Scope of duty owed by police: Supreme Court clarification

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

1. On 08/02/2018 the Supreme Court handed down judgment in the case of *Robinson*, confirming that the police *do* owe a duty of care to avoid causing injury to a member of the public where the danger is created by their own conduct.

2. The Court's decision clarifies what it held to be the mistaken view that the police enjoy a general immunity. In providing that clarification, the Court gave useful guidance on the appropriateness of when to apply the *Caparo* test, before providing a comprehensive analysis of the ordinary principles of negligence as they relate to public authorities (including and specifically the police) and distinguishing positive acts from omissions.

The facts

3. On a Tuesday afternoon in July 2008, Mrs Robinson was shopping on Kirkgate, a street in the centre of Huddersfield. In a park nearby, plain clothed DS Willan had spotted Mr Ashley Williams apparently dealing drugs. Williams was young and fit, and DS Willan did not fancy his chances of a straight-forward arrest. He called for backup, before following Williams into a bookmakers. Once inside, he again did not fancy his chances of a simple arrest without endangering himself or others. Williams left the bookmakers and stood outside. Three more plain clothed policemen approached, and a plan was quickly formulated to arrest Williams outside the bookmaker. Kirkgate was moderately busy, and two pedestrians passed Williams shortly before Mrs Robinson attempted to do the same. Before she had reached a yard past Williams, two of the policemen took hold of Williams, who resisted. In the tussle that ensued, Williams backed into Mrs Robinson who fell over. All three men fell on top of her. The two remaining policemen arrived shortly thereafter and completed the arrest. Mrs Robinson suffered injuries as a result.

4. The Supreme Court was fixed with two principal questions. First, did the officers owe a duty of care to Mrs Robinson? Second, if they did, were they in breach of that duty?

Mr Recorder Pimm had held that negligence was established, but that the officers were immune from suit. The Court of Appeal had held that no duty of care was owed, and even if one had been owed, the officers had not acted in breach of it.

The initial decision

5. Mr Recorder Pimm found that the decision to arrest Williams involved a foreseeable risk that Mrs Robinson would be injured. She was in very close proximity to Williams, was an elderly lady and there was a significant and foreseeable risk that Williams would try to escape.

6. The officers had acted negligently – it was accepted that they ought to be taking care of members of the public in the vicinity, yet Mrs Robinson was only 1 yard away and DS Willan did not notice her. That was prima facie in breach of his duty of care. Secondly, the officers could have waited for a safer opportunity. Thirdly, all four officers should have been present at the time of arrest, given the number of pedestrians passing.

7. However, the Recorder interpreted *Hill v Chief Constable of West Yorkshire* [1989] AC 53 as having conferred on the police an immunity against claims in negligence. Further, that *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3 established that that immunity was not confined to cases of omission. It therefore applied in the present case.

The Court of Appeal

8. On Appeal, Hallett LJ gave the leading judgment with which Sullivan LJ agreed, and Arnold J concurred. It was held at paragraph 40 that "the *Caparo* test [*Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618] applies to all claims in the modern law of negligence". Thus, that the court will only impose a duty if it is right to do so on the facts. The general principle that follows, it was held, was that most claims against the police, for acts or omissions, will fail the third stage of the test, that being whether it is fair, just and reasonable to impose a duty.

9. Further, it was accepted by the Court of Appeal that even if it was wrong that there is no immunity where police cause direct physical harm, here they had not. Rather it was Williams who had caused the harm, and as such this was a claim based on failure / omission, not a positive act.

Before the Supreme Court

10. The Supreme Court narrowed matters into 6 issues (para. 20):

> *(1) Does the existence of a duty of care always depend on the application of "the Caparo test" to the facts of the particular case?*
>
> *(2) Is there a general rule that the police are not under any duty of care when discharging their function of investigating and preventing crime? Or are the police generally under a duty of care to avoid causing reasonably foreseeable personal injuries, when such a duty would arise in accordance with ordinary principles of the law of negligence? If the latter is the position, does the law distinguish between acts and omissions: in particular, between causing injury, and protecting individuals from injury caused by the conduct of others?*
>
> *(3) If the latter is the position, is this an omissions case, or a case of a positive act?*
>
> *(4) Did the police officers owe a duty of care to Mrs Robinson?*
>
> *(5) If so, was the Court of Appeal entitled to overturn the Recorder's finding that the officers failed in that duty?*
>
> *(6) If there was a breach of a duty of care owed to Mrs Robinson, were her injuries caused by that breach?*"

11. By a majority, the Supreme Court held that there is no need to consider the third limb of the *Caparo* test in established situations where a duty of care flows from applying the ordinary principles of negligence. At paragraph 21:

> "*The proposition that there is a Caparo test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgement in Michael v Chief Constable of South Wales Police (Refuge and*

others intervening) [2015] UKSC 2; [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of Caparo, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.

