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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

C (A PERSON UNDER A DISABILITY)

Plaintiff;

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant.

GILLEN J

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Summary

The plaintiff is a vulnerable young woman who was raped on 16 June 2007. She has sued the PSNI for personal injuries suffered by her on account of the negligence of,

and breach of her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms by, the PSNI in the course of a flawed investigation of this rape. The issue now before the court is whether, before serving his defence, the defendant can strike out her claim on the basis that as a matter of public policy actions for damages will not lie against the police so far as concerns their functions in the investigation and suppression of crime save in exceptional circumstances.

Introduction

[1] This is an appeal against an order by Master McCorry dismissing an application by the defendant pursuant to Order 18 Rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 to strike out the plaintiff's claim on the basis that the pleadings disclose no reasonable cause of action.

[2] Within days of the conclusion of my hearing this appeal on 20 February 2014, and whilst I was in the course of writing my judgment, the High Court in England and Wales handed down a judgment in DSD and NVB v Commissioner of Police for the Metropolis [2014] EWHC 436 (QB) ("DSD") which I considered relevant to the issues in this matter. I therefore afforded counsel a further opportunity to address me on the impact of this decision on the instant case.

[3] In the course of my researches I also encountered, and again referred to counsel, an article in the Modern Law Review (2013) 76 "Negligence and Human Rights Law: The Case for Separate Development" dealing with the concept of convergence between the common law and the rights that arise from the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (as set out in Schedule 1 to the Human Rights Act 1998) (hereinafter "the Convention"). Mr Girvan, who appeared on behalf of the plaintiff, and Mr McMillen QC, who appeared on behalf of the defendant, furnished me with well argued and analytically rigorous written submissions and oral argument on these fresh issues.

[4] At a subsequent hearing, and in the wake of DSD, on the consent of the parties I granted leave to the plaintiff to amend the Writ of Summons and Statement of Claim to include a claim for breach of Article 3 of the Convention in addition to the claims for negligence and breach of Article 8 of the Convention already pleaded. It was agreed between counsel that the defendant would not oppose such an amendment on the basis that the defendant would have the right to argue any limitation point that existed at the time of the original writ and in particular to maintain the right to argue that the primary limitation period set out at section 7(5)(a) of the Human Rights Act 1998 had expired by the time this Writ/Statement of Claim was amended. The plaintiff has acknowledged that the defendant is entitled to make this argument. The parties invited me to make this amendment administratively in light of the agreement entered into between them but out of an abundance of caution and because I envisaged logistical difficulties in effecting this

step, I convened a further meeting and obtained the express agreement from both counsel on this matter.

Background

[5] At the time of the service of the Statement in Claim in July 2013 the plaintiff was a 25 year old woman who suffers from Asperger syndrome, autism and other mental problems. She does not have the capacity to act on her own behalf in these proceedings.

[6] At paragraphs 2 -5, the Statement of Claim alleges as follows:

> "2. The plaintiff was raped on 16th June 2007. A complaint was made to the defendant. For the avoidance of doubt, by raising a complaint in respect of the rape with the defendant thereby (sic) entered a relationship of proximity for the purposes of the common law. As a result of the manner in which the defendant carried out the investigation no prosecution was brought against the perpetrator of the rape. The plaintiff and her family were extremely upset and distressed by the manner in which the Defendant carried out the investigation. She made a complaint to the Police Ombudsman for Northern Ireland. The Police Ombudsman found the following:
>
> (i) While police officers initially visited the location where it was believed the rape had taken place, they did not seek to seize any possible CCTV footage and did not conduct house to house inquiries to seek further witnesses.
>
> (ii) The plaintiff had advised that she believed that she had left personal belongings at the locus where she was raped, however, no attempt was made by the defendant, its servants or agents, to follow this up;
>
> (iii) The plaintiff's mother advised the defendant that her daughter's diary may contain relevant information in relation to the rape; however, again, no attempt was made by the defendant to retrieve this book;

(iv) The plaintiff's mother advised the defendant that she believed that her daughter had received text messages asking her not to proceed with her allegation of rape. The defendant did not follow this up.

(v) The defendant did not initially take any statements from the people who were with the plaintiff on the night of the rape, from anyone at the complex where the rape was said to have taken place or from anyone in the taxi firm the plaintiff used to get home;

(vi) The plaintiff was not interviewed until 6 months after she had been raped – this is … an unacceptable period of time.

