CN v Poole Borough Council
[2017] EWCA Civ 2185

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

Summary

CN* v *Poole Borough Council

This case arose out of the hellish experience a family – a mother (N) and two children (CN and GN) was put through after they were housed on a housing estate by the defendant council in May 2006. CN suffered from severe physical and learning difficulties, and as a result the N family was made a target for harassment by another family on the estate; harassment which eventually resulted in CN attempting to commit suicide. The council and the police responded ineffectively to protect the N family from this harassment, and the family were only rehoused in alternative accommodation in December 2011. Proceedings were subsequently issued against the defendant council.

A claim in negligence against the council in its capacity as the housing authority – on the basis that the council had owed the N family a duty of care to rehouse them when it became aware of the treatment they were being subjected to – was struck out as inconsistent with the Court of Appeal's decision in *X* v *Hounslow LBC* [2009] EWCA Civ 286. No attempt was made to appeal against that decision, but instead a claim in negligence was made against the council on the basis that when it became aware of the cruel treatment that N's two children, CN and GN, were being subjected to, the council owed those children a duty of care to protect them from that treatment by taking them into care. This claim was initially struck out on the basis that the UKSC's decision in *Michael* v *Chief Constable of South Wales Police* [2015] AC 1732 meant that no such duty of care could have been owed by the defendant council to CN and GN, there being no special circumstances or relationship between the council and the children to give rise to such a duty of care. On appeal, Slade J reinstated the children's claims, relying on the Court of Appeal's decision in *D* v *East Berkshire Community NHS Trust* [2004] QB 558, which held that the social services would owe a child who they knew or ought to know is at risk of being abused a duty of care in handling the child's case.

The defendant council appealed to the Court of Appeal, and the Court of Appeal held, with Irwin LJ giving the principal judgment, that the children's claims must be struck out as inconsistent with the UKSC's decision in *Michael*, and that *D* v *East Berkshire* must be held to have been overruled and 'should no longer be followed' (at [101]). King and Davis LJJ agreed with Irwin LJ's judgment. Davis LJ observed that the duty of care that it was being argued that the defendant council owed CN and GN was not only inconsistent with *Michael*: accepting that the council owed CN and GN a duty of care in this case also required the court to accept that the council might have been duty-bound to take CN and GN away from their mother and into care in order to protect CN and GN from the abuse and harassment that they were subjected to on the housing estate. Davis LJ held that the council's separating CN and GN from their mother 'would not simply have been utterly heartless: it seems to me that such a step would have been utterly wrong' and an attempt to launch care proceedings 'in order to overcome...the problems caused by the neighbours on the estate would be, I would have thought, tantamount to an abuse of court' (at [118]). King LJ endorsed Davis LJ's comments

(at [113]) and Irwin LJ also observed that it was ‘a rather startling proposition’ to assert that CN and GN ‘should have been removed from their mother’s care’ (at [41]).

Robinson* v *Chief Constable of West Yorkshire

Mrs Robinson was a pedestrian who was caught up, and injured, in a melee that resulted from five police officers trying to arrest a drug dealer (Ashley Williams) as he came out of a betting shop. Mrs Robinson sued the police in negligence for compensation for her injuries, claiming that the police had owed her a duty of care in arresting Williams, as it was foreseeable that she – as someone who had just walked past Williams as the police closed in – might be injured in the attempt to arrest him.

At first instance, it was held that while the police had been careless in the manner in which they attempted to arrest Williams, they could not be sued in negligence for such carelessness as they were ‘immune’ from owing anyone a duty of care while performing their function of arresting criminals. The Court of Appeal upheld the first instance judge’s finding on the duty of care issue, while reversing his finding that the police had been careless. The UKSC reversed both aspects of the Court of Appeal’s decision, holding that the police had owed Mrs Robinson a duty of care based on the fact that it was foreseeable that she might be injured when they arrested Williams, and that the first instance judge’s finding that the police had been careless in arresting Williams in the way they did should not have been disturbed.

