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Duty of Care – Public Authorities

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When is a local authority liable for failing to protect a child from the wrongful acts of third parties?

Poole Borough Council v GN [2019] UKSC 25, 6 June 2019

By Adam Heppinstall

In *Darnley,* following the abandonment of the "tripartite" *Caparo* test in *Michael* and *Robinson,* the Supreme Court declared that the common law in this jurisdiction had *"abandoned the search for a general principle capable of providing a practical test applicable in every situation in order to determine whether a duty of care is owed, and if so, what is its scope"* (para 50.)

In this case, the Court determined, without the aid of any such *"universal touchstone"*, the issue of whether a local authority could owe a child a duty to keep him safe from the anti-social behaviour of third parties.

Background

1. The Claimants, who are two children (one of whom was disabled and under the care of a social worker) were housed by a local authority, with their mother, next door to a family which were known to the local authority to be anti-social.

2. The neighbours began a campaign of anti-social behaviour which the local authority tried to stem using its housing and anti-social behaviour powers, which included seeking committal to prison for contempt of injunctions etc.

3. One of the Claimants ran away from home and expressed suicidal ideation. The local authority allocated him the same social worker as the disabled child and eventually, five years after they moved in, agreed to rehouse the family elsewhere.

4. An action was brought against the local authority, seeking to hold it liable for the physical and psychological injuries alleged to have been caused by the anti-social behaviour of the neighbours during that five-year period.

5. Originally, the claim was brought on two limbs, first that the Council owed the family a duty in the exercise of its housing functions to protect them from anti-social behaviour and secondly, a duty arising out of its powers under the Children Act to keep the children safe from harm.

6. Master Eastman struck out both limbs applying *X v Beds* on the basis that no duty could arise out of the exercise of such statutory powers. Slade J restored limb 2 of the claim. The matter then came before the Court of Appeal, but with amended pleadings, which focused on a common law duty of care on the Council, in the context of their statutory duties, which arose because it had assumed a duty of care by investigating the family's case and becoming aware of the foreseeable risk of harm. The pleadings alleged a negligent investigation which should have (but did not) lead to a conclusion that the children should have been removed from their mother and taken into care to keep them safe from the neighbours' anti-social behaviour.

7. The Court of Appeal restored Master Eastman's strike out both on the basis of the *X v Beds* principle that the exercise of statutory powers do not

usually give rise to a duty of care and because it is unusual for liability to be imposed for the acts of third parties, absent special circumstances which were not present here.

The Result in the Supreme Court

8. Commendably there is only one judgment from Lord Reed DPSC, with which the President (Lady Hale PSC), Lady Black and Lords Wilson and Hodge JJSC agreed.

9. The end result is as follows:

"The particulars of claim in these proceedings do not disclose any recognisable basis for a cause of action. The complaint is that the council or its employees failed to fulfil a common law duty to protect the claimants from harm inflicted by their neighbours by exercising certain statutory powers. The relevant provisions do not themselves create a cause of action. Reliance is placed on an assumption of responsibility arising from the relationship between the claimants and the council or its employees, but there is nothing to suggest that those relationships possessed the necessary characteristics for an assumption of responsibility to arise. Furthermore, it is clear that the alleged breach of duty, namely a failure to remove the claimants from the care of their mother, has no possible basis. Although the court does not have before it all the evidence which might emerge at a trial, there is no reason to believe that the claimants could overcome these fundamental problems as to the legal basis of their claim. That being so, it is to the advantage of all concerned that the claim should not proceed to what would be a costly but inevitably fruitless trial." (para 91.)

10. To get to that result, Lord Reed had to stop off at a couple of major staging posts along the way:

"Recent developments in the law of negligence"

11. First stop along the way was a survey of all of the major caselaw over the last few decades relating to public authority liability, including crucially the decision in *X v Beds*.

12. Lord Reed reminded us that

> *"* Caparo *did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy."* (para 64)

13. He also noted that there is a big difference between harming a claimant and *"failing to protect the claimant from harm (including harm caused by third parties)"*.

14. He affirmed that public authorities are subject to these same principles as if they were private individuals *"except to the extent that legislation requires a departure from those principles."* (para 64)

15. He then set out a handy three-fold summary of the authorities to date:

> *"It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory*

powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to 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 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." (para 65)

X v Beds overruled in part

16. Lord Reed went on to explain that in so far as the Courts below are reading *X v Beds* as meaning that on the grounds of public policy alone, public authorities can never owe a duty of care in the context of the exercise of particular statutory powers, such as under the Children Act, that can no longer be regarded as good law because whether a duty of care is owed must not be determined on the grounds of public policy, but by application, in the relevant statutory setting of *"the general principles most recently clarified in the case of Robinson"* (para 74)

17. Which means that you start from the position that the public body may owe a duty of care just like a private person, and has no special public policy immunities, but when it comes to determining whether it does owe a duty of care, the Court is nevertheless entitled to take into account whether the proposed duty is *"excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers."* (para 75.)

No housing duty owed

18. Lord Read confirmed that there *"is a consistent line of authority holding that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour"*. (para 77)

No assumption of responsibility/special relationship

19. The Claimants asserted in this case that the duty of care arose because by getting involved, in investigating this family, monitoring their safety and discharging statutory duties, the local authority entered into some form of special relationship with the children and assumed a duty of care.

20. Lord Reed found that public bodies who offer a service to the public, often assume a responsibility for that service, like a NHS Trust and its medical services. But that is very different to *"the council's investigating and monitoring the claimants' position"* which *"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, in particular by re-housing them, 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*." (para 81).

21. He considered that the nature of the statutory powers being exercised in this case did not entail "*that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.*" (para 81).

22. Lord Reed went on to give guidance to judges such as Master Eastman in this case, who have to decide at a very early stage if they should strike out claims where it is said that the assumption of responsibility or other formulation of

a duty of care, will emerge from an investigation of the facts at trial, such that the claim should not be struck out prematurely.

23. Lord Reed stated "*that the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred."* But that *" In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred"*

Conclusion

24. Lord Reed summarised the position:

> *" I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. Although X (Minors) v Bedfordshire 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, as the Court of Appeal rightly held in D v East Berkshire, the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist."* (para 83.)

25. This is a very welcome restatement of the law in this area, especially following the decision to lay to rest the notion that *Caparo* created a three-part universal test, to be methodically applied in all cases.

26. It can also be seen as a very clear signal that this Supreme Court as presently constituted is going to shy away from denying duties of care on public policy grounds, which might be thought to be the preserve of another constitutional branch.

27. Out of respect for the legislator and the powers it confers on the executive however, the Court is going to take careful account of any relevant statutory context when deciding whether a duty is owed.

28. The judgment also provides the courts of first instance with confidence that they can and should strike out unmeritorious claims where no duty of care can be made out on the facts as pleaded. If no amount of disclosure or witness evidence can save the claim as pleaded, then the Court has a duty to summarily dispose of the proceedings, not least to save the costs which would otherwise be involved.

Adam Heppinstall[1]
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Cases Mentioned

Darnley v Croydon Health Services NHS Trust [2018] UKSC 50, [2018] 3 WLR 1153
Robinson v Chief Constable of West Yorkshire [2018] UKSC 4. [2018] AC 736
Michael v Chief Constable of South Wales [2015] UKSC 2, [2015] AC 1732
D v East Berkshire Community NHS Trust [2003] EWCA Civ 1151, [2004] QB 558
X (Minors) v Bedfordshire CC [1995] 2 AC 633
Caparo Industries v Dickman [1990] 2 AC 605

[1] Any views or opinions contained in this document are the author's own.