3. As a result of the failings of the defendant's investigation, a number of recommendations for the improvement of the Police investigation of allegations of rape and other serious sexual assault were made. New guidelines have been produced on the investigation of rape and the introduction of a specialist Rape Investigator's court.

4. The conclusion of the Police Ombudsman was that '… The PSNI investigation of C's rape was neither full nor proper. It did not meet the basic principles of investigation … The Police Ombudsman has recommended that our police officers be subject to disciplinary sanctions in relation to the investigation of C's rape'.

5. Sir Hugh Orde, Chief Constable of the defendant stated in a letter to the plaintiff and her family.

> `In this case I believe it is only right that I offer an apology, not only to C, but also to the wider family for any distress which may have been caused'."

[7] The plaintiff therefore seeks damages on account of the defendant's breach of the Human Rights Act 1998 and the Convention and negligence of the defendant in the course of a failure to investigate the rape of the plaintiff. It is alleged that she has

suffered extreme upset, distress and psychiatric injury including self-harming, acute depression, psychotic symptoms and an eating disorder.

Order 18 Rule 19(1)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules")

[8] Where relevant these Rules provide as follows:

> "The court may at any stage of the proceedings order to be struck out or amended any pleading to the endorsement on any writ in the action or anything in any pleading or in the endorsement, on the ground that:
>
> (a) It discloses no reasonable cause of action or defence as the case may be …. and may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be".

Principles Governing Strike Out under Order 18 Rule 19(1)(a)

[9] The principles governing this order are well trammelled and were not the subject of dispute in this case. Relevant principles can be summarised as follows:

(i) For the purposes of the application all the averments in the Statement of Claim must be assumed to be true (O'Dwyer v Chief Constable of the RUC [1997] NI 403 at 406(c)).

(ii) The summary procedure for striking out pleadings is to be used only in plain and obvious cases.

(iii) Courts should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim (Lonrho plc v Tebbit [1991] 4 All ER 973 at 979H).

(iv) The burden is on the defendant to show that the plaintiff's case is "unarguable or almost incontestably bad". The fact that the plaintiff only enjoys a weak case is not sufficient to justify striking it out (Rush v PSNI and Secretary of State for Northern Ireland [2011] NIQB 28).

(v) The matter must be decided on the face of the pleadings without evidence as set out in Order 18 Rule 19(2).

The Convention

[10] Article 3 of the Convention provides that no-one shall be subjected to inhuman or degrading treatment or punishment.

[11] Article 8 of the Convention provides for the right to respect for private and family life except such as is in accordance with the law and is necessary in a democratic society in the interests of … the prevention of disorder or crime or for the protection of the rights and freedoms of others.

[12] Under Section 6 of the Human Rights Act 1998 ("HRA") it is unlawful for a public authority to "act in a way which is incompatible with a Convention Right". Clearly the defendant in this case is a public authority. It follows that it is unlawful for the defendant to act in a way that is incompatible with Articles 3 and 8 of the Convention.

[13] Section 7 of the HRA empowers victims of violations to bring proceedings before the courts and Section 8 confers upon the Courts the power to grant appropriate relief including damages.

DSD and NBV v the Commissioner of Police for the Metropolis [2014] EWHC 436 (QB)

[14] As indicated above, this judgment was handed down by Green J a few days after the termination of this appeal. The plaintiffs in that action sought declarations and damages against the defendant Commissioner for an alleged failure to conduct an effective investigation into their allegations of sexual assault. The plaintiffs were among the victims of the so called 'Black Cab Rapist' who over a six year period between 2002 and 2008 had committed more than 100 drug and alcohol assisted rapes and sexual assaults on women whom he had been carrying in his cab. Both the plaintiffs complained to the police who commenced investigations, but failed to bring the rapist to justice until 2009. The issue was whether the HRA imposed a duty on a public authority, such as the police, not to act in a way which was incompatible with a Convention right. The plaintiffs submitted that the Commissioner had failed to conduct an adequate investigation which amounted to a breach of their rights under Article 3 of the Convention.

[15] Whilst the court accepted that the police are immune from claims for negligence as a matter of common law, after having exhaustively reviewed Strasbourg case law, Green J concluded at paragraph [212]:

> "First, Article 3 of the Convention imposes a duty upon the police to investigate which covers the entire span of a case from investigation to trial. The purpose behind this duty is to secure confidence in the Rule of

Law in a democratic society, to demonstrate the State is not colluding with or consenting to criminality and to provide learning to the police with a view to increasing future detection levels and preventing future crime. The investigations must be independent, impartial and subject to independent scrutiny.

