It's a fair cop: Supreme Court reviews duty of care

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(And a foot note on the Worboys Case)

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

SC (Lady Hale PSC, Lord Mance DPSC, Lord Reed JSC, Lord Hughes JSC, Lord Hodge JSC) 08/02/2018

Everyone who has passed through law school will remember the case about the snail in the ginger beer. Poor old Mrs Donoghue. A smaller number will recall *Caparo Industries Plc v Dickman* [1990] 2 AC 605, a much drier case all about accountants. The latest inheritor of tortious principles is poor Mrs Robinson, knocked down in a busy shopping street by a group of policemen arresting a drug dealer.

Since 1990 we should all have been reasonably clear about duty of care and when it arises. But many of us including, it appears, the Court of Appeal, are beset with "uncertainty and confusion" about it. At least that's the view of Lord Mance who gave the leading judgment of the Supreme Court in *Robinson*.

Mrs Robinson was 76 years-old and frail. The last thing she expected when she set out down a Huddersfield shopping street in 2008 was that she might be caught up in the arrest of a drug dealer by four plain clothes police officers and injured.

DS Neil Willan spotted the dealer Ashley Williams in a park and called for back up to effect an arrest. The officers decided to arrest Williams outside a bookmakers by two of them taking hold of him and the other two blocking his escape route.

The arrest began. Williams resisted and as the five men tussled they moved towards Mrs Robinson. Williams backed into her and knocked her down with the five men landing on top of her and injuring her. She sued for personal injury in negligence and also assault and trespass to the person occasioned by DS Willan.

Mr Recorder Pimm at first instance found the officers negligent, as they had foreseen that the suspect would try to escape arrest and the potential for harm to nearby individuals if he did, yet proceeded without noticing the appellant's nearby presence. Significantly, DS Willan had given evidence that he would have walked past Williams if any pedestrians were in harms way. He also stated they needed to make the arrest fast before Williams could dispose of his drugs and without him spotting they were police officers. Unsurprisingly given what Williams said about being aware of passers-by the Recorder held, that the police did have a duty of care towards Mrs Robinson and it was reasonably foreseeable she might be injured if they arrested Williams close to her. The blocking officers were too far away to be effective when the arrest began which meant they could not control Williams properly. However, the Judge held that *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 and *Desmond v Chief Constable of Nottinghamshire Police* [2001] EWCA Civ 3 conferred an immunity on the officers from negligence claims.

The Court of Appeal overturned the decision on liability. In the Court of Appeal, Hallett LJ considered that *Caparo* test applied to *"all claims in the modern law of negligence"* [40] and would only impose a duty of care if it was right to do so on the facts. She held that most negligence claims for acts and omissions by the police in the course of investigating and preventing crime would fail the third stage of that test: whether it was fair, just and reasonable to impose a duty. Hallett LJ suggested the only exceptions to this principle would be "outrageous negligence", activities outside the core functions of the police and where officers assumed some responsibility for a claimant.

The Court found also that Williams, not the officers, was responsible for the harm, so that the case concerned an omission, rather than a positive act. Of course, generally

there is no liability in negligence for omissions (see Lord Toulson in *Michael v Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732 at 97).

Curiously, Hallett LJ held there was no proximity between Mrs Robinson and the police officers, a point which appears to have aroused some puzzlement with Lord Reed who noted this was said: *"…notwithstanding that she had been injured when they fell on top of her"*! (To be fair to Hallett LJ both Sullivan LJ and Arnold LJ agreed with her).

The issues were summarised by Lord Reed as:

1) Does the existence of a duty of care always depend on the application of the Caparo test to the facts?
2) Is there a general rule that police are not under any duty of care when discharging their function of investigating and preventing crime?
3) Was this an omissions case?
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 duty were Mrs Robinson's injuries caused by the breach?

Lord Reed pointed out that in *Michael* Lord Toulson made it clear that the *Caparo* test was not a universal test but instead was meant to underline that duty of care must be based on precedent and authority (albeit that the categories of duty of care are not closed).

It followed *Anns v Merton London Borough Council* [1978] AC 728, which laid down that only reasonable foreseeability and public policy should limit liability in tort which led to a surge of cases where public authorities were found liable "progressively more divorced from common sense" (Lord Oliver of Aylmerton).

Hill was in fact stating that there as no universal test for duty of care. Proximity and fairness, concepts further developed after *Anns* were not capable of precise definition but were: *little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope"* (Lord Toulson at 617-618).

The approach in establishing duty was incremental based on established authorities as guidance to how novel situations might be decided (Lord Bridge in *Caparo*: *"It is preferable, in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories"* at 618). By example, after it is decided that auditors can be liable in negligence to the company they advise but not to the investors in that company, that will form the basis for the test for duty thereafter.

"It is normally only in a novel type of case, where established principles do not provide the answer that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised" (Lord Reed at 27). The recent snatch Land Rovers case of *Smith v Ministry of Defence (JUSTICE intervening)* [2013] UKSC 41 was an attempt to deal with novel legal issues (provision of protective equipment and the scope of combat immunity). Case law which is closely analogous should be part of the assessment of novel cases along with the use of the *Caparo* test resulting in an extension of the law of negligence. *Robinson* was not a case where that was required.

