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POLICE LAW BRIEFING

The long-awaited Supreme Court decisions in DSD v Commissioner of Police of the Metropolis and Robinson v Chief Constable of the West Yorkshire Police were handed down this month. While one preserves and, to some degree, clarifies the legal landscape governing claims against the police, the other revolutionises it. Members of the 1 Chancery Lane police team analyse both decisions in this briefing.

"What I mean and what I say is two different things," the BFG announced rather grandly.

When Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 spoke of police 'immunity' from liability in negligence one could have been forgiven for assuming that he meant that the police were 'immune' from liability in negligence. The recent case of *Robinson* clarifies that he did not, in fact, mean what he said.

What is *Hill* authority for?

Lord Keith concluded his speech in *Hill* by detailing the 'policy considerations' that prevented a duty of care arising in that case. Within his concluding paragraph he refers to '*police activities*' (apparently with no distinction between the many and varied activities of the police) and the detrimental effect that the threat of litigation might have on the ability of the police to properly carry out their role of investigating and suppressing crime. He makes no distinction between a '*straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar*' and more complex failures, the investigation of which '*would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do*'. In either case he was concerned about the '*significant diversion of police manpower and attention from their most important function, that of the suppression of crime*'. His conclusion was that '*the police were immune from an action of this kind on grounds similar to those which in Rondel v. Worsley [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court*'.

This proposition of 'immunity' might appear to have been gradually eroded over time but the decision in *Robinson* confirms that it in fact never existed in the first place. *Hill* 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 preventing crime. In fact, almost the opposite is said to be true. Lord Reed opines that the starting position is in fact that the police *are* generally under a duty of care to avoid causing personal injury where such a duty would arise according to ordinary principles of negligence. The police then, are nothing special when it comes to assessing liability in negligence.

What *Hill* is authority for is that the police do not owe a general duty of care, in the absence of special circumstances, to protect the public from harm through the performance of their function of investigating crime (although, see *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11 and the article of Paul Stagg in this briefing note as to the possibility of a claim under Article 3 ECHR for breach of operational failures of the police).

Lord Reed states that, at the point of discussing policy considerations (i.e. right at the end of his judgment and after he had in fact disposed of the appeal on other grounds), Lord Keith in *Hill* was in fact only contemplating whether the police owe a general duty of care to individual members of the public in the performance of their investigative function to protect them from harm caused by criminals (to which to answer was '*plainly no*'). It is this general duty that is negated by policy considerations but the same considerations do not provide a blanket immunity in respect of situations that would otherwise give rise to a duty of care. *Robinson* does clarify the position and should be cited from now on rather than *Hill* to avoid confusion going forwards.

Caparo or no *Caparo*?

The Court of Appeal (with leading judgment being provided by Hallet LJ) concluded that: *Robinson* was an 'omission' case, wrong; that there was insufficient 'proximity' between Claimant and Defendant, wrong; that the *Caparo* test was applicable and not satisfied. Wrong again. It is no small wonder that practitioners might be in a state of confusion when the Court of Appeal and the Supreme Court interpret the existing authorities to reach diametrically opposing conclusions.

Lord Reed expresses the opinion that the facts in *Robinson* concerned the application of established principles of the law of negligence; i.e. the duty to take reasonable care to avoid causing personal injury. Accordingly, the existence of a duty of care did not depend on the application of the *Caparo* test which is only applicable to 'novel' duty of care cases, like, in his opinion (albeit perhaps not that of Lord Mance who recognises the difficulty of fitting any particular decided case into '*any absolutely fixed legal mould*') *Smith v MoD* [2013] UKSC 41 which concerned questions about the 'combat immunity' principle. The Court of Appeal were clearly mistaken about this issue as the rationale for their denial of a duty of care depended entirely on the application of the *Caparo* test.

The *Caparo* test, therefore, only applies to those cases that do not fit into an existing category of decided cases. Practically speaking this question is likely to be easier to state than to determine. For practitioners concerned with police liability, however, the main tenet to take is that it is established that in cases of direct positive acts there is a duty to take reasonable care to avoid causing personal injury. This established category of case exists regardless of whether the defendant is a police force or not.

Act or Omission?

