instructing the girls to run to the pitch was not negligent in the circumstances. Further, she concluded that the muddy verge was not a trap and that the girls were expressly told not to be on it because of the transfer of mud onto the pitch (rather than any danger that it posed).

Spencer J accepted that schools owe an enhanced duty of care to their students above and beyond that of parents (in light of the decision of *Woodland v Essex County Council [2013] UKSC 66*). However, he rejected the notion that a school is required to reduce the risk to the lowest level reasonably practicable. Instead, he found that teachers must be afforded a measure of discretion and judgment (based on their knowledge of the school, the environment, the particular children in their charge etc) and that the courts should be slow to condemn teachers as negligent/supplant teachers' views for their own.

In the circumstances, he found that the Judge at First Instance was correct in finding that the teachers were not negligent in allowing children to run to their class as "*generally, it is not inherently dangerous for children to run as long as they are careful and to stop them from doing so when on their way to a sports session would be extremely difficult*" (paragraph 34).

The decision highlights the Court's reluctance to place too onerous a burden on schools. Provided an adequate risk assessment is in place, it is likely that much deference will now be given to the discretion/judgment exercised by teachers when making spontaneous decisions in the classroom.

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