Mitchell v Glasgow City Council
[2009] UKHL 11, [2009] 1 AC 874, [2009] 2 WLR 481, [2009] 3 All ER 205 HL

Summary

James Mitchell, 72, was attacked in July 2001 with an iron bar by his neighbour, James Drummond. Mitchell died of his injuries, and Drummond was convicted of manslaughter. Drummond and Mitchell both lived in council housing provided by the defendant local authority, and had been neighbours since the 1980s. Drummond was the classic 'neighbour from hell'. In 1994, he was playing loud music in his house, and Mitchell complained. Drummond retaliated by threatening to kill Mitchell (for which he was arrested by the police) and repeated his threats at least once a month after that. In 1995, the defendants threatened Drummond that if he continued to act in this way, they would repossess his house, and in January 2001, they finally issued a notice of proceedings for recovery of possession of his house. However, the notice was not followed up, and was allowed to lapse. At the same time, Drummond continued to threaten Mitchell and one incident of his threatening Mitchell was videotaped by Mitchell, and the video was handed over to the defendants. The defendants summoned Drummond for a meeting on July 31 2001 to discuss the video, and the possibility of their issuing a fresh notice of proceedings. The defendants did not inform Mitchell that they were having this meeting with Drummond. Drummond lost his temper during the meeting, and after he left the meeting, he attacked Mitchell with the iron bar.

Mitchell's family sued the defendants in negligence and under the Human Rights Act 1998. The claim in negligence was dismissed on the basis that the defendants had not owed Mitchell a duty of care, either to warn him that they were meeting with Drummond to discuss Mitchell's video of Drummond threatening him and the possibility of Drummond being evicted, or to warn him that Drummond became abusive during the meeting and that Mitchell might be in danger of being attacked by him:

(i) Lord Hope held (at [27]-[28]) that it would not be 'fair, just and reasonable' to find that the defendants had owed Mitchell a duty of care to warn him in this case: making such a finding might discourage landlords from taking any steps to stop their tenants harassing their neighbours, for fear that taking such steps might provoke an attack on the neighbours and result in their being sued for failing to do enough to warn the neighbours of the risk that they might be attacked. Lord Hope went on to remark (at [29]) that 'as a general rule...a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.'

(ii) Lord Scott held that there was not enough of a 'causative link' between what had happened at the meeting with Drummond and Drummond's subsequent attack on Mitchell to cast onto the local authority a duty to warn Mitchell that he might be in danger. He referred to a 1957 South African case, *Silva Fishing Corporation (Pty) Ltd* v *Mazewa*, where a company that hired out a fishing boat was held to be under a duty of care to go to the assistance of the people in the boat when the boat's engine failed (through no fault of the company, or defect in the boat). Lord Scott held that Mitchell's case was very different.

(iii) Lord Rodger held (at [57]) that a useful starting point in inquiring whether a duty of care was owed in this sort of case was to ask whether what the defendant had done to provide an opportunity for a third party to injure the claimant was wrongful. In this case, it had not been: the defendant had acted perfectly legitimately in attempting to stop Drummond acting in such an anti-social manner. Moreover (at [63]), as Parliament had not sought to impose a duty on local authorities to warn those who might be affected by their exercising their statutory powers to evict disruptive tenants, it was not for the courts to impose such a duty of care on local authorities like the defendants.

(iv) Baroness Hale agreed with Lord Hope that it would be undesirable to find that a duty of care was owed in this case as doing so might result in local authorities like the defendants being 'deterred from the responsible use of their powers by the threat of liability for the harm caused by the criminal acts of those anti-social tenants' (at [77]).

(v) Lord Brown identified a number of different situations in which A might owe B a duty of care to stop C harming B (that A was under a general obligation to supervise C, that A had specifically created a danger that C might harm B, that A had assumed a responsibility to protect B from being harmed by C) but held (at [82]) that none of these situations applied here. In particular, 'by threatening a disruptive tenant with eviction a landlord cannot be sensibly be said to be creating the risk of personal violence towards others...'.

The claim under the Human Rights Act 1998 was dismissed on the basis that as the defendants had not been aware there was a clear and immediate threat to Mitchell's life in the aftermath of their meeting with Drummond, they had not violated Mitchell's right to life under Art 2 of the European Convention on Human Rights by failing to take any steps to protect him from being harmed by Drummond in the aftermath of the meeting.