If the Defendant's actions were properly to be categorised as 'acts' then a duty of care is likely to arise under the established principles of negligence (i.e. to take reasonable care to avoid casing personal injury). Alternatively, if the course of events were properly classified as an 'omission' no duty is likely to arise (in the absence of a special relationship). Notwithstanding the fact that the Court of Appeal concluded that the case was an 'omission' case, the Supreme Court unanimously agreed that it is an 'act' case (again highlighting the difficulty with the concepts grappled with in *Robinson*).

Affirming Lord Hoffman's reasoning in *Stovin v Wise*, Lord Reed urges '*common sense*' as the mechanism for distinguishing between acts cases and omissions cases. I'm not sure what this says for the 'errant' reasoning of the Court of Appeal on this issue. Claimants should think carefully about how their claim is worded as in *Robinson* the Supreme Court noted that the Claimant's claim was '*not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured*'.

Under the general principles of negligence it is unlikely that a duty of care will be established in cases where a defendant merely fails to protect a claimant from harm perpetrated by a third party. This is a key consideration for future cases concerning liability of the police. If it can be said that the harm was properly caused by a third party then the police will be likely to avoid liability

Concluding thoughts

This is an area of law that has been in need of clarification for some time. *Robinson* does provide some clarification but there still remains huge scope for argument on each of the questions that now must be answered. In this writer's opinion the main principles to take from *Robinson* are these:

1. There is no general immunity from suit for the police. *Hill* has led to some confusion on this question that should not perpetuate from now on;

2. It is well established by the long-standing principles of common law negligence that there is no duty, in the absence of a special relationship, to protect persons against harm caused by third parties;

3. It is well established by the long-standing principles of common law negligence that there is a distinction between positive act cases and omission cases;

4. The *Caparo* test is only applicable to 'novel' cases in which there is no established principle that can be stated in relation to the imposition of a duty of care in a specific category of case (e.g. per *Smith*, should liability be imposed on the armed forces in respect of its provision of equipment to soldiers?). Accordingly, discussion of 'policy considerations' should not be '*a routine aspect of deciding cases in the law of negligence*';

5. As a result of 2 and 3 above and as evidenced by decided case law, it is an established category of

negligence that a duty of care arises in cases concerning positive direct acts, i.e. in such circumstances there is a duty to take reasonable care to avoid causing personal injury by one's direct positive actions (different considerations apply in the cases of pure economic loss and psychiatric injury);

6 The duty to take reasonable care to avoid causing personal injury in cases of positive direct acts applies to the police as much as it applies to anyone else;

7 *Hill* is authority for the proposition that the police do not owe a general duty of care, in the absence of special circumstances, to protect the public from harm through the performance of their function of investigating crime (i.e. this was a 'novel' duty (not a 'positive direct act' duty) that was considered under *Caparo* principles and found to fail on the third limb);

8 To determine whether any particular case is one of an act or an omission the focus should be on how the claimant forms his/her complaint and with recourse to one's common sense;

9 Appellate Courts will rarely disturb a trial judge's finding on breach of duty as he/she was in the best position to hear and evaluate the evidence.

By Katie Ayres

Investigate and Protect: the Police's Positive Duties Under the ECHR and the Supreme Court decision in *DSD*

Despite a delay of nearly a year between hearing and decision, the Supreme Court decision in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 fulfilled the expectations of most practitioners of producing little by way of change in the scope of the police's implied duties to investigate allegations of serious crime and to protect citizens from recidivist offenders. Although some of the press coverage proceeded on the basis that the decision breaks new ground, in fact it does little more than confirm the existence of the implied duties, on the basis of which practitioners had been litigating claims against the police for a decade or more.

The crimes of the 'black cab rapist' John Worboys have given rise to more than their fair share of legal controversy. In the weeks prior to the Supreme Court's decision, a media storm was caused by the decision of the Parole Board that Worboys should be released on licence and the subsequent attempts of victims to seek judicial review of the decision.

The Supreme Court decision itself arose from claims against the Commissioner brought by victims of Worboys, complaining of a breach of their rights under Art 3 of the European Convention on Human Rights. On its face, Art 3 imposes a purely negative prohibition on states: "no one shall be subjected to torture or to inhuman or degrading treatment". However, as with other provisions of the Convention, the Strasbourg court has adopted a highly purposive interpretation of that provision, holding that it would be hollow unless states were impliedly subject to positive duties to take action to investigate and punish conduct contravening the article (first recognised in *Assenov v Bulgaria* (1999) 28 EHRR 653), and to protect individuals at risk of such acts (a duty formulated in *Osman v UK* (2000) 29 EHRR 24). It was the scope of those obligations which was examined at each level of the court system in *DSD*.

