N v Poole BC
[2019] UKSC 25

Summary

The facts and background to this case have been set out in an earlier note on the Court of Appeal decision in this case (https://mcbridesguides.com/wp-content/uploads/2018/03/CN-v-Poole-Borough-Council-CA.pdf). The case concerned a family – made up of a mother and two sons, CN and GN – that was cruelly harassed by fellow residents of a council housing estate. The council's responded in an ineffectual way to this harassment, which resulted in CN's attempting to commit suicide. The council was sued on the basis that it (or its employees) had owed the sons a duty of care to take them into care. The claim failed in the Court of Appeal: *CN* v *Poole BC* [2017] EWCA Civ 2185. The Court of Appeal held that the decision in *Michael* v *Chief Constable of South Wales* [2015] AC 1732 meant that it was not bound by the decision of the House of Lords in *D* v *East Berkshire Community NHS Trust* [2005] 2 AC 373 to find that the council had owed the sons a duty of care, and went on to hold that the council had not owed the sons a duty of care, in part because of policy concerns that 'liability in negligence will complicate decision-making in a difficult and sensitive field…and that, in general, there is no liability for the wrongdoing of a third party, even where that wrongdoing is foreseeable' (per Irwin LJ at [94]); and in part because the contention that the council could have taken CN and GN into care, separating them from their mother, in order to save them from being harassed by third parties was untenable (at [41] (per Irwin LJ), [113] (per King LJ), [118] (per Davis LJ)).

CN and GN appealed to the UK Supreme Court, but their appeals were dismissed. Lord Reed gave the only judgment, with which the other four members of the panel agreed. He reaffirmed the principle, laid down in *Michael* and endorsed in *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736, that 'public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would imposed such a duty, unless such a duty would be inconsistent with…the legislation from their powers or duties are derived', with the result that 'public authorities can come under a common law duty protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of the danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation' (at [65]).

On the creation of danger point 'it was suggested in argument that a duty of care might have arisen on the basis that the council had created the source of the danger by the placing [the] family in house adjacent to [their harassers]'. However, this suggestion was dismissed on the basis that 'there is a consistent line of authority' – endorsed in *Mitchell* v *Glasgow City Council* [2009] AC 874 – that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour' (at [77]). Lord Reed went on to hold that 'the particulars of claim do not provide a basis on which an assumption of responsibility might be established' (at [79]). This was because 'the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours…but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare' (at [81]). As for the claim that the

council's employees had 'assumed a responsibility' to the claimants (thus giving rise to a duty of care on their part, and potential vicarious liability on the part of the council for the breach of that duty of care): 'there is no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely…[or that the social workers] under[took] the performance of some task…for the claimant[s] with the undertaking that reasonable care [would] be taken' ([87]-[88]). And even if such an assumption of responsibility could be established, breach of the duty of care arising out of the existence of such an assumption of responsibility could not as 'There were simply no grounds for removing the children from their mother' (at [90]).

Lord Reed therefore agreed with the Court of Appeal's decision in the *CN* case that the claimants' claims for negligence should be dismissed. He did, however, express some disagreements with the Court of Appeal's reasoning at [75]. (1) The suggestion that *D* v *East Berkshire NHS Trust* had been overruled by *Michael* was 'mistaken'. The 'true ratio' of the decision in *D* was that the House of Lords' earlier decision in *X* v *Bedfordshire CC* [1995] 2 AC 633 'cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions' (at [83]). And that understanding of *X* remains good law, and has been reaffirmed by *Michael*. (2) Instead of 'justifying decisions that public authorities owe no duty of care by relying on public policy' ([75] again) – as Irwin LJ did in *CN* – 'the question of whether a public authority is under a duty of care [is to be approached] on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others.' It is only if such 'general principles' indicate that a duty of care was owed that the courts have to ask whether 'it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating.'

Comments

The decision in *N* v *Poole BC* now forms – along with the decisions in *Michael* and *Robinson* – a troika of UKSC decisions that clearly endorse what in McBride & Bagshaw we call the *uniform approach* to determining whether a public authority owed a claimant a duty of care. It is now clear beyond question that the law of negligence treats public bodies and private individuals the same: if an equivalently-situated private individual would not owe the claimant a duty of care of some description, a public body will not owe that claimant that kind of duty of care.