Secondly, the duty is not conditional upon the State being guilty directly or indirectly of misconduct. Cases involving the infliction of violence by private parties upon victims in the custody or control of the State are treated as cases where the State bears some responsibility for the violence. It arises also in cases where the police are entirely free of any responsibility for the infliction of the violence which must exist before a prima facie violation of Article 3 can arise.

Thirdly, the duty is triggered where there is a credible or arguable claim by the victim that a person has been subjected to treatment at the hands of a private party which meets the description of torture or degrading or inhuman treatment in Article 3.

Fourthly, allegations of crime that are grave or serious will amount to torture or degrading or inhuman treatment. Rape and serious sexual assault will fall within this category.

Fifthly, where a credible allegation of a grave or serious crime is made, the police must investigate in an efficient and reasonable manner which is capable of leading to the identification and punishment of the perpetrator.

Sixthly, the duty is one of means, not results, i.e. the police will be in breach of Article 3 if the conduct (the means) of the inquiry falls below the requisite standard.

Seventhly, whether a breach has occurred is measured by viewing the conduct of the police over a relevant timeframe. Ordinarily, this will be measured by the time span from the assault on the claimant to the last point in the criminal process. There is however no reason why it cannot span the police

> investigation from the first point in time that evidence comes to police attention of a person's offending until the last point in the process."

[16] The court made the following additional determinations:

- The assessment of the efficiency and reasonableness of an investigation also takes into account whether the offender was adequately prosecuted.
- The mere fact that a civil claim against the offender has succeeded and/or that disciplinary measures have been taken against defaulting officers is not sufficient to expunge liability under Article 3 since it requires an effective criminal investigation.
- Investigative failings may be systematic or operational.
- The process of determining whether an investigation was reasonable or capable of leading to the apprehension, charge and conviction of a suspect is a fact sensitive exercise.

[17] Green J at [225] (iv) added:

> "Vulnerability:
>
> In a number of cases the court has also referred to the vulnerability of the category of person who was subjected to the violence. This has been especially evident in cases where violence was perpetrated against ethnic minorities. … the claimant has argued that victims of sexual assault (predominantly women) are a vulnerable category … however, in practice it is hard to see how this fits in to the legal framework of analysis and how it could work. … in those cases where vulnerability has been referred to the tenor of the analysis is to emphasise that although each state enjoys a margin of appreciation in the choice of means (of investigation) where the victim is especially vulnerable the Court might take this into account in determining whether an effective investigation was in fact carried out. … It appears to be a contextual factor which a court will take into consideration in assessing the application of the test to the facts of a given case."

[18] In DSD's case there had been systemic failings due to failure to provide:

- proper training supervised and managed,
- properly used intelligence sources,
- proper systems to ensure victim confidence

- adequate resources
- adequate interviews of vital witnesses,
- a collection of key evidence,
- a follow up on CCTV,
- proper preparation for interviews with the suspect etc.

The effect of DSD on this application

[19] Characteristically, Mr McMillen did not waste the time of the court and immediately recognised that the advent of DSD rendered an action in the instant case based on Article 3 of the Convention at least arguable. An application to strike out such a pleading is clearly unlikely to succeed in this instance.

[20] Having therefore permitted the amendment to include Article 3 in the pleadings on the consent of the parties in the circumstances set out in paragraphs [3] and [4] above there is no need for me to go further therefore than to recognise that insofar as the Writ and Statement of Claim rely upon Article 3 of the Convention in the instant case, this case must be permitted to proceed.

[21] I consider that no purpose would normally have been served by preserving the claim under Article 8 in this instance. As in the case of DSD it is difficult to conceive of any circumstances in the instant case in which Article 8 of the Convention would provide a broader level of protection that is accorded by Article 3. I respectfully agree with Green J when he said at paragraph [242]:

> "In none of the Strasbourg Authorities has the Court treated Article 8 as having an effect extending beyond Article 3. This is logical. Article 8 is a circumscribed obligation which is subject to competing interests. It has, by its very nature, a more limited ambit than Article 3 which is clear, unequivocal and brooks of no exception."