The two claimants, DSD and NBV, who were attacked by Worboys in 2003 and 2007 respectively, brought claims alleging breaches of the positive obligations on the part of the police. In a highly detailed judgment at first instance, Green J [2014] EWHC 436 (QB) found extensive breaches of the investigative duty. The breaches found were of both a systemic and operational nature, concerning both institutional and individual failings. He rejected numerous submissions advanced on behalf of the Commissioner seeking to deny or to qualify the existence of the duties. The Court of Appeal [2015] EWCA Civ 646, [2016] QB 161 dismissed the Commissioner's appeal.

In the Supreme Court, the arguments advanced on behalf of the police and the Secretary of State, who intervened along with a number of rights organisations, were rather more restricted than those canvassed in the courts below. Lord Kerr summarised them in para 6 of his judgment. It was suggested that it was a duty owed to the public rather than individual victims, that it applied only to systemic failings, that it only applied when state authorities were complicit in the breach, and that other remedies and the common law restrictions on claims should militate against the existence of the duty.

By a majority of four to one, the Supreme Court rejected all the arguments advanced on behalf of the Commissioner. Lord Kerr embarked on a comprehensive review of the case law on the advent and rationalisation

of the positive duty to investigate: paras 16-43. He drew attention to many statements, originating from at least the decision in *MC v Bulgaria* (2005) 40 EHRR 20, to the effect that the duty applied to operational as well as systemic failings and that, even if first recognised in cases where the state was complicit, it was now being regularly applied to cases where private individuals were guilty of the conduct infringing Art 3. He was satisfied that the case law established a "clear and consistent line of authority": paras 44-51. It was clearly applicable to both systemic and operational failings: paras 54-58. It did not require state complicity: paras 59-62. It was not relevant that the victims had already received compensation from Worboys and the CICA, or that the common law had declined to impose a duty of care in relation to investigations: paras 63-65 and 66-72 respectively. There was no warrant for awaiting an express statement from Strasbourg that the duty applied to circumstances such as Worboys' crimes, in view of the fact that it was the duty of the court to apply the Convention case law where it was "clear and constant": paras 73-79.

Lord Neuberger delivered a judgment concurring in Lord Kerr's view that the duty applied to operational as well as systemic failures: paras 81-99. Lady Hale agreed with both her colleagues. Lord Mance agreed with them, while being critical at para 142 of the Strasbourg court's approach which:

.... starts from a solidly rationalised principle, but then extends it to situations to which the rationale does not apply, without overt recognition of the extension, without formulating any fresh rationale and relying on supposed authority which does not actually support the extension.

Despite that criticism, he said that the "clear terms in which the conclusion has now so often been expressed" could not be ignored: para 150.

Lord Hughes was the sole dissenting voice, and then only in relation to whether the duty applied to operational failures. Clearly concerned about the implications of holding that the duty applied so widely, he adopted a somewhat tortuous interpretation of *MC v Bulgaria* and the subsequent case law. He concluded that there was a "marked and vital distinction, even if it is sometimes of degree, between structural failure to outlaw the behaviour and operational failings in the investigation of particular reports": para 140. However, since Green J had found systemic as well as operational failures, he agreed that the appeal fell to be dismissed.

Even if the outcome of the appeal is perhaps not surprising to anyone that has read the Strasbourg case law, nevertheless the implications of the definitive recognition of the investigative duty are concerning for police forces. Another way in which the Strasbourg court has expanded the reach of the Convention is by way of increasing the conduct which might fall within the ambit of Art 3. Besides rape (*MC v Bulgaria*), it now encompasses violence on racial (*Milanovic v Serbia* (2014) 58 EHRR 33) or religious (*Gldani Congregation v Georgia* (2008) 46 EHRR 30) grounds, as well as domestic assaults (*Eremia v Moldova* (2014) 58 EHRR 2). Possibly the most useful summary is found in *BV v Croatia* (application 38435/13) [2015] unreported, December 15th, in which a number of cases falling on one side of the line or the other are summarised: paras 152-154. Lord Hughes' suggestion in *DSD* para 128 that actual bodily harm may suffice without more would not seem correct; there is no case in which relatively modest injury has sufficed for a breach of Art 3 without there being at least a particular vulnerability on the part of the victim (see *Smirnova v Ukraine* [2016] unreported, October 13th, para 71, a case of harassment of a single, elderly woman by a group of young men). Besides Art 3, however, the investigative duty has been found applicable to cases falling within Arts 4, 5 and 8. It is hard to have confidence in Lord Kerr's glib assertion in *DSD* para 53 that it is not a serious possibility that "every complaint or burglary, care theft or fraud" might not potentially fall within the scope of the Convention. If the investigative duty applies to Art 8, why would it not apply to Art 1 of the First Protocol which protects property rights?

