

Pure omissions and public authorities

Ruth Kennedy considers the basis upon which liability can be established



Ruth Kennedy is a barrister at 2 Temple Gardens

This article focuses on liability for pure omissions in tort with a particular focus on public authorities. The general principle of the common law, as classically stated by Lord Goff in *Smith v Littlewoods Organisation Ltd* [1987], is that there is no liability for pure omissions. Unlike in some other jurisdictions, we generally (subject to some statutory exceptions) do not impose liability on bystanders who simply watch or allow bad things to happen to other people. That said, there are exceptions to this rule. This article considers what the recent cases tell us about establishing liability for omissions in terms of:

- primary liability in negligence;
- non-delegable duties; and
- vicarious liability.

Primary liability in negligence

In this section we will consider the chain of key cases, starting with the Supreme Court decision of *Michael v Chief Constable of South Wales Police* in 2015, then the Court of Appeal case of *CN v Poole Borough Council* [2017], before turning to the two very recent Supreme Court decisions of *Robinson v Chief Constable of West Yorkshire Police* and *Commissioner of Police of the Metropolis v DSD*, both in 2018.

Michael

In *Michael* the Supreme Court considered the duty of care of the police in failing to respond to a 999 call from Joanna Michael. The sad facts of the case are relatively

well-known. Joanna Michael called 999 one evening from her mobile telephone. She had told the operator from Gwent Police that her former partner had already beaten her and that he had told her he was going to kill her. She said that he would be back literally any minute. When the call was passed on to the Cardiff Police, who were closer, the operator from the Gwent Police failed to mention that the former partner had said that he was going to kill Ms Michael. It was therefore graded as a low-level threat requiring a response within 60 minutes. Ms Michael then called 999 again around 14 minutes after the first telephone call, she was heard screaming, and it was actioned immediately. When police arrived some eight minutes later Ms Michael was dead, having been stabbed by her former partner. There had been a number of reports of domestic violence committed against Ms Michael by her eventual killer.

There were various causes of action pleaded. This was an appeal from a summary judgment decision. The main focus of the Supreme Court decision was the cause of action in negligence. Lord Toulson considered the relevant case law in detail before summarising that there are two general exceptions to the rule that liability is not imposed by the common law for pure omissions. First, where the defendant was in a position of control over the third party and should have foreseen the likelihood of the third party causing damage to somebody in close proximity if the defendant failed to take reasonable care in the

'The general principle is that there is no liability for the wrongdoing of a third party, even where that wrongdoing is foreseeable.'

exercise of that control (see para 99). Second, where the defendant assumes a positive responsibility to safeguard the claimant under the *Hedley Byrne* principle (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963], see para 100).

Neither of those categories described the facts of this case, and an extension would have been required. Lord Toulson recognised at paras 102 and 103 that ‘the categories of negligence are never closed’ and that it would have been open to the Supreme Court in *Michael* to create a new exception to the general rule that there can be no liability for omissions. He also clarified that, against this backdrop, it was not a question of the police having special immunity. On the contrary, the correct question was whether an exception should be made to the ordinary application of common law principles. He makes clear that there are no special rules in the context of public authorities, in contrast to what can be gleaned from *Hill v Chief Constable of West Yorkshire* [1987] and in *X v Bedfordshire* [1995]. There were two ways in which the parties were suggesting that liability be extended. The first, which Lord Toulson referred to as the ‘interveners’ liability principle’ – because it was argued by the interveners – was specific to victims of domestic violence. It was formulated as applying where the police knew of a number of persons (in this case who were suffering at the hands of domestic violence) who were clearly identified – the police owed a duty to take reasonable care for their safety. The second, known as Lord Bingham’s liability principle after Lord Bingham’s dissent in *Smith v Chief Constable of Sussex Police* [2008], referred to cases where there was a risk of immediate harm.

Interveners’ liability principle

Counsel for the interveners suggested that the Supreme Court should extend the scope of the duty of care in this case and recognise that there was liability in negligence for two reasons.

The first was that the nature and scale of the problem of domestic violence is such that the courts ought to introduce such a principle to provide protection for victims and to act as a spur to the police to respond

to the problem more effectively. This was rejected, essentially for two main reasons:

- given that the duty of care relied on is the public law duty of the police to preserve the Queen’s peace, it did not make sense

to restrict any duty to very particular individuals; and

- no assumption could be made as to the operational consequences of changing the law of negligence in this way.