[22] Normally I would have therefore recognised that the overriding objective governing litigation in the High Court – enshrined in Order 1 Rule 1A of the Rules of the Court of Judicature (NI) 1980--would require the court to deal with this case in a manner appropriate to the importance of the case and not waste time with an Article 8 exploration. However, I shall stay my hand in this instance in light of the fact that the defendant has maintained a limitation point with reference to the amendment to include Article 3 and consequently it is possible that the only Convention right that the plaintiff may be able to rely on will be Article 8. In the circumstances therefore, I have determined that I shall not strike out the Article 8 pleading.

The Common Law

[23] A claim in the tort of negligence depends on the existence of a "duty of care" owed by the defendant to the plaintiff. Where a plaintiff can show foreseeability of damage and a relationship of proximity with the defendant, a duty of care will be imposed provided the court is satisfied that it is "just and reasonable" to impose such a duty. This requirement involves considerations of "public policy".

[24] One of the first areas in which immunity in this type of case was recognised was in relation to police investigations. Hill v Chief Constable of West Yorkshire [1989] 1 AC 53 provides, as a matter of public policy, that actions for damages for negligence will not lie against the police "so far as concerns their function in the investigation and suppression of crime".

[25] In recent years some judicial doubt has been expressed about the scope of Hill by the House of Lords in Brooks v Commissioner for Police for the Metropolis [2005] 1 WLR 1495 and Van Colle v Chief Constable of Hertfordshire Police [2008] 3 WLR 593. Lord Nicholls in Brooks said there may be:

> "Exceptional cases where the circumstances compel the conclusion that the absence of remedies sounding in damages would be an affront to the principles which underlie the common law. Then the decision in the Hills case should not stand in the way of granting an appropriate remedy."

[26] However, Van Colle's case makes clear that it was the view of the House of Lords that it was a core principle of public policy that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals from harm caused by criminals since such a duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole.

[27] The Hill principle does not impose blanket "immunity". The extent to which that principle may be dis-applied has not been the subject of a definitive list of possible exceptions.

[28] I respectfully adopt the approach of Hallett LJ in Robinson v Chief Constable of West Yorkshire Police [2014] EWCA Civ 15 (a case where a claimant was injured when she was innocently caught up in the arrest of a drug dealer in a busy street) when she summarised the position as follows at [49]:

> "As to the extent of the principle (*ie the Hill principle*) and guidance on when it may be dis-applied, no judge, as far as I am aware, has attempted a definitive

> list of possible exceptions. I shall resist the temptation to be the first. Lord Steyn in (*in Brooks v Commissioner for Police [2005] All ER 489*) when raising the question of what might amount to a case of "outrageous negligence" and fall outside the Hill principle stated in terms that it would be "unwise to try to predict accurately what unusual cases could conceivably arise (paragraph 34)". Also, Lord Carswell in Van Colle had his doubts about a separate category of "outrageous negligence" and no other judge has adopted it. In principle, therefore, I can see the sense in exempting cases of outrageous negligence on the basis no one wishes to encourage grossly reckless police operations. I prefer to consider such claims as being on the margins.
>
> [50] Other claims which may not offend the Hill principle include those which do not relate to core functions e.g. claims based on negligent traffic management decisions and claims where police officers have assumed responsibility for a claimant. I appreciate that practitioners would prefer the courts to go further and provide greater guidance than these broad categories of when it will be fair, just and reasonable to impose a duty. But, in my view, a careful analysis of the case law should provide a sufficient degree of certainty."

The submissions of counsel

[29] In the instant case, Mr Girvan submitted that:

- the classification of this plaintiff as a vulnerable adult suffering from Asperger syndrome, autism and other mental problems so that she is unable to bring these proceedings, and
- the nature of the offence, namely rape,
- the circumstances where she is alleging that the defendant harassed the plaintiff, made derogatory comments to the plaintiff and failed to provide any counselling or support for her,
- the patent defects in the investigation,
- the presence of a potential breach under Article 3 of the Convention must impact upon the public policy arguments that underpin the Hill principle and should inform the approach in this case.

[30] Counsel contended that these all serve to elevate this case into the exceptional case or special circumstances or outrageous negligence category which provide a basis to dis-apply the core principle of Hill.