The crumb of comfort for those representing the police in the Supreme Court's decision in *DSD* is the repeated assertions by the court that the failings by the police will need to be substantial in order for liability to exist. Lord Kerr stated that the failings had to be "conspicuous and substantial" and "really serious" (para 53), "egregious" (para 71), "obvious and significant" (para 72) and that "a painstaking, minute examination of decisions taken" was not called for (para 71). Lord Neuberger, citing some useful examples in the case law, emphasised the need for "'serious' defects" (para 98) and Lord Mance also underlined this aspect of the Strasbourg jurisprudence (para 151(ii)). Lord Hughes, by contrast, pointed out inconsistencies in the approach of the Strasbourg court to the question of whether the failings were sufficiently serious (para 126) as part of his complaint that the applicability of the duty to operational failings had never been adequately articulated.

Some issues remain for clarification. Two in particular will be considered here. First, is there any difference between the standards applicable to the investigation of crime in which state agents were implicated and those committed by private individuals? Lord Mance was the only member of the court to touch upon this (para 151 (i)); he thought that a distinction was to be drawn. Laws LJ in the Court of Appeal had reached the same conclusion (para 45):

There is perhaps a sliding scale: from deliberate torture by State officials to the consequences of negligence by non-State agents. The energy required of the State to combat or redress these ills is no doubt variable, but the same protective principle is always at the root of it. The margin of appreciation enjoyed by the State as to the means of compliance with Article 3 widens at the bottom of the scale but narrows at the top. ....

The second point relates to the circumstances in which a failure to investigate a crime committed against victim A could amount to a breach of the rights of victim B in a later offence. In the Court of Appeal, Laws LJ stated that "the serial nature of Worboys' crime is I think important" (para 80). Lord Hughes pointed out (para 138) that "a crime of violence committed by A against B will only occasionally carry a risk of repetition, whether against B or against others". Plainly, it is not necessary for there to be a real and immediate threat to B specifically before B can complain of a breach of the investigative duty: see Lord Mance (para 151(iv)). However, in the absence of a pattern of offending which ought to have been identified by police, it seems unlikely that subsequent victims will be able to assert reliance on failings in relation to previous investigations.

By Paul Stagg

Avoiding Article 3 claims in future

The case of Worboys was very unusual. It concerned a large series of attacks on strangers over several years by a single individual and once he was finally caught, questions naturally arose as to why Worboys had evaded capture for so long prior to his arrest. The Metropolitan Police commissioned a report from its Critical Incident Advisory Team who went through the evidence of each encounter or potential encounter with Worboys and produced a 62-page report in which they identified weaknesses in the investigation in 4 substantial areas; training, adherence to guidance and procedure, treatment of victims and recording of evidence. The report laid out chapter and verse in relation to each failing. The report was included amongst documents sent to the IPCC when the Claimants complained about the police's investigation, and to the Claimant's lawyers when they intimated that claims might be made. It provided a perfect template for the bringing of a claim under Article 3. Its contents formed the basis of the claim and they also formed the mainstay of the judgment at first instance which was upheld on appeal and again by the Supreme Court.

Those conditions will seldom arise in any future case.

So what can be done in future by emanations of the State – including police forces, Social Services departments and the like – to avoid a successful Article 3 claim? It is important to remember that the claim succeeded largely because the Court found that there was a widespread and persistent failure by the police to follow their own policies and procedures. All good organisations already take steps to ensure that their staff work in the way that their policies require them to. The problem here was a lack of training to keep the officers up to date with the detail of what should be done, and a lack of adequate supervision of what was an enormous and complicated enquiry. The way to avoid a successful Article 3 claim is to ensure that policies are in place to deal with the way the organisation is supposed to work, and that the staff on the ground are (i) aware of what those policies say and (ii) are chased up by supervisors to ensure that they carry out the necessary work.

By Geoffrey Weddell