Comments

The result may have been right, but the judgments cast a big question mark over the existence of what we have called the 'creation of danger principle' – that is, the idea that if A has done something to put B in danger of suffering some kind of physical harm, then A will owe B a duty to take reasonable steps to protect B from that danger. At first sight, all of the Law Lords seemed to acknowledge that in such a situation, there might be grounds for finding that A owed B a duty of care. But they went on to say that: either (1) *Mitchell* was not such a case – that is, the 'creation of danger principle' did not apply here; or (2) *Mitchell* was a case where the 'creation of danger principle' applied, but for policy reasons, it was undesirable to give full effect to that principle in this context.

Lords Scott, Rodger and Brown seemed to take view (1). But it is hard to see why. Lord Scott simply asserted that the *Silva* case – which does seem to give effect to the 'creation of danger' principle – did not apply in *Mitchell*'s case without explaining properly why this was. He said, at [44]:

> The company plainly did not regard themselves as having assumed responsibility for taking steps to rescue the crew from the danger they were in as a result of a breakdown of the boat's engine, but Schreiner JA treated them as having assumed that responsibility. He did so because the boat was the company's boat, supplied for use by the crew members for the purposes of the joint enterprise, and the boat was essential to that joint

> enterprise. There seems to me no equivalent in the present case to those features. The Council's comparable obligation to Mr Mitchell was to act as a responsible landlord and to take steps to terminate Mr Drummond's tenancy in order to remove him from the locality where he was causing such trouble. That obligation cannot, in my opinion, suffice to justify treating the Council as having assumed responsibility for Mr Mitchell's safety.

In the first half of this paragraph, Lord Scott makes it clear that the existence of a duty of care in this sort of context does *not* depend on what responsibilities you have 'assumed' to the claimant. If you create a danger, then you have a duty to do something about it. (Saying that in such a case you are held to have assumed a responsibility to do something about the danger is mere verbiage; it is amazing that in the 21st century judges are still prepared to indulge such fictions.) But then in the second half of this paragraph, he seems to make the existence of a duty of care on the part of the council to Mitchell in this case dependent on what responsibilities it assumed to Mitchell.

Lord Brown simply asserted at [82] that, 'by threatening a disruptive tenant with eviction a landlord cannot be sensibly be said to be creating the risk of personal violence towards others'. But why not? Why can't we say this?

Lord Rodger seemed to take the view that the 'creation of danger principle' classically only applies in cases where a defendant has *wrongfully* put a claimant in danger of suffering some kind of harm – without seeming to recognise that such a limit makes the 'creation of danger principle' almost wholly redundant. Take the example he gives at [57]: 'If I negligently collide with a cyclist who is knocked unconscious, I must surely take reasonable care to move her from the path of oncoming vehicles.' But if I do not move her from the path of oncoming vehicles, and she is run over by a car and suffers brain damage from being run over, she will not need to rely on the 'creation of danger principle' to sue me for damages for her brain injuries. She can simply rely on my initial act of negligence as a basis for suing me for such damages. She can say – 'Nick McBride owed me a duty of care not collide with me, he breached that duty, and that breach resulted (when I was subsequently hit by an oncoming vehicle) in my suffering brain damage, and that brain damage was a non-remote consequence of Nick McBride's initial act of negligence in colliding with me.' It is only in the case where I *innocently* collide with a cyclist that the creation of danger principle comes into its own – in such a case, if I fail to move her and she is subsequently run over and suffers brain damage, the *only* way she can get up a claim for damages against me for the injuries to her brain is to argue that, having knocked her down, I owed her a duty to take reasonable steps to save her from being run over by oncoming traffic.

Lord Hope and Baroness Hale seemed to take view (2) – that the fact that the council had helped to set off the chain of events that resulted in Mitchell being attacked might, in principle, have meant that it owed Mitchell a duty to take reasonable steps to save him from being attacked; but policy reasons meant that such a duty should not be recognised in this kind of case. But even Lord Hope cast some doubt on the 'creation of danger principle' when he said (at [29]) that 'as a general rule...a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.' But why should you not have such a duty, even in the absence of such an assumption of responsibility, in the case where you created the danger that a claimant will be injured by the criminal act of a third party? Perhaps

Lord Hope would say that there may be a duty, and that is an exception to his 'general rule'. But the danger created by Lord Hope's *dictum* is that future courts will not recognise any exceptions to his 'general rule' and refuse to find a duty of care in cases where the 'creation of danger principle' might suggest that such a duty exists.

Let us now step back, and ask and answer properly the fundamental questions that lie at the heart of the *Mitchell* case:

(1) Should the courts recognise the existence of what we call the 'creation of danger principle'?

(2) If so, should the courts place any limits on the operation of that principle? – In particular:

(2A) Should the courts only give effect to the principle where a danger has been *wrongfully* created?