[31] Mr McMillen countered these arguments by submitting that:

- witnesses and victims do not constitute a special class or category of individual who has an elevated status or relationship with the police (per the House of Lords in Van Colle's case).
- sexual offences cause immense suffering to all victims including those who are often vulnerable. This case is no different.
- It is only in cases where the police have made positive operational decisions rather than investigative decisions that exceptions to Hill have been found.
- to impose liability in the instant case would be to defeat the public policy basis of the Hill principle and the need to avoid defensive policing.
- in any event there was basis for asserting that the plaintiff's specific type of harm or reaction was reasonably foreseeable should the police fail to investigate the matter properly.
- the plaintiff is not without remedy e.g. criminal injury compensation /judicial review of the police actions/invocation of the police complaints procedure or even private prosecution of the alleged rapist.

Discussion

[32] The concept of the convergence of the law of negligence with human rights law under the Convention is considered in an article by Donal Nolan, a Fellow Tutor in law at Worcester College, Oxford in the Modern Law Review Volume 76 No.2 March 2013 p286.

[33] Mr Nolan challenges the argument in favour of convergence, arguing that human rights and negligence perform different functions within our legal order and that the norms of human rights are not more fundamental than the norms encapsulated in negligence law. Convergence would undermine the coherence of negligence law and ultimately the case for separate development rests on the desirability of recognising public law and private law as autonomous normative systems with their own distinct rationales, concepts and core principles.

[34] This thesis follows the thinking embraced in such leading text books as Clerk and Lindsell on Torts 20th Edition where the author states at 14-91 and 14-92 respectively:

> "The common law has in some instances responded to Convention Rights, but the more recent trend is towards separation of the actions.

> Despite early indications in D v East Berkshire NHS Trust [2004] QB 558 (*concerning the acceptance of a duty to children as a direct result of the European Court decision in Z v UK [2002] 34 EHRR*) that the law of tort would adapt to protect Convention rights more thoroughly, the recent trend has been towards conceptual separation between actions in tort and under the Convention. There is a developing understanding that remedies under the Human Rights Act 1998 are appropriate to the purposes of the statute as a whole and that there is no need to introduce major changes in the tort law in order to protect the same Convention rights through different means."

[35] On the other hand the courts have been able to take account of obligations under the Convention in the development of the common law and the interpretation of legislation.

[36] In R (on the application of West v Parole Board [2005] 1 WLR 350 the circumstances in which determinate sentence prisoners recalled to prison were entitled to an oral hearing before the Board was considered. The court took the common law as its starting point, and considered judgments in the European Court, together with judgments from a number of common law jurisdictions, in deciding what the common law required. It went on to hold that the Board's review of the prisoner's case would satisfy the requirements of Art 5(4) of the Convention provided it was conducted in a manner that met the common law requirements of procedural fairness. (See also Osborn v Parole Board [2013] UKSC 61 per Lord Reed at [57]).

Conclusion

[37] I am satisfied that the advent of Article 3 and its relevance to this case does not necessarily alter the core principle set down in Hill. Human rights under the Convention and negligence may well perform different functions within our legal order. Nonetheless I suspect that the last drop of ink has not been spilt on this issue.

[38] However, at this stage I am unable to conclude that a breach of Article 3 may not at least be a contextual factor and arguably help to inform the issues at common law in this case. In particular it may feed the argument that the facts of this case fall within the list of possible exceptions to the Hill core principle given the particular vulnerabilities of this plaintiff, the likely effect of an insensitive and flawed investigation on such a person, the factual matrix relied on in the pleadings by the plaintiff and the full extent of the flaws in the investigation set out in the statement of claim. Does this combination of factors constitute special or exceptional circumstances? Was this an outrageous instance of negligence? Like Hallett LJ I too resist the temptation at this stage to define the list of possible exceptions to Hill.

Such issues, including the matter of foreseeability of the type of injury, demand the detailed analysis of a full hearing before any court could determine the eventual outcome in the context of the Hill core principle.

[39] I must remind myself that this is not the hearing of the action. At this stage only if the court is persuaded that no matter what the actual facts (within the bounds of the pleadings), the claim is unarguable and bound to fail in law, should the court strike it out. The burden is on the defendant to show that the plaintiff's case in this regard is unarguably or almost incontestably bad. The fact that the plaintiff may enjoy a weak case on this aspect of the common law is not sufficient to justify striking it out particularly where, arguably, this may be a developing area of the common law in light of the Convention rights.

[40] In all the circumstances I have come to the conclusion that I must affirm the decision of the Master and dismiss the defendant's summons.