D v Commissioner of Police of the Metropolis
V v Commissioner of Police of the Metropolis
[2018] UKSC 11

Summary

The claimants in this case were raped by John Worboys. Worboys was the notorious 'black cab rapist' who raped or sexually assaulted over a hundred women whom he had picked up in his taxi. (Worboys was, in fact, only convicted of one rape and five sexual assaults – a fact that may have played a part in the Parole Board's recent recommendation that Worboys should be released from custody after spending 10 years in prison. That recommendation was the subject of a successful judicial review, and the head of Parole Board felt compelled to resign as a result of the courts' instructing the Parole Board to reconsider Worboys' case.) D was one of Worboys' earliest victims – she was raped by him in 2003. V was one of Worboys' last victims – she was raped by him in July 2007, and Worboys was finally arrested by the police in February 2008. Both D and V claimed that the police had failed adequately to investigate their complaints that they had been raped by a black cab taxi driver, and that their rights under Article 3 of the European Convention on Human Rights (ECHR) ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment') had therefore been violated. Their claims were successful both at first instance (where they were awarded compensation for the police's failures to investigate their complaints properly) and in the Court of Appeal.

The police appealed to the UK Supreme Court, and their appeal was unanimously dismissed. The leading judgment was given by Lord Kerr, with whom Lady Hale and Lord Neuberger (at [100]) agreed. Lord Neuberger gave a separate judgment which he said amounted to 'little more than a summary of those [reasons] given by Lord Kerr' (ibid), and with which Lady Hale and Lord Kerr (at [80]) agreed. Lords Hughes and Mance gave separate judgments, with Lord Hughes differing sharply from Lord Kerr on the issue of when the police would be held to have violated C's rights under Article 3 by virtue of failing to investigate properly C's claims that they had been the subject of serious and unlawful violence at another's hands. Counsel for the police had tried to argue that a failure properly to investigate C's claims would only violate C's rights under Article 3 if: (i) C claimed to have been the subject of unlawful violence by the *state*, or someone working for the state; and (ii) the police's failure to investigate C's claims properly was due to a *structural* failure in the way the police dealt with criminal complaints, and not just due to an operational failure in the way the police investigated a particular criminal complaint. It was further argued that were the law to go further than (i) and (ii), it would violate those 'public policy' concerns that underlie the common law's general refusal to find that the police owe actual or potential victims of crime a duty of care.

Lord Kerr rejected all these points. On point (i), he ruled that 'the state is obliged under article 3 to conduct an effective investigation into crimes which involve serious violence to persons, whether that has been carried out by state agents or individual criminals' (at [48]; see also [62]). On point (ii), he rejected the idea that there had to be 'some form of structural deficiency before egregious errors in the investigation of...offences...can amount to a breach of article 3' (at [30]). However, Lord Kerr held that 'simple errors or isolated omissions will not give rise to a violation of article 3' (at [29]) – it would have to be shown that 'errors in investigation, to give rise to a breach of article 3, must be egregious and significant' (at [29]) or 'conspicuous and substantial' (at [53]) or 'obvious and significant' (at

[72]). On the argument that the public policy concerns that underlie the position at common law on when the police will owe victims of crime a duty of care should also influence the courts' interpretation as to when the police will come under an investigative duty by virtue of Article 3, Lord Kerr did not think that his reading of Article 3 violated any of those concerns of public policy (at [71]). Lord Neuberger observed that 'Just as the majority of this court accepted in *Michael*'s case...that the domestic tortious test for liability should not be widened to achieve consistency with the human rights test, so should the human rights test for liability not be narrowed to achieve consistency with the domestic, tortious test' (at [97]) and thought that it was 'entirely defensible [to think]...that the imposition of [an investigative] duty, provided that it is realistically interpreted and applied, would serve to enhance the effectiveness of police operations' (ibid).