The second was that the common law should be extended in harmony with the obligations of the police under Arts 2 and 3 of the European Convention on Human Rights (ECHR) (see para 117). This was rejected on the basis of the reasons given by Lord Brown in *Smith* – that Convention claims have different objectives to civil actions and that there was no principled reason for matching them.

Lord Bingham’s liability principle

Lord Bingham’s liability principle was similarly rejected for two broad reasons. The first was that the arbitrary distinctions that drawing dividing lines would mean – that if the report is made by the person themselves, it is actionable, otherwise it is not, or whether the whereabouts of the person making the threat are known or unknown. Secondly, that if this type of liability is to be imposed, then it should be for Parliament to make the decision to impose a scheme of compensation.

Lord Kerr and Baroness Hale dissented. Lord Kerr gave an alternative third way of finding liability, however, as highlighted by Lord Toulson there are issues with the way that his test double-circles proximity. It essentially asks the same thing twice. It, therefore, seems

unlikely that Lord Kerr’s dissent will be adopted any time soon.

CN v Poole

The second case of note is the 2017 Court of Appeal case of *CN v Poole*. The claimants and their mother were placed by the defendant, under its

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powers as the local housing authority, in Grange Gardens, Poole. Before being placed there by the defendant, the defendant was said to have been aware that a family lived nearby who persistently engaged in anti-social behaviour. It was said on behalf of the claimants that it was predictable that this family and its associates would subject the claimants to significant harassment and abuse.

The claim made against the local authority was that the defendant owed the claimants a duty of care to protect them from harassment and abuse by the third party. This had been struck out at first instance by Master Eastman, but had been reinstated on appeal below by Slade J. There was also initially a housing claim, which was struck out by Master Eastman and there was no appeal therefrom.

It is important to note from the outset the peculiar nature of what the claimants were requesting that the defendant do. As summarised by Irwin LJ – it was that the defendant had a duty under the Children Act 1989 to remove this highly vulnerable disabled child, and his younger brother, from their single-parent mother because of harassment by neighbours (see para 42). The claimants centred their claim upon the decision of *JD v East Berkshire Community Health* [2003] where the Court of Appeal found that the Human Rights Act (HRA) and Strasbourg jurisprudence meant that the bar to children bringing claims in negligence against local authorities in *X v Bedfordshire* for abuse suffered was now wrong.

Slade J, when considering the initial appeal, had found that *JD v East Berkshire* was still good law and had not been overturned by *Michael. X v Bedfordshire* is a very well-known case where the claimants were children who suffered parental neglect and abuse, which the local council was said to have known about. The claimants succeeded in their claim

He further went on to find that two considerations militated against liability on the facts of the instant case. First, that liability in negligence would complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making. Second, the general principle is that there is no liability for the

the police and public authorities do not benefit from some special kind of immunity, with explicit reference to paras 115-116 of *Michael* (Lord Mance and Lord Hughes also agreed with this proposition, though disagreeing with other parts of Lord Reed's analysis). He summarised his conclusions at para 70 of his judgment when he said:

... it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht and Attorney General of the British Virgin Islands v Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility.

This statement of the law seems uncontroversial and it was on this basis that Lord Reed found the police liable in negligence for Mrs Robinson's injuries. Lord Mance and Lord Hughes disagreed with the reasoning of Lord Reed but agreed with the end result. Yet the consequences have been widely regarded as significant as, in general, the courts have been cautious in imposing duties on the police where operational decision-making is involved. That being said, this case seems far removed from the pure omission cases of *Michael* and *CN v Poole*. Here the deliberate decision of the officers to arrest the suspect at that exact moment, when Mrs Robinson was there to see, caused her injury. Lord Reed makes this distinction when he finds at paras 72-73 that this was a case that concerned a positive act as opposed to an omission. Therefore, while *Robinson* gives a useful overview

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under the ECHR in Strasbourg and were awarded damages for suffering inhumane and degrading treatment as a result of the UK's failure. However, it was found by the House of Lords that this did not mean that the council owed a duty of care in negligence because of policy reasons, including that this could lead to floodgates being opened.

In *JD v East Berkshire*, the Court of Appeal conversely found that given:

- the importance of protecting children, the most vulnerable in society; and
- that the local authority was bound to respect the child's Convention rights,

therefore the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties (see para 83).

