Case Comment

Robinson v Chief Constable of West Yorkshire

personal injury - liability - negligence
(CA (Civ Div), Hallett L.J., Sullivan L.J., Arnold J., February 5, 2014, [2014] EWCA Civ 15)

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Cases: Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15; [2014] P.I.Q.R. P14 (CA (Civ Div))
Caparo Industries Plc v Dickman [1990] 2 A.C. 605; Times, February 12, 1990 (HL)
Hill v Chief Constable of West Yorkshire [1989] A.C. 53 (HL)

J.P.I.L. C68 On July 29, 2008, a man called Williams was dealing in Class A drugs in a busy street in Huddersfield. He was spotted by DS Willan who, with the agreement of a senior officer, decided to make an arrest as quickly as possibl—in particular, whilst Williams was still in possession of the drugs. DS Willan called for backup and concluded the arrest had to be made on the street. The intention was to have two officers approach Williams from the front and two others from the rear in a pincer movement to try to prevent escape. Williams was to be seized, pushed against an adjacent wall, restrained and arrested.

The claimant, Mrs Robinson was walking up the same road. Within a very short time of her passing Williams and his group, two "well built" officers in plain clothes approached, revealed themselves as police and seized hold of Williams. Unfortunately, Williams then struggled so violently, his momentum took the group up the street towards Mrs Robinson. They knocked into her and all fell to the ground with Mrs Robinson underneath. It took three seconds for the other two officers to reach the melee. Others tried to intervene in the arrest and to get rid of the drugs. This was all captured on Closed Circuit Television footage.

Mrs Robinson was injured and, by a claim form dated July 11, 2011, she sued the local Chief Constable for damages for personal injury. The judge found that there had been negligence, although not outrageous negligence, on the part of the police officers involved in the arrest, but that the immunity from suit for officers engaged in the apprehension of criminals applied. Accordingly, despite the finding of negligence, the claim was dismissed. Mrs Robinson appealed.

She argued that the judge was wrong in law to apply the three-stage test in *Caparo Industries Plc v Dickman* [1] where the case involved direct physical harm. She contended that public policy considerations did not arise and there was no need for the court to ask itself whether it was fair, just and reasonable for the action to proceed. She also contended that he was wrong in law to apply a blanket immunity and to find that it required "outrageous negligence" to defeat the principle in *Hill v Chief Constable of West Yorkshire*.[2]

The Court of Appeal confirmed that the basic principle was that, where there was a wrong, there should be a remedy. However, they held that there were cases where it would not be fair, just and reasonable to impose a duty of care and the interests of the public at large could outweigh the interests of the individual allegedly wronged. They held that the *Caparo* test applies to all claims in the modern law of negligence, and is reflected in all the most recent appellate decisions which addressed in turn, whatever the nature of the harm, the issues of foreseeability, proximity and whether it was just and reasonable to impose a duty.[3]

The court further held that the *Hill* principle was designed to prevent defensive policing and better protect the public. They stated that it would fundamentally undermine that objective to make the police liable for direct acts but not indirect acts, and would encourage the police to avoid***J.P.I.L. C69*** positive action for fear of being sued. The general principle was that most claims against the police in negligence for their acts or omissions in the course of investigating and suppressing crime and apprehending offenders would fail the third stage of the *Caparo* test.

They held that it would not be fair, just and reasonable to impose a duty where the courts had concluded that the interests of the public would not be best served by imposing a duty to individuals.[4] However, they confirmed that the *Hill* principle did not impose a blanket

immunity. While there was no definitive list of possible exceptions, there were exceptional cases in which the police did owe a duty of care even when suppressing and investigating crime.[5]
In principle, although there was sense in exempting cases of outrageous negligence on the basis no one wished to encourage grossly reckless police operations, such claims would be on the margins. A careful analysis of the case law would provide a sufficient degree of certainty. Accordingly, the *Caparo* test did apply to this case.
They held that it would not be fair, just and reasonable to impose a duty on police officers doing their best to get a drug dealer off the street safely. The judge recognised that there were a number of exceptions to the *Hill* principle and only considered whether outrageous negligence was present because the parties had addressed him on it. He did not find that a finding of outrageous negligence was the only way in which the principle could be defeated. The *Hill* principle did not apply in general to the law of negligence and to the facts of this case. They decided that the findings of the judge that a duty existed and that there was a breach were unsustainable.
The appeal was dismissed.