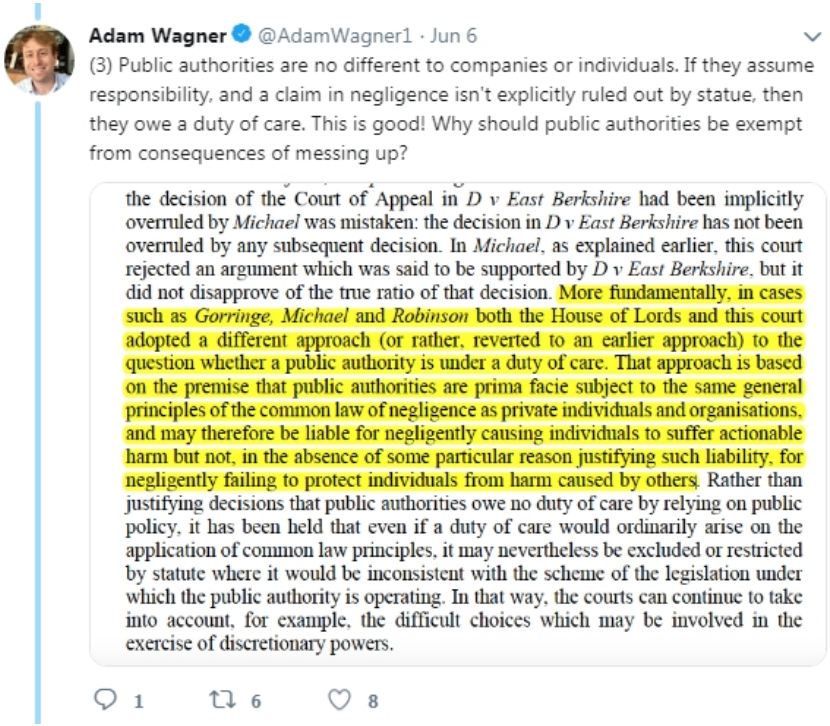
The decision in *N* v *Poole BC* cements the uniform approach into the law of negligence so firmly that it would take a judicial earthquake to root it out. This may explain the very curious delay in delivering the judgment in *N* v *Poole BC*. Argument was heard in the case over two days, on July 16 and 17 2018. But judgment was only handed down almost a year later, on June 6 2019. Compare the first two private law cases decided by the UKSC in 2019 – *Wells* v *Devani* [2019] UKSC 4, and *Perry* v *Raleys Solicitors* [2019] UKSC 5. *Wells* was argued on October 11 2018, with the UKSC's decision handed down on February 13 2019. *Perry* was argued on November 27, 2018, and decision was handed down the same day as *Wells*. Why did the relatively straightforward and unanimous decision in *N* v *Poole BC* take so long to hand down? Might it be that certain anti-*Michael* forces in the UKSC recognised the significance of the decision and resisted for as long as possible consenting to

the decision being handed down in the form it took? If so, they might be delighted by the reaction of some members of the Bar to the decision in *N* v *Poole BC*, which shows a signal failure to understand that we are now living in a post-*Michael* world.

The reaction is roughly along the lines – the claimants in *N* v *Poole BC* may have lost on the facts, but the big take away message from *N* v *Poole BC* is that local authorities *can* be held liable in negligence for failing to save children from being abused and policy considerations are *not* to be invoked as a reason for not holding a local authority liable for their failures in this regard. See, for example, this summary of the decision in *N* v *Poole BC* issued by Doughty Street Chambers: https://www.doughtystreet.co.uk/news/landmark-judgment-rules-local-authorities-can-face-legal-action-if-they-fail-protect. It is only necessary to quote the headline and part of the first paragraph:

> **Landmark judgment rules that Local Authorities can face legal action if they fail to protect vulnerable children**
>
> This morning the Supreme Court has handed down a landmark judgment in the case of *Poole Borough Council v GN (through the Official Solicitor, his litigation friend)* and Another. The Supreme Court has unanimously ruled that local authorities can be held legally accountable if they fail to protect vulnerable young people and children in their area who are considered to be at risk, regardless of whether they are officially in care.

Can face legal action – but no mention is made *at all* of the fact that they will *not* face legal action unless an equivalently-situated private individual would face such legal action, and that this requirement is hardly ever going to be satisfied (as it was not in *N* v *Poole BC*). Or take this tweet from Adam Wagner, also of Doughty Street Chambers, as part of a thread that he sent out in praise of the decision in *N* v *Poole BC* (the complete thread can be found here: https://threadreaderapp.com/thread/1136583922647805952.html):



If they assume responsibility. Adam Wagner seems to think that in cases where a public authority is guilty of 'messing up' it will be super-easy, barely an inconvenience, to establish that there was an assumption of responsibility – but again, as the facts of *N* v *Poole BC* (or, indeed, *Michael*) show, that is simply not the case. It is incredibly difficult to make out an assumption of responsibility, particularly when it comes to the requirement that the claimant has to have *relied* on the defendant's undertaking that the defendant would take care.

These sort of *plus ça change, plus c'est la même chose* reactions to decisions such as those in *N* v *Poole BC* are ultimately not going to do claimants any favours. In my note on the Court of Appeal decision in *CN* I advised the barristers for the claimants not to go down the plainly untenable line of arguing that there was a duty of care to take CN and GN into care, but instead to argue that there was a duty of care to re-house the claimants (and their mother) on the basis that the council had created the danger that the claimants (and their mother) were in, mounting a full-scale assault on *Mitchell*. It seems from Lord Reed's judgment that there was a half-hearted attempt to argue this in front of the UKSC, but it was too little, too late, and Lord Reed was able easily to swat this point aside, thereby ultimately dooming the claimants' case. Adam Wagner began his Twitter thread on *N* v *Poole BC* by saying:

His heart sank – but seriously, what did he *think* was going to happen? The claimants were going to lose unless either *Michael* or *Mitchell* was overruled. And *Michael* was never going to be overruled by a panel made up of five Supreme Court Justices, hearing argument over two days. McBride & Bagshaw was the first, and probably still the only, tort textbook to advocate for the uniform approach to public authority liability in negligence that has now been approved three times by the UKSC. If barristers want to win claims for their clients in the post-*Michael* world maybe they should start reading McBride & Bagshaw and taking its lessons on board.

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