The authorities relevant to police liability go back to *Entick v Carrington* (1765) EWHC KB J98 (the King's Messengers smashing up a house in Grub Street while seizing seditious papers: a case which interestingly helped found the Fourth Amendment of the United States Constitution) and the Victorian constitutional expert Dicey: *"every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen"*.

They were in fact no different to private bodies/individuals but they would not be liable for omissions short of a statute giving a private right of action; or creating a danger of harm which would not otherwise have existed; or an assumption of responsibility for an individual's safety. *Anns* held local authority building inspectors liable for a third party builder's negligent building without any special circumstances applying and quite rightly it was ultimately overturned (*Stovin v Wise* [1996] AC 923).

Turning to the question of how to treat police in tort Lord Reed quoted Lord Keith (at 59 of *Hill*):

"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."

Lord Keith relied on numerous authorities (for example police attending an armed siege firing a CS gas canister into a building without fire-fighting equipment being on hand: *Rigby v Chief Constable of Northamptonshi*re [1985] 1 WLR 1242: Lord Reed this decision clearly contradicted the supposed rule that police are not liable for negligence in the course of suppressing crime).

So in *Hill* police did not owe a duty of care to a murderer's potential future victims to take reasonable care to apprehend him. But *Hill* was decided before Anns was overruled and so the second stage of Anns (public policy) led Lord Keith to find the police were immune from *"actions of this kind"* (63-64) i.e. future victims of murderers. He did not mean those suffering personal injury by virtue of negligence where ordinary private defendants would be found to owe a duty. The police were no different in that respect.

Lord Reed concluded:

1) Does the existence of a duty of care always depend on the application of the Caparo test to the facts? The answer was plainly no that was only relevant to novel situations.
2) Is there a general rule that police are not under any duty of care when discharging their function of investigating and preventing crime? No.
3) Was this an omissions case? No. It was the direct action of the police officers that led to Mrs Robinson's injury.
4) Did the police officers owe a duty of care to Mrs Robinson? The accident was not just reasonably foreseen but actually foreseen by the officers involved so yes they did owe her a duty of care.
5) If so was the Court of Appeal entitled to overturn the Recorder's finding that the officers failed in that duty? It was not a "heat of the moment" case and there was no absolute need to arrest Williams at that point so the Recorder's finding of negligence was correct.
6) If there was a breach of duty were Mrs Robinson's injuries caused by the breach? The question here was whether Williams' actions in resisting arrest was *novus actus* and broke the chain of causation? It was absurd to hold that the officers

owed a duty to Mrs Robinson not to arrest Williams when he was too close to her and then to hold that the very danger foreseen as creating the risk of injury broke the chain of causation. Their negligence did cause her injuries.

So where does that leave us? The police are clearly not immune to personal injury suits in normal circumstances; Caparo is not the first port of call rather we should be seeking out appropriate precedents for the individual case; "agony of the moment" cases may still be outwith any duty of care; direct actions creating risk of injury provide more than enough proximity and do not break the chain of causation. No doubt there will be further arguments about defensive policing although which was a risk Lord Hughes recognised in *Robinson*. But defensive behaviour in the face of the risk of litigation is a general one in society and, it seems from *Robinson*, is simply something we must all cope with given the state of the current law.

Footnote: ***Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)*** **[2018] UKSC 11**

In relation to the question of whether there is liability for police failing to investigate crimes effectively the Supreme Court in *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11, held that the Metropolitan Police were liable for a breach of Article 3 of the European Convention on Human Rights for failures to conduct investigations effectively into a a large number of sexual offences committed by the London black cab driver John Worboys. However, the Court made clear that this is a very different matter to breach of duty to that under the common law. Lord Kerr stated at [68-69] that the bases of liability were different:

importantly, no assumption should be made that the policy reasons which underlay the conclusion that an exemption of police from liability at common law apply mutatis mutandi to liability for breach of Convention rights. In Michael much of the debate as to whether 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. No such considerations arise in the present context. The issue here is simple. Did the state through the police force fail to comply with its protective obligation under article 3?"

It seems clear that a breach of the Convention will not therefore of itself found an action under the common law. Claimants would of course be well advised to consider an action pursuant to Article 3 as an additional or alternative route to claim damages and the writer anticipates the Worboys case will lead to a significant increase in cases brought for failure to investigate effectively. Lord Hughes at [136] noted he expected the judgment to lead to litigants seeing Convention actions as a substitute for tort based claims.

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

Hill v Chief Constable of West Yorkshire [1989] A.C. 53.

Desmond v Chief Constable of Nottinghamshire Police [2001] EWCA Civ 3.

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

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

Smith v Ministry of Defence (JUSTICE intervening) [2013] UKSC 41.

Stovin v Wise [1996] AC 923.

Rigby v Chief Constable of Northamptonshire [1985] 1 WLR 1242.

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