Lord Reed gave the leading judgment, with which Lady Hale and Lord Hodge agreed. He began (at [21]) by condemning the idea that the so-called *Caparo* test should be used in *all* negligence cases to determine whether or not a duty of care was owed – which idea gave the impression that in *all* negligence cases, it could be argued that a duty of care was not owed because it would not be ‘fair, just and reasonable’ to recognise that such a duty of care was owed. If a line of authority had already established that a given set of facts would give rise to a duty of care it was ‘unnecessary and inappropriate to reconsider’ in every case where those facts were present ‘whether the existence of the duty is fair, just and reasonable’ because the decision to recognise that those facts gave rise to a duty of care was itself based on considerations of what is just and reasonable (at [26]). It is ‘only in a novel...case’ where the existing cases ‘do not provide an answer’ to the issue of whether a duty of care is owed that the court has to consider ‘what is “fair, just and reasonable”’ (at [27]) – and also the case where the UKSC is ‘invited to depart from an established line of authority’ (at [26]).

Given this, it was inappropriate for the first instance judge and the Court of Appeal to decline to find that the police had owed Mrs Robinson a duty of care on the basis of considerations of what is ‘fair, just and reasonable’. Instead, the case could be resolved by reference to the ‘established principles governing liability for personal injuries’ (at [29]) – in particular, the principle that the police, like everyone else, are subject to an ‘ordinary common law duty of care to avoid causing reasonably foreseeable injury to persons and reasonably foreseeable damage to property’ (at [48]). As the police here performed a positive act (attempting to arrest Williams) (at [73]) that foreseeably might result in Mrs Robinson being injured (at [74]), the police had owed Mrs Robinson a duty of care in arresting Williams.

Lords Mance and Hughes gave separate judgments, concurring in the result reached by Lord Reed, if not fully endorsing his reasoning. Lord Mance agreed with Lord Reed that invocation of the so-called *Caparo* test was inappropriate when the facts of a case fell into a well-established category of case where a duty of care would be owed (at [83]). He was more doubtful whether the authorities showed that it had already been established that a duty of care would be owed in Mrs Robinson’s case: he thought that they had left it ‘open to...[make]

a genuine policy choice whether or not to hold the police responsible on a generalised basis for direct physical intervention on the ground, causing an innocent passer-by physical injury, in the performance of their duties to investigate, prevent and arrest for suspected offending...' (at [95]). But he agreed that the law should choose in such cases to hold the police liable 'for positive negligent conduct which foreseeably and directly inflicts physical injury on the public' (at [97]).

Lord Hughes began his judgment by identifying 'The general question of importance in this appeal [as being] when the police do or do not owe a legal duty of care to individuals in the course of performing their public functions of investigating and preventing crime' (at [98]). Lord Hughes agreed with Lord Reed that 'it is neither necessary nor appropriate to treat *Caparo Industries* v *Dickman*...as requiring the application of its familiar three-stage examination afresh to every action brought. Where the law is clear that a particular relationship, or recurrent factual situation, gives rise to a duty of care, there is no occasion to resort to *Caparo*, at least unless the court is being invited to depart from previous authority' (at [100]). Looking at the authorities relevant to his 'general question of importance', Lord Hughes thought that they established that the police owe others a duty of care 'not by positive action to occasion physical harm or damage to property' (at [100] and [120]) – which proposition covered Mrs Robinson's case – but that 'there is no duty of care towards victims, witnesses or suspects in the manner of the investigation of offences or the prevention of crime' (at [120]). He thought that this second proposition owed its place in the law to 'policy considerations... [that] are simply too considered, too powerful and too authoritative in law to be consigned to history' (at [113]). These policy considerations include: (1) a fear of 'defensive policing' (at [111]-[113]); (2) 'the reluctance of the common law to impose liability in tort for pure omissions' (at [114]). Lord Reed disagreed with this aspect of Lord Hughes' judgment: 'The absence of a duty towards victims of crime...does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-standing principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility' (at [69](1)).