12. Thus, only in novel cases where no clear answer is provided by established principles is the court required to go beyond those principles in order to decide whether a duty of care should be recognised.

13. Given the confusion which had evidently taken hold, the judgment addressed those principles in detail within the present context, and provided a distinction between positive acts and omissions.

14. First, it was made clear that at common law public authorities are generally subject to the same liabilities in tort as private individuals (para. 32). Thus, tortious conduct is equally tortious if committed by a public authority, and it follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence (para. 33).

15. Second, specifically addressing the position of the police, the decision of Lord Keith in *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53 was thoroughly analysed given that the Supreme Court deemed it to have been continuously misunderstood:

"*45. For the purposes of the present case, the most important aspect of Lord Keith's speech in Hill is that, in the words of Lord Toulson (Michael, para 37), "he recognised that the general law of tort applies as much to the police as to anyone else". What Lord Keith said was this: "There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence." (p 59; emphasis supplied) The words "like anyone else" are*

important. They indicate that the police are subject to liability for causing personal injury in accordance with the general law of tort. That is as one would expect, given the general position of public authorities as explained in paras 32-33 above.

50. On the other hand, as Lord Toulson noted in Michael (para 37), Lord Keith held that the general duty of the police to enforce the law did not carry with it a private law duty towards individual members of the public. In particular, police officers investigating a series of murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. That was again in accordance with the general law of negligence. As explained earlier, the common law does not normally impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, generally under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility."

16. The reason given for the misunderstanding which had attached to *Hill* illuminates what may be seen as a departure from the (mistaken) assumption of blanket immunity afforded to police:

"*51. As previously explained, however, the reasoning by which Lord Keith arrived at the same conclusion as Lord Toulson reflects the period during which the case was decided, when Anns continued to be influential. Following the two-stage approach to liability set out in Anns, Lord Keith considered first the argument that a duty of care arose in consequence of the foreseeability of harm to potential victims if the murderer was not apprehended. In that regard, Lord Keith emphasised that the foreseeability of harm was not in itself a sufficient basis for the imposition of a duty of care, and introduced the concept of proximity as a further ingredient. He concluded that there was no ingredient or characteristic giving rise to the necessary proximity between the police and the claimant's daughter (who was one of the murderer's victims), and that the circumstances of the case were not capable of establishing a duty of care owed towards her by the police.*

52. As Lord Toulson remarked in Michael (para 42), if Lord Keith had stopped at that point, it is unlikely that the decision would have caused controversy. However, having observed that what he had said was sufficient for the disposal of the appeal, Lord Keith went on to discuss the application of the second stage of the approach laid down in Anns: namely, whether there were reasons of public policy why an action should not lie "in circumstances such as those of the present case" (p 63). He concluded that there were such reasons, and expressed the view that the Court of Appeal had been "right to take the view that the police were immune from an action of this kind" (pp 63-64).

53. It is important to note that this part of Lord Keith's speech was unrelated to a determination of whether the police were liable for negligence resulting in personal injury, where "anyone else" would be subject to liability under ordinary principles of the law of tort. He had already confirmed the existence of liability in those circumstances, as explained at paras 45-46 above. His comments about public policy were concerned with a different question, namely whether the police generally owe a duty of care to individual members of the public, in the performance of their investigative function, to protect them from harm caused by criminals: a question to which, on the principles established prior to Anns and subsequently reinstated in Stovin v Wise, Gorringe and Michael, as explained in paras 34-37 and 39 above, the answer was plainly no.

17. To avoid any doubt:

"*55. The case of Hill is not, therefore, authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed. Lord Keith spoke of an "immunity", meaning the absence of a duty of care, only in relation to the protection of the public from harm through the performance by the police of their function of investigating crime.*"

18. Five authorities were relied upon by the respondent to argue against that conclusion, and the Court discussed them in detail, concluding that:

> "*68. On examination, therefore, there is nothing in the ratio of any of the authorities relied on by the respondent which is inconsistent with the police being under a liability for negligence resulting in personal injuries where such liability would arise under ordinary principles of the law of tort. That is so notwithstanding the existence of some dicta which might be read as suggesting the contrary.*"

19. On that basis, the second of the issues on appeal was addressed. The Court concluded that the police may be under a duty of care to protect an individual from a danger of injury they themselves have created, including a danger of injury resulting from human agency. On those 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 (para. 70).