(2B) Should the courts refuse to give effect to the principle where A creates a danger that C will be wrongfully and wilfully injured by B, an adult of normal mental capacity?

(2C) Should the courts refuse to give effect to the principle where it would be contrary to public policy to do so?

(3) If the answer to (1) is yes, then how in practice should the principle operate? In particular,

(3A) When should a defendant be held to have 'created' a danger, as opposed to doing something that has merely provided an occasion for a danger to arise?

(3B) In cases where a defendant has created a danger that someone else will be injured, will the defendant only incur a duty to do something about the danger if he *knows* that he has put someone else in danger of being injured, or is it enough that he *ought to have known* that he has put someone else in danger of being injured?

(3C) In cases where a defendant has a duty to do something about a danger that he has created, *how much* is he required to do to eliminate or alleviate that danger?

I think the answer to (1) is 'yes'. I think, in principle and other things being equal, if I have put A in danger of being harmed, the law should not allow me to walk away and treat A's fate as a matter of indifference to me.

I think the answer to (2A) is 'no'. If I innocently collide with a cyclist, and she falls unconscious to the ground, I don't think the law should allow me to proceed on my way and not do anything to help her avoid being run over by innocent cyclists.

I am not sure what the answer is to (2B). On the one hand, whether B acted badly or not in injuring C is a matter of supreme indifference to C, so far as her relationship with A is concerned. What counts – so far as A's relationship with C is concerned – is that she has been injured (never mind how), A played some part in putting her in danger of being injured, and A then failed to do anything to help alleviate or eliminate that danger. On the other hand, if A is held to have owed a duty of care to C in this situation, then B may be able to bring a claim in contribution against A and thereby avoid being held fully liable for the injuries that he has wrongfully and wilfully inflicted on C. And that may be unjust. It could be argued that B, as the person principally responsible for C's injuries, should be principally responsible for compensating C for those injuries.

There are those who argue that public policy should never be taken into account in determining the outcome of tort cases. I am not one of those, and think the answer to (2C) is 'yes'.

The answer to (3A) is difficult. If A's mother knows that A is drunk and is proposing to go out driving, I don't think it could be argued that A's mother owes those who foreseeably might be injured by A's drunken driving a duty to take reasonable steps to stop A driving on the basis that, by giving birth to A, she has 'created a danger' that A will now run someone down in his drunken state. There clearly is a distinction between 'creating a danger' and providing an occasion for a danger to arise. The difficult issue is where you draw the line.

If I leave a loaded gun in a drawer, and then – to my knowledge – a child gets hold of it, have I created a danger that the child will injure himself or another, with the result that I owe the child and anyone who might be foreseeably injured by the gun going off a duty to intervene and take the gun off the child? I think the answer is 'yes'.

But what if an adult gets hold of the gun and – to my knowledge – is planning to shoot C with it? Have I created a danger in this situation, with the result that I owe C a duty to warn her that she is in danger, or to call the police and get them to protect C? Those who would argue 'no' might borrow a distinction from the law on occupiers' liability (on whether the state of some premises is dangerous) and say that in the case where a child gets hold of my gun, I have created a danger because the gun, in the child's hands, is dangerous of and in itself, and because I was the one who loaded the gun, that danger is down to me. In contrast, in the case where an adult has got hold of my gun, the gun is not dangerous of an in itself – it is what the adult is proposing to do with the gun that is creating the danger, not my act of loading the gun. As such, I have not created a danger in the case where an adult has got hold of my gun and is proposing to shoot C with it. Those who would argue that I *have* created a danger in the case where an adult has got hold of my gun would say that the 'no' camp's way of distinguishing between the adult case and the child case amounts to a distinction without a difference. I, having loaded the gun that is about to be used to shoot C, should not be allowed by the law to regard C's fate as a matter of indifference to me.

If the 'no' camp is right, then that might provide a basis for arguing – instead of asserting, as some Law Lords in *Mitchell* seemed content to do – that the 'creation of danger principle' did not apply in *Mitchell*. The idea is that the council's meeting with Drummond did not create a danger that Mitchell would be attacked. Drummond created the danger by choosing to react to the news that Mitchell had videoed him in the way he did.

As for questions (3B), and (3C), I think the answer to (3B) is that a defendant should be held to owe a duty in a case where he *knows or ought to know* that his actions have put another in danger of being injured. Any more restrictive formulation seems to give an unjustifiable advantage to the unthinking or obtuse. I think the answer to (3C) is that – it depends, on a lot of things. Not least, A's degree of fault for putting B in danger. The more at fault A was, the more A needs to do to save B from being harmed. But if A innocently put B in danger of being harmed, A will only have to take minimal steps to save B from being harmed.

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