Comments

(1) *Prophecy*. In the Preface to the forthcoming 6th edition of McBride & Bagshaw, we confess ourselves to have been bad prophets for predicting in the Preface to the 5th edition that tort law was in for a period of relative calm, and failing to anticipate the various acts of nutty innovation in the law of tort perpetrated at all levels of our judiciary (particularly at the level of the UKSC, and particularly in the field of vicarious liability) after the 5th edition came out. But readers of McBride & Bagshaw will have been able to see the decisions in these two cases coming a mile off.

On p 253 of the 5th edition, we noted that 'It is highly doubtful that the decision in *D* v *East Berkshire NHS Trust* can survive the reasoning of the UK Supreme Court in *Michael* v *Chief Constable of South Wales Police* (2015).' We then went on to note that 'However, it may be that no branch of the social services will want to incur the opprobrium of trying to overthrow it' – and it may well be that *D* v *East Berkshire NHS Trust* may well have survived had it not been for what Davis LJ (at [116], with the agreement of King LJ at [107]) called an act of 'legalistic legerdemain' (sleight of hand): reframing what was originally a claim for negligently failing to provide alternative housing as a claim for negligently failing to take children into care. Doing so made the authority of *D* v *East Berkshire NHS* immediately

relevant and gave the defendant council no real option but to try to tear it down, which it easily did thanks to the decision in *Michael*.

Ever since the 1st edition of McBride & Bagshaw (back in 2001), we have disdained reliance on the so-called *Caparo* test as a way of either understanding or presenting the law on when one person will owe another a duty of care. Here's to you, Mrs Robinson, then, for allowing that position to be fully vindicated 17 years later. It is to be hoped that students and academics will take the lesson of *Robinson* on board – a pretty meaningless three stage 'test' for determining when a duty of care will be owed is absolutely no substitute for careful analysis of the authorities to come up with a clear and testable propositions that describe in which situations (with the emphasis strongly on the plural 's' in situations) a duty of care will be owed. As for barristers and judges, God only knows what they will do – they have been sucking on the *Caparo* teat for so long, it will be very hard for them to adjust to the new age that *Robinson* seeks to usher in.

(2) *The treatment of* Michael. Pleasing, too, was the treatment of *Michael* in both *CN* and *Robinson*. In my article '*Michael* and the future of tort law' (2016) 32 PN 14, at 31 I expressed the fear that *Michael* might be consigned to the fate that the Germans call *totgeschwiegen* – being killed by not being talked about. The Court of Appeal's decision in *ABC* v *St George's Healthcare NHS Trust* [2017] EWCA Civ 336 (where the claimant sued the defendant health authority for failing to warn her that her father had Huntingdon's Disease and that she consequently had a 50% chance – sadly realised – of having the disease herself) confirmed the fear: a clear case of a failure to act, but neither the barrister for the defendants, nor the Court of Appeal itself mentioned *Michael*. The fear has now been safely dissipated: both *CN* and *Robinson* fully recognise the importance of *Michael* and its implications.