In *CN v Poole*, Irwin LJ held that the Supreme Court decision of *Michael* had effectively overturned the principles set out by the Court of Appeal in *JD v East Berkshire* in respect of claims made by children against local authorities. Lord Toulson's analysis of whether the common law needed to be extended to reflect ECHR jurisprudence was not restricted to the facts of that particular case and had general application.

wrongdoing of a third party, even where that wrongdoing is foreseeable. King LJ and Davis LJ agreed, giving short supplementary judgments – both stressing how odd it was that the claimants were arguing that they should have been removed from their mother's care.

Robinson

Earlier this year the Supreme Court handed down the decision of *Robinson v Chief Constable of West Yorkshire Police*. Mrs Elizabeth Robinson, described by the recorder at first instance as 'a relatively frail lady then aged 76', was walking down a street in Huddersfield when she was knocked over by a group of men struggling with each other. Two of them were police officers and one of them was a suspected drug dealer they were attempting to arrest. The question for the Supreme Court was whether the officers owed a duty of care in negligence to Mrs Robinson. As part of this analysis, Lord Reed, giving the lead judgment, asked the following as subsidiary questions:

- Does the law distinguish between acts and omissions?
- Was this an omissions case or one of a positive act (see para 20)?

In addressing these questions, the Supreme Court referred to Lord Toulson's judgment in *Michael* a great deal. Lord Reed restated that

of the law in this area, it is not an omissions case.

Commissioner v DSD

It is necessary to briefly consider *Commissioner v DSD* – the HRA case against the police for failure to investigate the crimes committed by John Worboys. As is well known, John Worboys was a driver of a black cab in London who committed a legion of sexual offences against women. The claimants in proceedings were among his victims. The claims were brought under ss7 and 8 of the HRA (for breach of Art 3 of the ECHR), not negligence, but the case has some useful *dicta* (following on from *Michael*) on how the standard of care in negligence impacts upon claims made under the ECHR or HRA. In short, the answer is that it does not. Lord Kerr (with whom Lady Hale and in substance Lord Neuberger agreed) found that as much as the common law duty of negligence should not be adapted to harmonise with the perceived duty arising under ECHR, so any ECHR duty should remain free from the influence of pre-HRA domestic law (at para 68). He highlighted that one of the key distinctions between *Commissioner v DSD* and *Michael* was that in *Michael* much of the debate as to whether the police owed a duty to an individual member of the public centred on the question whether there was a sufficient proximity of relationship between the claimant and the police force against whom action was taken. In the context of an ECHR or HRA claim, no such considerations arise: either the police had a protective duty under Art 3 or they did not. Therefore, *Commissioner v DSD* does little to either elucidate the common law principles of primary liability in negligence or critique them.

Conclusions on primary liability

Drawing the threads from the above cases together, the authorities are now clearer than they once were about what obligations are owed by public authorities in the case of omissions:

- It is now established, at least for the moment, that there is no justification for extending the liability imposed on public

authorities in negligence to reflect the UK's obligations under the ECHR.

- Lord Toulson's statement in *Michael* as to the two exceptions to the general principle that there is no liability for pure omissions is very important. First, where

a position of control exists and second, where there is an assumption of responsibility.

- There is no immunity for public authorities, as it was once thought after *X v Bedfordshire*. The usual *Caparo* test applies (*Caparo Industries plc v Dickman* [1990]). However, while there is no immunity, given that the third stage of the *Caparo* test encompasses policy considerations, where a public authority is concerned there will still be very specific factors that are involved in considering whether a duty of care exists. These include concerns about floodgates (see Irwin LJ in *CN v Poole* and all the judgments delivered by the Supreme Court in *Robinson*).
- *Robinson* is significant in its practical effect – in finding the police liable in negligence for decisions made during an operation – but as stated above, it is not an omissions case.

Non-delegable duties and vicarious liability

The crucial case on this issue in recent times is *Armes v Nottinghamshire County Council* [2017], which considered both non-delegable duties and vicarious liability. The claimant was bringing a claim against the local authorities who had placed her in foster care when she was a child. She suffered physical and sexual abuse at the hands of those foster parents.

The relevant question for the court was not whether primary liability was made out, ie that the local authority had been negligent, but rather whether the local authority was in breach of a non-delegable duty or whether there was a claim for vicarious liability.

