Claim No.: 544 of 2018

IN THE ST HELENA SUPREME COURT

18/07/2019

Charles Ekins

CHIEF JUSTICE

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BETWEEN:

A

Plaintiff

-and-

THE ATTORNEY GENERAL OF ST HELENA

(On behalf of the Crown and on behalf of the Government of St Helena)

Defendant

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Mr Philip Simms, Counsel, instructed by the Public Solicitor on behalf of the Plaintiff

Mr Andrew Bershadski, Counsel, instructed on behalf of the Attorney General

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RULING

This is an application by the Attorney General to strike out the proceedings brought in this case by A, the Plaintiff. The alleged facts upon which the claim is based are set out in the Plaintiff's Particulars of Claim, which I do not propose to rehearse in any detail at this stage. Briefly stated, however, the Plaintiff avers that during the course of her childhood she was persistently subjected to serious sexual abuse by B; that St Helena Government, through the Social Services department became aware of the very real possibility that the Plaintiff was indeed being abused in that way; but did nothing to protect her from the abuse thus being perpetrated. It is claimed that Social Services had a duty of care to protect her from the predations of B but negligently failed to take such steps as were, in all the circumstances, reasonable. In consequence it is asserted that the Plaintiff has suffered severe psychological harm.

The Defendant's application is that the claim should be struck out under the provisions of Order 9 rule 15 of the Civil Procedure Ordinance on the basis that the claim discloses no cause of action in that SHG at no time owed to the Plaintiff a common law duty of care in the circumstances of this particular case.

This application was originally listed for 13/02/19. The hearing date was vacated, however, given that it was known that a case-Poole Borough Council v GN and Another-had recently been heard by the Supreme Court in the UK; that the issues to be decided by the Supreme Court in that case were of potential relevance to the issues in the instant case; and that it was anticipated that the judgement of the Supreme Court in the UK was due to be handed down in the relatively near future. That judgement was in fact handed down on 6th June.

Put succinctly it is the Defendant's contention that a public authority does not owe a common law duty of care to those for whom it has statutory duties to protect from harm. Thus, in X v Bedfordshire County Council [1995] 2 AC 633 the House of Lords decided that a Local Authority owed no such duty of care to children in respect of whom it has a statutory duty to protect. Similarly, in the case of Michael v Chief Constable of South Wales [2015] AC 1732 where it was held that the police owed no duty of care for the negligent failure to protect victims of crime; Mitchell v Glasgow County Council [2009] UKHL 11 where it was held that landlords owe no duty of care to those affected by their tenants' anti-social behaviour. The Defendant acknowledges that there are situations in which a justification commonly exists for holding that the common law imposes such a liability, namely;

1. Where the Defendant is responsible for creating the source of danger;
2. Where the Defendant has assumed a responsibility to protect the Plaintiff from the danger complained of;
3. Where the Defendant has done something which prevents another from protecting the Plaintiff from that danger;
4. Where the Defendant has a special level of control over the source of the danger;
5. Where the Defendant's status creates an obligation to protect the plaintiff from that danger.

The Defendant submits that none of the exceptions or circumstances outlined above are of relevance to this case. Nor does this case fall into one of those categories of case where the Defendant has engaged the services of a professional to intervene and to assist and upon whose expertise the Plaintiff can be expected to rely; in other words where the principles applicable to private individuals would impose such a duty. The Defendant submits, therefore, that the claim in fact discloses no cause of action and should be struck out.

The Plaintiff submits that the starting point for consideration of the Defendant's application is the principle that no action should be struck out unless the court is certain that the claim is bound to fail. Unless that certainty exists, it is inappropriate to strike out the claim. The Plaintiff further submits that in the context of the present claim it must be observed that striking out is not normally appropriate in an area of the law which is uncertain and developing and specifically the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power-see Barrett v Enfield London Borough Council [2001] 2 AC 550. It is submitted that this is the first claim of its type to have been brought before any Court in St Helena and therefore the first occasion upon which the Supreme Court has had the opportunity to consider the extent to which, if at all, public bodies upon St Helena owe a common law duty of care. As a matter of principle, therefore, it would not be proper to strike the claim out without giving the Plaintiff the opportunity of a full hearing.

That the area of law referred to above is both uncertain and developing is, submits the Plaintiff, well-illustrated by the case of D v East Berkshire

Community NHS Trust [2003] EWCA Civ 1151. In that case the Court of Appeal held that with the advent of the Human Rights Act 1998 and its adoption of Convention rights the policy reasons for ruling against the existence of a common law duty of care in cases where Local Authorities had negligently failed to protect children from abuse were no longer justified.

"It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to the child in relation to the investigation of child abuse and the initiation and pursuit of care proceedings" (see para 84).

The decision in D v Bedford was subsequently appealed to the House of Lords which did not dissent from the decision of the Court of Appeal in this respect.

