FEAR AND LOATHING IN DORSET: NO PUBLIC AUTHORITY DUTY TO PROTECT?

A family in reduced circumstances, consisting of a mother and two children, one severely disabled, moved onto a social housing estate. A group of teenagers, led by a neighbour’s children, played rough games of football near the family’s house, causing damage to the mother’s car. She asked them to stop. They responded with a campaign of abuse, more damage, spitting, indecent exposure and threats of stabbing. The mother successfully persuaded their landlord, a company to which the local authority’s housing functions had been outsourced, to evict the neighbour. But that only made matters worse. The neighbour was rehoused close by and the harassment and intimidation continued, including threats of violence, stalking, abuse and “bricks through windows, pets stolen, rabbits mutilated, grass put on people’s windows, tyres cut, tyres slashed” (C. Hayden and A. Nardone, “Moving in to Social Housing and the Dynamics of Difference: ‘Neighbours from Hell’ with Nothing to Lose?” [2012] Internet Journal of Criminology, at 7). The pressure on the younger child was so great that he attempted suicide. The mother turned constantly to the authorities. The police did little. The landlord facilitated the installation of protective equipment around the house but refused to help the family move. The local authority social services department also failed to help. The mother went to the media. That at least prompted a Home Office investigation, which heavily criticised the police and local authority. The mother and children then brought an action against the local authority, alleging common law negligence. The action was struck out by the Master. The High Court (Slade J.) restored a part of the action relating to the children’s claim against the local authority as a social services authority (*CN v Poole Borough Council* [2016] EWHC 569 (QB)). The Court of Appeal (Davis, King and Irwin LL.J.), restored the order of the Master ([2017] EWCA Civ 2185).

The claimants’ difficulty was that any civil action against the police was blocked by *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] A.C. 1732 and against the landlord or the local authority in its guise as housing authority by *Mitchell v Glasgow CC* [2009] UKHL 11, [2009] 1 A.C. 874. They nevertheless persisted, on the theory that the local authority should have removed the children from the family home and taken them to a safe place, using its powers under the Children Act 1989. The negligence action was legally possible, the claimants said, because of the Court of Appeal’s judgment in *D v East Berkshire Community NHS Trus*t [2003] EWCA Civ 1151, [2004] Q.B. 558, in which a social services authority was held to be in principle liable in negligence for wrongly removing children from their parents (a point not discussed in the subsequent appeal to the House of Lords [(2005] UKHL 23; [2005] 2 A.C. 373) on the different issue of liability to the parents. The Court of Appeal in *D* had declared the restrictive House of Lords decision in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 to have been superseded by the Human Rights Act 1998. The claimants said that *D* still bound the Court of Appeal. The local authority retorted, and the Court of Appeal agreed, that *D* was incompatible with subsequent House of Lords and Supreme Court authority, especially *Mitchell* and *Michael*.

As a strike out case, factual issues were strictly irrelevant, including whether attempting to use the Children Act powers would have worked, whether, given that using them implied separating children from their mother, not using them was unreasonable, or whether liability in negligence would make social workers unduly “defensive” in their work or would “complicate decision-making in a difficult and sensitive field” (at [94]). The judges, however, could not help referring to them (see Irwin L.J. at [94], King L.J. at [110-113] and Davis L.J. at [116-118]), just as they could not help conflating issues of duty and breach (see D. Howarth, “Negligence after *Murphy:* Time to re-think” [1991] C.L.J. 58, 72-81). The strict issue was legal. Has the highest court definitively held that no action in negligence is possible against a social services department for failing to exercise its powers to protect a child from injury inflicted by a third party?

The argument that *Mitchell* and *Michael* do rule out actions against social services departments is that they establish a rule that goes beyond the particular circumstances of housing authorities and the police, a rule that public authorities can only be liable in negligence when private individuals could be liable. That means, for example, that public authorities cannot be liable for pure omissions, including failures to warn of dangers (*Mitchell*) and failures to rescue or protect people from third party wrongdoers (*Michael*), unless the established exceptions apply, namely where the defendant had control over the third party or where the defendant had assumed a responsibility to safeguard the claimant.

Judges have certainly referred to such a rule. In *Michael*, for example, Lord Toulson said (at [101]) that “[t]hese general principles have been worked out for the most part in cases involving private litigants, but they are equally applicable where D is a public body”. The utility of this “equal applicability” rule is that it helps courts avoid saying that they are creating immunities to negligence and thus objections under Article 6 of the European Convention on Human Rights. But “equal applicability” might be too simple an explanation of the cases. To see why, we need to return to the reasons for excluding negligence liability in cases of pure omissions.

The principal reason is that liability for pure omissions is oppressive. As Lord Hoffmann said in *Stovin v Wise* [1996] A.C. 923 at 943, in a passage relied on in *CN*), “it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect”. Lord Hoffmann bolstered this point of political philosophy with what he called a moral argument (at 944):

A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?

The problem is that these reasons do not necessarily apply to public authorities. The pure omission rule is designed to protect the individual from the state, not to protect the state from individuals. It is a rule against compulsory altruism and arbitrariness. But why should we be concerned about the “freedom” of a public body? And is not the reason for picking on a publicly funded body to carry out a rescue precisely that it has been funded to carry out rescues?

The explanation for applying the pure omission rule to the state lies elsewhere: first, in the view that people should stand on their own two feet and not presume that they are entitled to assistance from the state; and, secondly, in the view that public authorities with limited budgets should not distort their priorities to reflect the risks of paying damages rather than meeting need. *Michael* exemplifies both reasons. *Mitchell* exemplifies at least the former.

But these two reasons are not applicable to all public authorities at all times. The first works for able-bodied adults with reasonable degrees of control over their own lives, but it does not work for people not in that position. The second works where the priorities implied by avoiding damages claims are different from those implied by meeting needs but not where the priorities implied by allowing negligence actions reinforce those established by legislation.

On the facts of *CN,* the first reason plainly fails – the claimants were vulnerable children, one of them disabled. They cannot reasonably be told to look after themselves or not to look to the state for protection. On the second reason, the problem in police cases is that minimising damages implies putting more effort into investigations involving rich victims. That problem does not apply to social services cases, in which the victims are either children or poor.

The Court of Appeal pointed to two further reasons for treating *D* as no longer good law. One was that, because of *Mitchell* and *Michael*, social services departments no longer have recourse against landlords and the police even if they were more blameworthy. But it seems unfair on victims to delete their remaining cause of action just because other ones have been deleted. Another response is that if damages under the Human Rights Act turn out to be available, contribution would be possible if the defendants are “liable in respect of the same damage” under the Civil Liability (Contribution) Act 1978, s. 1, Thar itself is, however, a potentially contestable point, since courts have said that the purpose of compensation under the Human Rights Act is different from that in tort (e.g. *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50; [2009] AC 225 at [138])and it is uncertain how in the light of such comments judges would apply the leading case on the meaning of “same damage”, *Royal Brompton Hospital NHS Trust v Hammond (No.3)* [2002] UKHL 14, which says, perhaps unhelpfully, that the words are to be taken without “glosses” and in their “natural and ordinary meaning” (Lord Steyn at [27]).

The second reason was that *D* was decided when courts still thought that negligence should bend to the Human Rights Act. Subsequently, most notably in *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11, [2018] 2 W.L.R. 895 (noted above), the Supreme Court has decided that negligence and human rights need not be consonant. But consonance being unnecessary does not entail that consonance is banned. Indeed, contrary to the idea that only one remedy should exist for each right, overlap can be helpful to ensure that meritorious cases do not slip through the gaps.

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