Lord Hughes agreed (at [107]) that Article 3 imposed positive obligations on the state to protect people from inhuman or degrading treatment by non-state actors, but argued that – subject to one exception – that positive obligation simply required 'that the state have a legal framework for the prohibition of conduct passing the article 3 threshold, and thus afford the protection of its legal system against such behaviour' (at [110]). The one exception that goes 'beyond the requirement for structures and systems to render serious violence unlawful' is that the state can come under a duty under Article 3 'to prevent serious violence from occurring to an individual when the threat of it is sufficiently specific' (at [113]). This exception, Lord Hughes conceded, has been 'further extended beyond prevention of anticipated violent crime to a duty to investigate reported past violence' (at [114]), but Lord Hughes thought that this positive obligation simply required the state to have 'a proper structure of legal and policing provision designed to punish [violence] when it occurs and has administered that structure in good faith and with proper regard for the gravity of the behaviour under consideration' (at [127]). He thought that such a limited obligation respected the 'powerful, repeated and carefully considered' (at [132]) reasons that underlie the absence of 'a duty of care in tort owed by the police to individual citizens and sounding in damages in relation to the detection of crime and the enforcement of the law' (at [130]). These reasons demand that the courts not 'revisit...matters [relating to how the police have carried out their functions] step by step by way of litigation with a view to private compensation' – doing so would, Lord Hughes thought, 'inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental to, not a spur to, law enforcement' (at [132]). Having said all that, Lord Hughes was in favour of finding that the claimants' Article 3 rights had been violated here: 'What went wrong involved plain structural errors. The Metropolitan Police had a written policy for recognising and dealing with cases of drug induced rape but it was institutionally treated as mere form and there was no proper training in its application' (at [140]).

Lord Mance also thought that the outcome of the appeal in this case was 'not in doubt' (at [141]) while expressing some sympathy for Lord Hughes' interpretation of Article 3 (at [142]) and dissatisfaction for the way the European Court of Human Rights had started 'from a solidly rationalised principle' (here, that the state's observing its obligations under Article 3 require that it properly investigate and deal with allegations that it has itself subjected people to inhuman or degrading treatment) 'but then extends it to situations to which the rationale does not apply' (here, cases where the state has failed properly to investigate and deal with allegations that a third party has subjected the claimant to inhuman or degrading treatment) and it has done so without having 'really focused at any stage on the implications for policing of the general duty which it has suggested', such as 'the risks of defensive policing and of police priorities being affected by the perceived risk of being sued' that 'have been discussed domestically in a number of common law cases' (all quotes from [142]). While the 'foundations or rationale [of the European Court of Human Rights'

decisions in this area] may be shaky', Lord Mance found himself unable 'to ignore the clear terms in which the conclusion has now so often been expressed, to the effect that the state's positive investigative obligation can arise even where the relevant offence is not arguably attributable to any state agent' (at [150]).

Comments

(1) *Background and significance*. The government *really* did not want to lose this one. In order to make it easy for the UKSC to find in its favour, the government assured the UKSC 'that, whatever the outcome of this appeal, [the police] will not seek to recoup any of the compensation and consequential costs' that had already been paid to D and V (at [4]). It was also 'strongly argued, particularly on behalf of the Secretary of State, that the question whether a liability such as that contended for by [D and V] arises was one on which the ECtHR should be invited to pronounce' (at [73]) – thus postponing the dread moment when this case was finally lost. Why was the outcome of this case so important to the government? It is not far-fetched to suggest that the reason lies in what we are discovering about the general uselessness of the police in investigating recent complaints of rape not just in London, but also in Rochdale, Rotherham, Telford, Newcastle, Oxford, Peterborough, Bristol, Aylesbury, Derby, and goodness knows what other areas of the country. The police in the UK have an absolutely horrific recent record when it comes to investigating claims of rape, and the compensation bill arising out claims basing themselves on the UKSC's decision in *D* could easily run into millions of pounds. (D was awarded £22,500 in damages, while V was awarded £19,000 in damages.) The bill will get even larger if anyone picks up on Lord Mance's observation (at [141]) that an investigative duty under Article 3 cannot and should not 'be confined to the victim of the offence in question. Part of its purpose must be not only to punish, but also to deter and to prevent the occurrence of further such offences, and if a third person suffers foreseeably as a result of a failure to investigate, that third person appears to me, potentially at least, to be a victim.' Only a limitation defence can save the government from a tidal wave of claims being made against police forces up and down the country as a result of the decision in *D* – and it is doubtful whether such a defence could be made out as the one year period for bringing a claim under the Human Rights Act 1998 under s 7(5)(a) can be displaced in favour of 'such longer period as the court...considers equitable having regard to all the circumstances' under s 7(5)(b).

