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Case Comment

Robinson v Chief Constable of West Yorkshire Police: a re-interpretation by the Supreme Court

The existence of a duty of care is central to the law of negligence. The Supreme Court has taken the opportunity to clarify the position of the police with regard to when they will owe a duty of care and, at the same time, to re-formulate the approach to be taken in determining a duty of care.

Facts

On the afternoon of Tuesday 29 July 2008, Mrs Robinson was walking along a moderately busy street in Huddersfield. The 76 year old, who was later described by the Supreme Court as "relatively frail",[1] became embroiled with the arrest by the police of a suspected drug dealer. Just as she passed the suspect, and whilst she was within approximately one metre of him, two police officers moved towards the suspect and took hold of him in order to effect an arrest. The suspect resisted arrest and a tussle followed. This resulted in the suspect backing on to Mrs Robinson and knocking her over. The two policemen and the suspect then fell on top of Mrs Robinson. As a result Mrs Robinson suffered significant physical injuries.

Mrs Robinson brought an action in negligence against the police. The principal question at issue was whether the police officers involved in the arrest owed Mrs Robinson a duty of care. The secondary question was whether, if a duty of care was owed, the police officers were in breach of that duty of care. The trial judge found that the police officer who had initiated the arrest was negligent but that the immunity from suit for police officers that existed in the apprehension of criminals, established by case law, applied and the claim should therefore be dismissed. On appeal, the Court of Appeal had held that the police in these circumstances owed no duty of care, owing to the application of public policy considerations. The Court of Appeal had applied the tripartite test formulated in *Caparo Industries v Dickman*[2] and found that it would not be fair, just and reasonable to impose a duty of care on police officers when they were carrying out their role of investigation and suppression of crime and apprehending offenders. The Court of Appeal's reasoning was that the interests of the public at large, in having drug dealers removed from the streets, outweighed the interests of the individual who had been allegedly wronged. Mrs Robinson appealed to the UK Supreme Court.

The Supreme Court Decision

[1] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Reed at para 1

[2] Caparo Industries v Dickman [1990] 2 AC 605

Lord Reed gave the judgment of the majority of the Supreme Court. He identified the main issues as being (1) whether "the *Caparo* test" always applies to the question of whether a duty of care exists in any given case (note the use of the phrase "the *Caparo* test" rather than the tripartite test which is later rejected by the majority of the Supreme Court in its judgment); (2) the extent of any duty of care that is owed by the police in their functions and whether the law distinguishes between acts and omissions of the police; (3) if the law does distinguish between acts or omissions, which category the case before the court fell into; (4) whether the police officers owed a duty of care to Mrs Robinson; and (5) if there was a duty of care owed, whether the requisite causal connection existed between Mrs Robinson's injuries and the breach.

Although this case raised important questions about the scope of the duty of care owed by the police, significantly Lord Reed identified the case as raising no new area in law where the Court had to determine whether a duty of care should be recognised. This was not a novel situation; the Court was not required to consider an extension of the law of negligence. This laid the foundations for the approach Lord Reed proceeded to take. In his view, it was simply a case of personal injury and it required, therefore, simply the application of long established principles of the law of negligence to the facts. Lord Reed distinguished between cases where what is in question is the duty of care police owe to avoid causing physical harm in accordance with ordinary principles of negligence and where what is in question is a possible common law duty of care owed by the police to protect individuals against harm caused by criminals. Lord Reed takes this opportunity to clarify the judgment in *Hill v Chief Constable of West Yorkshire*.[3] *Hill* had been applied in a number of subsequent judgments[4] to refute a duty of care on the part of the police in their investigation and suppression of crime, on the basis of an immunity of the police based on public policy considerations. Lord Reed stated that Lord Keith in *Hill* had been misunderstood. Lord Keith in *Hill* had in fact recognised that the police *could* be liable in negligence like anyone else, on the basis of the common law duty of care to avoid causing reasonably foreseeable injury to persons or property. So it is clarified by Lord Reed that Lord Keith in *Hill* in fact referred to the two types of tortious liability that Lord Reed identified: what could be referred to as regular negligence liability that arises as for any person; and negligence liability to individual members of the public that arises in performance by the police of their investigative functions, for failure to protect members of the public from harm caused by criminals. Lord Reed emphasised that, of these two types of negligence liability, Lord Keith was only referring to the latter when he applied to the police what Lord Keith referred to as 'an immunity'. However, according to Lord Reed, it was actually simply the absence of a duty of care rather than an immunity. The rejection of liability in the latter type of case was, Lord Reed said,

[3] Hill v Chief Constable of West Yorkshire [1989] AC 53

[4] Such as Elguzouli-Daf v Commissioner of Police of the Metropolis [1995] Q.B. 335; Brooks v Commissioner of Police of the Metropolis [2005] UKHL 24; [2005] 1 W.L.R. 1495; Smith v Chief Constable of Sussex Police [2008] UKHL 50; [2009] AC 225

simply the application of the common law rules which do not impose liability for a failure to prevent harm caused by third parties (an omission), unless special circumstances exist such as an assumption of responsibility.[5] In support of this view Lord Reed referred to Lord Toulson's judgment in *Michael v Chief Constable of South Wales Police*.[6] Lord Toulson in *Michael* had rejected the police immunity approach of *Hill* and had also sought to rely on already existing common law principles.