20. In respect of the third issue, the court went on to conclude that the present case was not comparable to cases concerning pure omissions. Nor was it a case in which the Chief Constable was sought to be made liable for the conduct of a third party:

> "*72. […] Lord Reid's observation in Dorset Yacht (at p 1027) is apposite: "the ground of liability is not responsibility for the acts of the escaping trainees; it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind".*
>
> *73. In the present case, the ground of action is liability for damage caused by carelessness on the part of the police officers in circumstances in which it was reasonably foreseeable that their carelessness would result in Mrs Robinson's being injured. Her complaint is not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured. In short, this case is concerned with a positive act, not an omission.*"

21. In respect of the fourth issue, and the fact that it was not only foreseeable, but actually foreseen that Williams was likely to resist arrest within a moderately busy shopping street, it was reasonably foreseeable that an attempted arrest at a time when pedestrians were close by might result in them being knocked into and injured. The reasonably foreseeable risk of injury imposed on the officers a duty of care towards pedestrians in the immediate vicinity, including Mrs Robinson (para. 74).

22. In respect of whether the Court of Appeal was entitled to overturn the Recorder's findings that the officers had failed in their duty of care (the fifth issue), the Court stressed that it was important not to impose unrealistically demanding standards of care on police. Further, it is necessary to remember that taking reasonable care can be consistent with exposing individuals to a significant degree of risk (para. 76).

23. However, this could, and did, turn on the fact that one finding of negligence in the present case did not involve an unrealistically high standard of care. The officers were aware of the risk of Williams running and of the potential harm to the public. It was also accepted by DS Willan that if it appeared to him that someone was in harm's way he would have walked past Williams without affecting the arrest. DS Willan simply failed to notice Mrs Robinson. The Recorder was entitled to find negligence on that basis alone. DS Willan accepted that he ought to have been taking care for the safety of individuals in the vicinity. If he had been, he would have noticed her. Williams did not need to be arrested at that precise moment, regardless of the risk to passers by (para. 78).

24. Finally (issue 6), it was held that Mrs Robinson's injuries were caused by the officers' breach of their duty. Taking hold of Williams had caused him to attempt to struggle free. In the course of the resultant tussle, Mrs Robinson was knocked over and injured.

> "*80. In these circumstances, it is impossible to argue that the chain of causation linking the attempt to arrest Williams to Mrs Robinson's being injured was interrupted by Williams' voluntary decision to resist arrest, which resulted in his knocking into her. The voluntary act of a third party, particularly when it is of a criminal character, will often constitute a novus actus interveniens, but not when that act is the very one which the defendant was under a duty to guard*

against … In short, Mrs Robinson was injured as a result of being exposed to the very danger from which the officers had a duty of care to protect her."

Conclusion

25. It should be noted that Lord Mance disagreed with the approach of the majority on the basis that he did not agree that policy considerations may not shape police liability in the context of positive conduct (as opposed to pure omissions). His opinion was that:

> "*95. As to the present appeal, I also think that there was open to the law 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 by some third person(s). In my opinion, that policy choice should now be made unequivocally in the sense indicated by Lord Reed.*
>
> *97. […]Rather we should now recognise the direct physical interface between the police and the public, in the course of an arrest placing an innocent passer-by or bystander at risk, as falling within a now established area of general police liability for positive negligent conduct which foreseeably and directly inflicts physical injury on the public.*"

26. While not a significant departure from the view of the majority, it is one worth noting, and one supported to a degree by Lord Hughes' opinion that policy considerations remain vital.

27. Thus, the position that the police have immunity from a claim founded on the police's failure to prevent injury resulting from danger created by someone else remains unchanged. What is 'new', is that this immunity does not extend to situations where it is the police's own conduct which creates the danger.

28. For the sake of completeness, please note the recent decision in *DSD and NBV v Commissioner of Police of the Metropolis* [2018] UKSC 11, in which the Supreme Court confirmed that investigative failures by the police where the underlying offence is committed by members of the public, *may* give rise to breach of Article 3 of Human Rights Act 1998.