Comment

The two main issues addressed during the appeal were the extent to which the three-stage test in *Caparo* applied to the facts of this case, and, secondly, the circumstances in which the police immunity arising from *Hill* could be disapplied.
The Court of Appeal decided that the trial judge was right to have applied the *Hill* immunity pursuant to which the claim failed, but wrong to have considered that there was sufficient proximity between the police and Mrs Robinson to impose a duty of care; and wrong to have found that if a duty existed it was actually breached. There was some censure of the trial judge for criticising the officer's handling of the operation when he was not an expert in the arrest and detention of suspects.
For public interest reasons, the court were rather forthright in their support of the immunity afforded generally to the police. They concluded that risk to society from (serious?) crime outweighs risk to unfortunate passers-by. Thus, the case provides significant support for police forces defending negligence claims.

Duty of care and the Caparo test

It should be well known to all personal injury lawyers that in *Caparo* the House of Lords modified the neighbour/foreseeability test for individual cases of breach of duty into a three-stage test, namely a requirement for:

- the foreseeability of damage;
- a relationship of "proximity"; and
- that the court should consider it fair, just and rea***J.P.I.L. C70*** sonable to impose a duty.

In arguing that the third limb of the *Caparo* test did not apply to cases where the claimant suffered *direct physical harm*, counsel for Mrs Robinson sought an interpretation of the law which would have had a wide impact on the law of negligence generally, and which would have been of particular concern to the public sector, including the Emergency Services, Local Authorities, and the MOD, to name a few.
Mrs Robinson's counsel relied, in part, on a recital of first principles to support her argument, stating that *Caparo* was confined to cases of indirect harm, indirect economic loss, or psychiatric harm.[6] It was suggested that the higher degree of moral culpability in cases of direct harm meant that all that ought to be required to impose a duty of care was reasonable foreseeability and proximity. It followed that considerations of public policy did not apply.
Their Lordships were unequivocal in rejecting these submissions, pointing towards the judgment of Lord Steyn in *Brooks v Commissioner for Police*, namely that the distinction between direct and indirect harm was "unmeritorious".[7] It was held that although there was a qualitative difference, this would only operate to "colour the court's attitude to deciding when it is fair, just and reasonable to impose a duty. It will not mean that claims one side of the line must fail and claims on the other may proceed."[8] Their Lordships confirmed that the starting point for *all* claims in the modern law of negligence was the *Caparo* test, and Hallett L.J. swept aside argument to the contrary with irrefutable logic, stating that:
"the idea that the Common Law would impose a duty, in circumstances where it is unfair unjust and or unreasonable to do so, is to my mind nonsensical."[9]

There is, perhaps, a risk of over-simplification in this statement, as determination of "fair just and reasonable" can clearly be a matter of some complexity, centred as it is on issues of public policy. There are clearly many considerations to be taken into account. As Lord Browne-Wilkinson once said:

"In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered." [10]

By its judgment, the Court of Appeal put paid to any notion that a different test for the imposition of a duty of care should apply to direct harm as opposed to indirect harm, economic loss, psychiatric harm, or omissions.

As regards "proximity", Hallett L.J. said:

"'Proximity' in the context of a police officer is intended to reflect some kind of relationship between [the claimant and the police] above and beyond the duty owed by them to the public in general. The most obvious example would be the assumption of care as in the handling of an informant. There is nothing of that kind here."

She did not believe this special proximity existed in this case.

The Hill principle

Coincidentally, the defendant in this appeal (Chief Constable of West Yorkshire) was also the defendant in the *Hill* case. In *Hill*, one of the two grounds upon which the House of Lords dismissed the claim ag***J.P.I.L. C71*** ainst the police was that, as a matter of public policy, the police were generally immune from actions for negligence in respect of their activities in the investigation and suppression of crime (the *Hill* principle). The justification for the *Hill* principle was restated by Hallett L.J., who said that:

"provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street. It will be little comfort to Mrs Robinson, but the risk to passers-by like her is trumped by the risk to society as a whole."