Lord Reed explained that, at the time *Hill* was decided, the two-stage test imposed by the case of *Anns v Merton London Borough Council*[7] meant that Lord Keith in *Hill* had to use policy considerations at the second stage of the two-stage test to reject a duty of care owed by the police to protect individuals against harm caused by criminals. However, "the return to orthodoxy"[8] in the shape of *Stovin v Wise*[9] and *Gorringe v Calderdale Metropolitan Borough Council*,[10] where it was clarified that a public law duty or power did not create a common law duty of care to members of the public to confer the benefit of protection from harm, meant that the basis for rejecting such a duty of care could cease to be public policy and instead be a general principle of the law of negligence; the omissions principle. The situation of Mrs Robinson however, dealt with a positive act of the police where it was reasonably foreseeable that carelessness in the way the policemen arrested the suspect would directly result in Mrs Robinson being physically injured. This was an example of the regular negligence liability that arises as for any person. The police officers thus owed Mrs Robinson a duty of care and the causal connection existed.

Lord Mance and Lord Hughes dissented as to the reasons why a duty of care existed in the case before the Court, but what was particularly significant was their view of the role of public policy in the liability of the police in negligence. Whereas the majority downplayed the significance of the role of policy in this area, both Lord Mance and Lord Hughes thought that public policy had played a significant role in the decisions on the extent of police liability under the law of tort and that it was primarily policy considerations that shaped the denial of a duty of care owed by the police to the public in the investigation and suppression of crime.

As well as the majority of the Supreme Court in *Robinson* putting to bed any suggestion that policy has or needs to play a part in the question of police liability in negligence, the Court also made obiter comments clarifying the approach that should be taken when a court is faced with a novel case that requires consideration

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[5] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Reed at para 70

[6] Michael v Chief Constable of South Wales Police (Refuge and others intervening) [2015] UKSC 2; [2015] AC 1732

[7] Anns v Merton London Borough Council [1978] AC 728

[8] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Reed at para 31

[9] Stovin v Wise [1996] AC 923

[10] Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057

of whether a duty of care exists. There is no such thing as a tripartite test that was created by Lord Bridge in the case of *Caparo Industries v Dickman*. *Caparo* has been misunderstood. In support of this fairly radical position Lord Reed pointed out that Lord Bridge himself in *Caparo* did not intend to lay down a single test or principle to apply to determine if a duty of care is owed. The three elements of the tripartite test were recognised by Lord Bridge as just "convenient labels" that were not open to precise definition.[11] Lord Reed then went on to state that it "…was made clear in *Michael* that the idea that *Caparo* established a tripartite test is mistaken".[12] Rather, Lord Reed emphasised that part of Lord Bridge's judgment in *Caparo* which referred to incremental development of the duty of care; using precedent to guide the development of the law. Lord Reed thus stated that, in novel cases, courts should look at those already existing cases with the closest analogies and use these to determine the existence of a duty of care, also taking into account the reasons for and against imposing liability, in order to determine if it is just and reasonable to impose a duty of care in the novel situation.

Commentary

Although an English case, the majority judgment in *Robinson* was given by one of the Scottish Justices, Lord Reed, and being that this area of the law of tort is effectively the same as the Scottish law of delict, the decision is both highly persuasive on lower Scottish courts and, perhaps more importantly, signposts the way in which future Scottish appeals will be dealt with by the Supreme Court.

Lord Reed has gone back to basics and rooted the thorny question of police liability in negligence in the ordinary common law principles of tort law. By rejecting the existence of the tripartite test, refusing to identify this genre of case as a novel category, and by explaining Lord Keith's reliance on immunity and public policy in *Hill*, the Supreme Court manages to remove both public policy considerations and immunity from the vocabulary used in police negligence liability cases. This is a clear divergence from the past but not altogether surprising as the stage had been set by Lord Toulson in *Michael*.[13] The judgment in *Robinson* nevertheless seeks to end the argument for police tortious liability to individual members of the public for failure to protect them from harm caused by criminals, once and for all, by basing the rejection of liability on well-established legal principle rather than policy. Any redress in this area must now be sought through an individual's assertion of their human rights under the Human Rights Act 1998,[14] under which

[11] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Reed at para 24

[12] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Reed at para 28

[13] Michael v Chief Constable of South Wales Police (Refuge and others intervening) [2015] UKSC 2; [2015] AC 1732

[14] See the recent Supreme Court decision of Commissioner of Police of the Metropolis v DSD and another [2018] UKSC11

the remedy that is available for a breach of one's human rights is quite different from compensation for negligence.[15]