And yet... there is still evidence (here, and in the UKSC's decision in *D* v *Commissioner of Police of the Metropolis* [2018] UKSC 11 – noted elsewhere on this website – at [97] (per Lord Neuberger), [131]-[132] (per Lord Hughes), [142] (per Lord Mance)) that some judges still do not 'get' what *Michael* was trying to do in terms of insisting that a public body cannot be held liable in negligence unless an equivalently situated private person would be held liable (and, consequently, that if a public body is not held liable on the ground that an equivalently situated private person would not be held liable, the public body is not being granted an immunity from anything – there is no liability for it to be held immune from). For example, in *CN*, Irwin LJ mirrored Lord Hughes' judgment in *Robinson* by observing that there were 'broadly two considerations' why the defendant council could not be sued in *CN*: 'The first is the concern...that liability in negligence will complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making. The second is the principle that, in general, there is no liability for the wrongdoing of a third party, even where that wrongdoing is foreseeable' (*CN*, at [94]). But under *Michael* – properly understood – the first of these considerations is *irrelevant*, if the second consideration applies. If an equivalently-situated private individual would not be held liable in negligence, then *Michael* says the public body cannot be held liable either. This is not a policy position. This is a point of principle – the same rules apply to everyone. Lord Reed gets that (see his invocation of Dicey at [33], and his insistence at [69](4) that 'The distinction between careless acts causing personal injury...and careless omissions to prevent acts causing personal injury...is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence') and evidently Lady Hale does too, given her agreement with Lord Reed's judgment and despite her dissent in *Michael*. But Lord Hughes obviously doesn't – and his policy-centric judgment dangerously threatens the new equilibrium that *Michael* has achieved for the law of negligence.

Also dangerous is the failure of all of the judges in *CN* and *Robinson* to clearly recognise that until now the cases on omissions liability in negligence have been all over the place in their reasoning, with some (principally those where Lord Hoffmann was in the majority) adopting the approach that finally won out in *Michael* but many others adopting what in McBride & Bagshaw we call the 'policy approach', under which it is assumed that a public body will be held liable in negligence for failing to prevent a harm which it was its job to prevent harm unless a good reason of public policy can be given why it should not be held liable. Cases that adopted the 'policy approach' should simply be called out for what they are – cases that were, in light of *Michael*, wrongly reasoned but possibly still rightly decided. However, it is clear from *CN* and *Robinson* that the courts are unwilling to write these old cases off. For example, in *CN* Irwin LJ remarked of the House of Lords' decision in *X* v *Bedfordshire CC* [1995] 2 AC 633 – one of the first cases to adopt the 'policy approach' after and despite the repudiation of *Anns* – that 'the policy considerations laid down there bear on whether a duty of care exists, not on immunity' (at [93]). But in *X* they were relevant to an immunity, because the House of Lords assumed in that case that there should be liability unless some reason of policy justified the social services being held 'immune' from that liability. Under the approach in *Michael*, *X* would take no more than a glance to decide – 'Failure to save children from being abused? Any special circumstances or relationship that would normally give rise to a duty to act? No? No liability.' No reference to policy required. In arguing that the existing authorities indicated that policy considerations were more relevant to the outcome of *Robinson* than Lord Reed was prepared to credit, Lord Mance invoked *Smith* v *Ministry of Defence* [2014] AC 52 (at [86]), *Hill* v *Chief Constable of West Yorkshire Police* [1989] AC 53 and *Smith* v *Chief Constable of Sussex Police* [2009] AC 225 (both at [88]). Of *Smith* v *Ministry of Defence*, he remarked that that case turned on considerations of what was 'fair, just and reasonable' and did not draw any 'distinctions...between acts and omissions' (at [86]). Of *Hill* and the other *Smith* case, he said that they 'can, I agree, be rationalised as cases of omission, but that was not how they were reasoned' (at [88]). He is wrong there about *Hill* (Lord Reed's analysis of that case at [51]-[52] is very similar to that advanced in McBride & Bagshaw, 5th ed, 222) but the two *Smith* cases are based squarely on the 'policy approach' to public authority liability and should be treated as such – possibly right in the result, but utterly irrelevant in terms of their reasoning after the decision in *Michael*.