It was accepted, however, that the police did not enjoy blanket immunity from suit. This was apparent from the previously successful claims of *Knightley v Johns* [11] (where a police inspector's failure to close a tunnel caused an accident when he ordered a subordinate to drive through the tunnel against oncoming traffic) and *Rigby v Chief Constable of Northamptonshire* [12] (where an officer fired a CS gas canister into a shop whereupon a real and substantial risk of fire materialised). However, their Lordships were reluctant to view these cases as providing examples of "outrageous negligence".

Instead, they were framed as cases where a special *assumption of responsibility* by the police had imposed a duty of care.[13] Indeed, one of the appeal court, Arnold J., appeared to doubt that "outrageous negligence" was capable of imposing a duty of care on the police and suggested that any analysis of *Rigby* on that basis was unconvincing.[14] Hallett L.J. was more reserved in her approach, accepting in principle that "outrageous negligence" may justify a departure from *Hill* as there was a public interest in discouraging reckless police operations. However, she expressly declined the opportunity to provide guidance or examples of when such cases may arise, simply stating they would be "on the margins".[15]

It is worth clarifying, however, that the *Hill* principle does not apply to non-core police activities, for example traffic management decisions.[16] The extent to which the combat immunity cases (*Smith v Ministry of Defence* [17]) might have a bearing on such issues has yet to be determined.

In conclusion, this case does not lay down any new principles of law, but clarifies—in case there were any doubt—first, that *Caparo* has become part of the general law and that it is to be applied to cases of direct injury as well as indirect harm; and secondly, that the circumstances in which the police will be deemed to owe a duty of care to individual members of the public in performing their core functions will be rare. No definitive list of exceptions to the *Hill* principle has been given. Practitioners contemplating actions in negligence against the police will need to consider very carefully whether the cause of action arises out of a non-core police activity and/or whether it can be properly argued that there has been a particular assumption of care to the individual—such as to an informer.

Practice points:

- The starting point for establishing a novel duty of care in all claims in negligence is the three-stage *Caparo* test.
- There is no distinction between direct and indirect harm in the application of the *Caparo* test, though the nature of the harm caused may be relevant when determining whether it is fair, just and reasonable to impose a duty of care.
- Claims in negligence against the ***J.P.I.L. C72*** police for injury during the performance of core and operational activities will only succeed in very limited circumstances, as in general they do not owe a duty of care to members of the public.
- The *Hill* principle may be disapplied where there has been an assumption of responsibility by the police sufficient to establish the necessary "proximity". Proximity and the fair, just and reasonable test are very much bound together.
- The *Hill* principle does not apply to non-core activities of the police (e.g. traffic management).
- Breach of duty by the police may be hard to establish and there will need to be credible expert evidence as to the standards of care of a reasonably competent police officer.

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J.P.I. Law 2014, 2, C68-C72

1.
Caparo Industries Plc v Dickman [1990] 2 A.C. 605.
2.
Hill v Chief Constable of West Yorkshire [1989] A.C. 53.
3.
Caparo Industries Plc v Dickman [1990] 2 A.C. 605 applied.
4.
Brooks v Commissioner of Police of the Metropolis [2005] UKHL 24 and *Van Colle v Chief Constable of Hertfordshire [2008] UKHL 50* applied.
5.
Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242 considered.
6.
See discussion of *Donoghue v Stevenson [1932] A.C. 562* at [5] and [6].
7.
Brooks v Commissioner for Police [2005] All ER 489 at [32].
8.
Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15 at [44].
9.
Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15 at [41].
10.
Barrett v Enfield LBC [2001] 2 A.C. 550 at [558].
11.
Knightley v Johns [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851.
12.
Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242; [1985] 2 All E.R. 985.
13.
See Hallett L.J. on *Knightley v Johns [1982] 1 W.L.R. 349* at [50] and Arnold J. on *Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242* at [66].
14.
Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15 at [66].
15.
Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15 at [49].
16.
As in *Knightley v Johns [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851* (see *Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ 15* at [50]).
17.
Smith v Ministry of Defence [2013] UKSC 41.