The omissions rule that was seized on by Lord Toulson in *Michael*[16] has in *Robinson* been further justified and focussed into the rule against liability for the actions of third parties and for danger which the police have not themselves created. The basis for non-liability in negligence of the fire service in Scotland is also based upon the principle of non-liability for omissions.[17] The reliance on the omissions principle as the basis for rejecting a duty of care owed by the fire service has however been criticised.[18] Lord Hughes in *Robinson* argues that the omissions rule is not the only or a sufficient reason for not imposing a duty of care by the police in the investigation and suppression of crime.[19] He provides by way of example, the absence of a duty to individuals in the manner in which police investigations are conducted.[20] Both Lord Hughes and Lord Mance question the majority's reluctance in *Robinson* to admit the role policy has played in this area to date. So why has the Supreme Court down played the role of policy in this area and relied instead on what they insist are applicable established principles of the law of negligence? Perhaps the Supreme Court thinks it is more palatable for the public to accept if rooted in the law rather than policy? There has been criticism of the policy basis in the past.[21] Ironically though, in order to make it look less like the courts simply apply policy to cases in order to achieve the desired end result and more like they apply well settled law, the Supreme Court has just exercised a considerable amount of judicial re-interpretation and, in so doing, has rather shaken up the foundations for determining the existence of a duty of care in negligence.

The Supreme Court has changed the emphasis to be laid on the judgment in *Caparo*. The tripartite test is not to be used to determine the existence of a duty

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[15] Human Rights Act 1998, Article 8 – provides for damages to be awarded when required to provide "just satisfaction", so such an award is not automatic and the finding of a violation in itself may be considered to be a sufficient remedy. See further Jim Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4th edn, Bloomsbury Professional, 2017) at chapter 1. In addition the seriousness of the failings of the police have to be particularly marked, needing to amount to a breach of such articles as Article 2 (right to life) or Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) of the European Convention of Human Rights.

[16] Michael v Chief Constable of South Wales Police (Refuge and others intervening) [2015] UKSC 2; [2015] AC 1732

[17] A J Allan (Blairnyle) Limited v Strathclyde Fire Board [2016] CSIH 3; 2016 S.C. 304

[18] For example see Greg Gordon, " A song of fire and ice: AJ Allan (Blairnyle) Limited & Anor v Strathclyde Fire Board" 2017 ELR 122

[19] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Hughes at para 114 and 118.

[20] Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595 per Lord Hughes at para 114.

[21] See criticisms of aspects of the reliance on policy in Claire McIvor, "Getting defensive about police negligence: the Hill principle, the Human Rights Act 1998 and the House of Lords", 2010 CLJ 133; Hanna Wilberg, "Defensive practice or conflict of duties? Policy concerns in public authority negligence claims" , 2010 LQR 420; Jonathan Morgan, "Policy reasoning in tort law: the courts, the Law Commission and the critics", 2009 LQR 215

of care either in situations where a duty is already well established or in novel cases. This approach, it is noted, is of marked contrast to the position that was recently taken by the Inner House of the Court of Session in the Scottish case of *A J Allan (Blairnyle) Limited v Strathclyde Fire Board*,[22] which raised similar questions about the duty of care owed by the fire service. Although the Inner House denied the existence of a duty of care owed by the fire service to individual members of the public, it clearly applied the tripartite test and public policy considerations.[23] One wonders where this leaves the convergence of the English and Scots law of negligence – there are perhaps signs of some divergence. Though there are also some signs of similarity in future direction. Lord Drummond Young in his obiter comments in *Blairnyle* advocates incremental development of the duty of care in negligence cases, by analogy with established categories rather than what he calls the mechanical application of rules derived from existing case law. However he also calls for a greater role for policy to shape that development, resulting in a less unified law of negligence but one that would deal more fairly with individual cases.[24] Although the Supreme Court in *Robinson* admits a role for policy in novel cases in the assessment of whether the existence of a duty of care would be just and reasonable, the extent of the role of policy envisaged by the Supreme Court under this changed approach to novel cases is yet to be seen.

[22] A J Allan (Blairnyle) Limited v Strathclyde Fire Board [2016] CSIH 3; 2016 S.C. 304

[23] See A J Allan (Blairnyle) Limited v Strathclyde Fire Board [2016] CSIH 3; 2016 S.C. 304 per Lady Paton at para 17, 26 and 28. Lord Drummond Young also applies policy considerations – see in particular para 89, and actually advocates a greater role for public policy in determining a duty of care, arguing that it affects the application of the proximity test rather than it just being the third consideration of the tripartite test.

[24] A J Allan (Blairnyle) Limited v Strathclyde Fire Board [2016] CSIH 3; 2016 S.C. 304 per Lord Drummond Young at para 97. See also Greg Gordon, " A song of fire and ice: AJ Allan (Blairnyle) Limited & Anor v Strathclyde Fire Board" 2017 ELR 122, who calls for greater transparency in the use of policy in the reasoning for denying a duty of care in the law of negligence, and thus a more fine-tuned application of policy to situations.