(3) *Novel cases*. The UKSC acknowledged in *Robinson* that in novel cases – or cases where the UKSC was being invited to depart from an established line of authority – considerations of what is 'fair, just and reasonable' would still be relevant (Lord Reed at [27], Lord Mance at [83]-[84], Lord Hughes at [100]), but the UKSC also agreed that even in such novel cases, the law on when one person owed another a duty of care would 'develop incrementally and by analogy with existing authority' (per Lord Reed at [27], also Lord Mance at [83]). This is likely to mean that in *genuinely* novel cases, the claimant will lose. This is because a case will only count as genuinely novel if there are no established principles that can be gleaned from the existing caselaw that indicate one way or the other whether a duty of care is owed in that case. But in such a genuinely novel case, any finding that a duty of care was owed will not count as an incremental development in the law, but will instead represent a big leap forward (or backward, depending on your view of the case). So if the approach to duty of care cases in *Robinson* is adhered to, duty of care cases will fall into one of three boxes in the table overleaf. Cases that fall in box (C) will lose automatically. Almost all cases will fall into box (A) or (B) – there are now so many duty of care cases, it is hard to think of any genuinely novel cases – and argument over these cases in court will focus on (i) whether a given case falls into box (A) or (B), and (ii) if it is agreed on which box the case falls into, whether the

line between box (A) or (B) should be shifted incrementally to shift the case from one box to the other (so from a loser to the winner if the case is originally in box (B), but shifting the line incrementally to the right would put the case in box (A); and from a winner to a loser if the case is originally in box (A) but shifting the line incrementally to the left would put the case in box (B)).

<table>
<tr><td>(A) Established principles indicate duty of care owed</td><td>(B) Established principles indicate no duty of care owed</td></tr>
<tr><td colspan="2">(C) Genuinely novel cases</td></tr>
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If this is the future for duty of care cases, then we may still be in for the time of relative quiet that we anticipated in the Preface to the 5th edition of McBride & Bagshaw. And we will be in for even more quiet if penny drops with the UKSC and they finally think to themselves – if incremental development should be the order of the day in duty of care cases, shouldn't it also be the case in other tort cases (such as vicarious liability cases) instead of our making wild leaps forward in expanding people's liabilities in tort?

(4) *CN in the UKSC*. However, the next possible disruptor of peace in the neighbourhood of tort law looms, as the UKSC has now (on March 16 2018) granted leave to appeal in *CN*. Let us engage in another exercise in prophecy. If counsel for the claimants appeals on the basis that the defendant council owed CN and GN a duty of care to take them into care, they will lose. Davis LJ's remarks in *CN* about the wrongness and heartlessness involved in depriving CN and GN of their mother because the N family was being abused and harassed by another family on the estate kills stone dead the possibility of this particular claim being successful in the UKSC. The only hope for counsel for the claimants is to revive the housing claim, and argue that the defendant council owed the N family a duty to rehouse them once it became clear that they were being abused and harassed by another family on the estate. But if the counsel for the claimants tries to argue this point on the basis that *Michael* was wrongly decided, then again the claimants will lose in the UKSC. At this stage of the game, and particularly given the decision in *Robinson*, the UKSC cannot possibly go back on *Michael*, no matter how much Lady Hale might wish to. But it is possible for counsel to argue that a duty of care was owed on the established basis of 'creation of danger' – that is, if A has foreseeably put B in danger of suffering some serious harm, A will come under a duty to take reasonable steps to protect B from that harm. That such principle exists in English law was endorsed by the Court of Appeal in *CN* at [30] and [41], and at [70] in *Robinson* ('[the police] may be under a duty of care to protect an individual from a danger of injury which they have themselves created...' (per Lord Reed)), and it is arguable that it applies in *CN* (though Irwin LJ thought not, at [95]: 'This is not a case where the Defendant brought about the risk...'). However, arguing that this principle *does* apply in *CN* will not bring into question *Michael*, but another case entirely – *Mitchell* v *Glasgow City Council* [2009] 1 AC 874, where the House of Lords took a very restrictive stance on when a defendant local authority could be held to owe a claimant a duty of care because they played a part in triggering a series of events that resulted in the claimant's being killed by a 'neighbour from hell'. If counsel for

the claimants in *CN* tries to revive the housing claim, arguing that *Mitchell* v *Glasgow City Council* was wrongly decided, then the claimants in *CN* may well win in the UKSC.

Nick McBride