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Armes: non-delegable duties

In respect of non-delegable duties, in *Woodland v Essex County Council* [2013] Lord Sumption identified two categories of case where non-delegable duties have been said to arise (which were reaffirmed in *Armes*):

- a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work; or
- where three critical characteristics are fulfilled:
 - there is an antecedent relationship between the defendant and the claimant;
 - the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks; and
 - the duty is by virtue of that relationship personal to the defendant.

Lord Sumption's second category was potentially the one that applied to the current facts.

Lord Reed characterised the critical question for the Supreme Court to decide at para 37 as, in essence, whether the function of providing the child with day-to-day care was one that they were duty-bound to perform or one that they merely had

to arrange to have performed. You can see that the decks were already stacked in a particular direction by the way that the question was constructed.

Unsurprisingly given the formulation of the critical question, the court found that the local authority was not personally

relationship between the individual tortfeasor and the defendant. There were five factors to take into account from *Christian Brothers (The Catholic Child Welfare Society v Various Claimants* [2012]) as adopted by *Cox* and the Supreme Court found, of those five, that there were three crucial factors in the instant

Vicarious liability appears to still be on the move.

Overall conclusion

First, the general principle at common law remains that people are not held liable for omissions as opposed to positive acts in negligence. There are two exceptions to that rule, as set out by Lord Toulson in *Michael*: where a position of control exists and where there is an assumption of responsibility.

Second, insofar as public authorities are concerned, while *Robinson* in practice marks a departure from the general tendency of courts to refuse to find the police liable for operation failures, its significance for the law of omissions should not be overstated. As *Michael* and *CN v Poole* show, courts are generally slow to impose primary liability on public authorities for pure omissions.

Third, when advising clients, it is important to consider whether they could be liable through non-delegable duties or vicarious liability. Following *Cox* and *Armes* the scope of potential vicarious liability has been enlarged. The courts seem much more comfortable in imposing vicarious liability, when no fault has to be shown on the part of the defendant, than they do with primary liability – which is odd, given that the result to the defendant is the same. ■

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required to provide the service – partly because then it could be liable for deciding that the child should stay with his or her parents and this could lead to a conflict of interests.

Armes: vicarious liability

The question of whether local authorities are vicariously liable for torts committed by foster parents against children placed with them while in care was previously considered by the Court of Appeal in *S v Walsall Metropolitan Borough Council* [1985]. Oliver LJ had analysed it as a question of agency. The law has moved some way since then: it is significantly wider, as *Cox v Ministry of Justice* [2016] will tell you.

There are two questions which should be asked, which were reaffirmed by *Cox*:

- What sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual?
- In what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed?

In *Armes*, the court was considering the first category – the

case. First, foster parents provided care as an integral part of the local authority’s organisation. Second, the local authority placing children in their care essentially created the risk that the children would be abused. Thirdly, the local authority exercised a degree of control over the foster parents. In finding that the local authority was liable for the actions of the foster parents, the Supreme Court took an approach that was a marked departure from previous authorities, most notably *S v Walsall Metropolitan Borough Council*. However, given the enlargement of the scope of vicarious liability since *S v Walsall Metropolitan Borough Council*, the result is less surprising than it might appear.

Armes v Nottinghamshire County Council
[2017] UKSC 60

CN & anor v Poole Borough Council
[2017] EWCA Civ 2185

Caparo Industries plc v Dickman
[1990] UKHL 2

Commissioner of Police of the Metropolis v DSD & anor
[2018] UKSC 11

Cox v Ministry of Justice
[2016] UKSC 10

JD & ors v East Berkshire Community Health & ors
[2003] EWCA Civ 1151

Hedley Byrne & Co Ltd v Heller & Partners Ltd
[1963] UKHL 4

Hill v Chief Constable of West Yorkshire
[1987] UKHL 12

Michael & ors v Chief Constable of South Wales Police & anor
[2015] UKSC 2

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

S v Walsall Metropolitan Borough Council
[1985] 1 WLR 1150

Smith v Chief Constable of Sussex Police
[2008] UKHL 50

Smith v Littlewoods Organisation Ltd
[1987] UKHL 3

The Catholic Child Welfare Society & ors v Various Claimants
[2012] UKSC 56

Woodland v Essex County Council
[2013] UKSC 66

X v Bedfordshire
[1995] UKHL 9