Further to emphasise the developing nature of the law, and in the context of St Helena in particular, the Plaintiff points to St Helena's Constitution. Paragraph 10(10) of the Constitution provides that every person shall have the right to a fair hearing. It is submitted that to strike out the Plaintiff's claim at this stage would be improperly to deny the Plaintiff that right given particularly, and as already submitted, that this is a developing area of the law.

The Plaintiff submits further and irrespective of whether a duty of care exists within the test perhaps adopted in X v Bedfordshire County Council, that the proper approach in considering whether a possible duty of care exists is to adopt the test set out in the case of Caparo Industries PLC v Dickman [1990] 2 AC 605. There it was said that "in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".

The Plaintiff submits that it is clear that in circumstances such as these the necessary foreseeability of damage and proximity exist. Judged objectively it therefore has to be fair, just and reasonable to impose a duty of care; or at the least it cannot be said at this stage that the proper existence of such a duty can so certainly be ruled out as to merit striking out the Plaintiff's claim. That is particularly so submits the Plaintiff given further provisions of the Constitution which guarantee the individual security of person and the protection of the law (Para 5); protection from inhuman and degrading treatment (Para 7); and

respect for a family life (Para 13). These are rights for which the Defendant is responsible for upholding and enforcing and given that the Plaintiff so fundamentally deprived of those rights, it is at least arguable that it would be fair, just and reasonable to impose a common law duty of care. It is equally arguable that it would be fair just and reasonable given the developing nature of the law on St Helena as already dealt with.

Finally, and with specific reference to Poole, the Plaintiff submits that the Particulars of Claim plead in detail the factual background to this case. It is submitted that it is open to me to infer from those facts that it is simply not possible to reject the notion of an assumption of responsibility by the Defendant, particularly within the context of St Helena where within a small community those in a position of responsibility inevitably hear, see and come to know of more than those within much larger population centres; and accepting that context the relevant agencies assume an enhanced responsibility to intervene where necessary. That context is itself something which can induce an assumption of responsibility.

The Plaintiff submits finally that in correspondence the Defendant has acknowledged the existence of a duty; that the Defendant is now therefore estopped from denying the existence of a duty; or if not estopped that acknowledgement is itself evidence that such a duty does exist, sufficient at least to make it inappropriate to strike out the claim.

The Defendant responds to those submissions by reference to the decision in Poole (supra). At the time when the Defendant's application was originally listed, the decision of the Court of Appeal in Poole was still only fairly recent. The Court of Appeal had held that in view of the decisions in Michael and Mitchell particularly the decision in D v East Berkshire could no longer be regarded as good law. It was, opined the Court, "beyond doubt that, but for the impact of the Convention and the supposed need for an extension of common law liability to reflect the obligations of the state under the Convention, the decision would have been against an extension of liability. That consideration was a pivot of the decision. Yet that proposition has been explicitly rejected in the later cases [of Mitchell and Michael]."

The Defendant submits that the judgement of the Supreme Court in Poole does not support the principles contended for by the Plaintiff; and indeed, that the facts in Poole are very similar to the facts in the instant case.

The Defendant further submits that the so-called admission of a duty of care cannot give rise to an estoppel and nor does it provide any useful evidence of whether a duty of care arises as a matter of law. That can only be determined by reference to the authorities.

Mr Bershadski submits that the Plaintiff's reliance upon the principles in Caparo is misplaced. Caparo is only of possible relevance where the law is not already settled; and if there were any doubt that the law in this regard was not already settled prior to Poole, Poole has settled it.

It is further submitted that the St Helena "context" alluded to by the Plaintiff is irrelevant. Either a duty of care exists or it does not. Whether it exists or not cannot be influenced by the size of the community in which events occur.

It is finally submitted that St Helena's Constitution should play no part in the principles which I have to apply. The Constitution provides for certain rights which are guaranteed. The Constitution provides for remedies for any alleged breach of those rights. Those are entirely independent of the existence or otherwise of a common law duty of care and provide no useful or other basis for seeking to determine whether a common law duty of care exists in any given circumstance.

I turn then to an examination of the decision of the Supreme Court in Poole.

Lord Reed, who gave the judgement of the Court summarised the matter thus: the framework for determining the existence or non-existence of a duty of care on the part of a public authority arises or may arise in the following circumstances:

1. Where the principles applicable to private individuals or bodies would impose such a duty-e.g. where the authority has created the danger or assumed responsibility to protect the person concerned, unless the imposition of such a duty would be inconsistent with the relevant legislation; however
2. It will not arise merely because the authority has a statutory duty, even if by exercise of the statutory functions, harm could have been prevented to a person who in fact suffers harm.