(2) *The treatment of Michael*. This website continues its *Michael*-watch, for signs of backsliding on the parts of the courts from the position taken in *Michael* v *Chief Constable of South Wales Police* [2015] AC 1732 as to when a public body will be held liable in negligence for a failure to act. (See also the notes on *CN* v *Poole BC* [2017] EWCA Civ 2185 and *Robinson* v *Chief Constable of West Yorkshire* [2018] UKSC 4 on this website.) The backsliding is particularly pronounced in this case, and perhaps predictably so. Lord Kerr (and by extension Lady Hale) is defiantly uncomprehending of the majority judgment in *Michael* (from which he, of course, dissented), referring at one point in his decision in *D* to 'the policy reasons which [underlie] the...exemption of police from liability at common law' (at [69]). For the umpteenth time, there is no exemption – there is simply a refusal to make the police liable in circumstances where an equivalently situated private person would not be held liable. Lord Hughes' and Lord Mance's equivalent inability to come to terms with the new dispensation represented by *Michael* was already evident from their judgments in *Robinson*, and is reconfirmed here. And Lord Neuberger – as genial as ever – goes along with everyone else. It is almost as if the Supreme Court Justices (SCJs) who were most likely to go

along with the sort of policy-centric approach to the liability of the police favoured by Lord Kerr and Lady Hale in the *Michael* case were handpicked to decide this case. The result is a regrettable nadir for the UK Supreme Court in terms of the rigour and respectability of its reasoning.

(3) *The common law vs human rights law*. This nadir is all the more regrettable because it prevented the SCJs in this case properly coming to grips with the issue discussed in McBride, '*Michael* and the future of tort law' (2016) 32 PN 14, at 25-30, which is – how can the common law and the law on human rights justifiably come to different conclusions as to when (say) the police will owe you some kind of duty to protect you from becoming a victim of violent crime, and if you are a victim of violent crime, some kind of duty to investigate your case properly? Lords Kerr and Hughes seemed to agree that the common law and the law on human rights should not come to different conclusions in these sorts of areas – they just disagreed on how they should come together. Lord Hughes wants to make the law on human rights a bit more like the common law. Lord Kerr wants to make the common law more like the law on human rights, but is currently prevented from doing so by the decision in *Michael*. However, he is adamant that the law on human rights is not going to be watered down or weakened just because the common law has (in his eyes) taken a wrong turn on the issue of when the police will be held to owe some kind of duty to an actual or prospective victim of violent crime.

Had Lord Kerr read the above article, he would have seen that there was a way to reach the conclusions that he wanted to reach in *D*, without perpetuating any divide between the common law and the law on human rights on what positive duties the police owe potential or actual victims of crime. What he could have said was this: '*Michael* recognises that no one has a right that state institutions be competent in performing their functions. I dissented at the time *Michael* was decided because I failed to recognise that that was the issue that was at stake in *Michael*, having been misled by earlier cases and academic writing into thinking that the issue in *Michael* was whether there was a policy reason *not* to hold the police liable for carelessly failing to save someone from harm. Having realised my mistake, I acknowledge that *Michael* came to the right conclusion. A government body that incompetently fails to save a claimant from harm does not violate that claimant's rights. However, while we have no right that our government be competent, we do have a right that our government not treat us as though we are worth nothing. The ECHR is based on this simple proposition, and all of its provisions should be read in light of this. If the police do not raise a finger to save a claimant from being raped when they know full well she is in danger of being raped, they violate her rights under Article 3 of the ECHR because they have treated that claimant as though she is worth nothing. And if the police are told that a claimant has been raped, and they do not raise a finger to investigate her case, or they investigate her case without any semblance of taking her case seriously, then they violate her rights under Article 3 of the ECHR because they have treated that claimant as though she is worth nothing. In finding that a claimant may be able to make a claim under Article 3 of the ECHR when the police have acted egregiously either in failing to save her from being raped, or in failing properly to investigate her claims that she has been raped, we do not create any divide between the common law on what positive duties the police owe potential or actual victims of crime, and the position taken by the ECHR on what positive duties are owed to potential or actual victims of crime. In the above cases, while the claimant will be able to claim that her Article 3 rights have been violated, she will also be able to claim that she is the victim of a tort. The tort is not negligence because, as I have already said, I now recognise, as *Michael* does, that there is no duty on a government body to take care to protect its subjects from harm. The tort is misfeasance in public office – a tort that is committed whenever a public official chooses to

sleep on the job, knowing that those whom he is charged to protect will suffer harm as a result of his neglect.'

Such a ruling would have restored harmony between the common law and the law on human rights, and would have also reflected the facts on the ground. For what the police were guilty of in *D* and *V* – and in the towns and cities listed in point (1), above – was not just negligence. It is much worse than that: it is misfeasance in public office. A renewed attention to this tort, rather than the much abused tort of negligence, might provide the key to freeing the common law from the libel that human rights are better protected under the ECHR than under the common law.

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