Approached on that basis the vast body of authorities are readily reconcilable. In X v Bedfordshire there was no assumption of responsibility as the social

workers concerned were not providing their professional services to the claimants. Similarly, in Michael and Mitchell. By contrast in the case of Barrett v Enfield London Borough Council [2001] 2 AC 550 there had been an assumption of responsibility where the Council had taken the claimant into care; and in Phelps v Hillingdon London Borough Council [2001] 2 AC 619 where an educational psychologist appointed by the Council had assumed responsibility because it was foreseeable that the child's parents would rely upon the advice. The starting point, however, is as identified by Lord Hoffmann in Customs and Excise Commissioners v Barclays Bank plc [2007] 1AC 181 where he posed the question of whether a statutory duty can generate a common law duty of care. "The answer is that it cannot……..The Statute either creates a duty or it does not. (That is not to say ……that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty."

Lord Reed considered it helpful to approach the matter, at least in the first instance, in the following way: whether the case is one in which it is alleged that the Defendant has harmed the Plaintiff; or whether it is one where the true nature of the case advanced is that the Defendant has failed to provide a benefit to the Plaintiff, for example by failing to protect the Plaintiff.

Lord Reed recognised that even where no assumption of responsibility could be inferred from the nature of the function itself undertaken by the public authority such an assumption might nevertheless be inferred from the manner in which the authority had behaved towards the plaintiff in any given case; and that since such inferences must depend upon the particular facts of each case the existence or absence of such an assumption was unlikely to be suitable to a strike out application. But as he also pointed out the Particulars of Claim must provide "some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred."

I therefore apply those principles to the present case.

According to the Particulars of Claim, B was convicted and received a custodial sentence for a sexual offence. He was subsequently released. Where he went to live is not entirely clear but he seems to have had fairly unrestricted contact with the Plaintiff. In September that year there were allegations that B had raped the Plaintiff. B was charged with an offence of rape but was acquitted. B continued to have contact with the Plaintiff, at times it seems supervised, but

in 2000 further disclosures were made against B pertinent to the serious sexual abuse of the Plaintiff. He was again tried and acquitted. In that same year the Plaintiff was placed on the child protection register and it seems was placed on the "At risk" register on at least a number of occasions until her 16th birthday. In 2002, the Plaintiff disclosed that she had also been abused by C.

The Particulars of Negligence alleged against the Defendant (Para 22 of the Particulars of Claim) allege that the Defendant failed to provide effective child protection systems, particularly in the light of B's history; failed adequately to investigate her allegations that she had been raped; failed to provide effective services or sufficiently qualified staff; failed to facilitate her disclosures of sexual abuse; and failed to provide therapeutic and practical support at the time of and after her various disclosures. It is agreed by all the parties that I am entitled to draw such inferences as I think proper from the facts averred.

I make it plain that I have absolutely no doubt that the Plaintiff suffered the abuse described in the Particulars of Claim, upon which I have heard evidence in other proceedings before the Supreme Court unconnected to the present. I have enormous sympathy for the Plaintiff whose childhood was about as blighted as it is possible to imagine. I cannot however base my decision either upon the fact that I am satisfied that she suffered this abuse; or by reference to the sympathy I feel for her. I must be guided strictly by the legal principles that are engaged.

This is a case which it seems to me in essence falls squarely on all fours with Poole. I do not consider the distinctions which the Plaintiff sought to draw to be persuasive; and thus when I consider the allegations of breach of duty, I am satisfied that they fall within the second category of case identified by Lord Reed, namely that the true nature of the case advanced is that the Defendant has failed to provide a benefit to the Plaintiff, by failing to protect the Plaintiff. I can identify no area or circumstance in which it could conceivably be inferred that the Defendant has assumed a responsibility for the Plaintiff; and in this respect I adopt the Defendant's analysis set out at para 3.5 of Mr Bershadski's revised skeleton argument. Furthermore, I see nothing in the matters pleaded from which the apparent manner in which the Plaintiff was treated gave rise to an assumption of responsibility; and I am also satisfied that there is nothing in St Helena's circumstance which alone or in conjunction with any of the matters pleaded permits an inference to be drawn that St Helena's Social Services in some way thus assumed a responsibility. Additionally, and patently, it was not the Defendant who created the danger which indubitably caused the Plaintiff

harm. I am satisfied therefore, that this is indeed one of those cases, rare as they may be, where it is appropriate to strike out the Plaintiff's claim as disclosing no cause of action given the absence of any prospect on the Plaintiff's behalf that the Defendant owed her a common law duty of care. If this action were permitted to proceed it would involve all parties in considerable cost with no prospect at the end of the day that the Plaintiff's case could succeed.

I am also satisfied that the Plaintiff's submissions pertinent to the Constitution equally do not avail the Plaintiff. In Poole the Court of Appeal explicitly held that D v East Berkshire was no longer good law in this regard and the Supreme Court does not appear to have disagreed with the Court of Appeal on this point. By extension, reference to the Constitution cannot, it seems to me, impose upon the Defendant a common law duty of care where none would otherwise exist.

That perhaps suffices to deal with the Application but I deal with the additional submissions made by the Plaintiff.

Firstly, it was submitted that the Defendant is estopped from denying the existence of a common law duty of care by virtue of a letter written by the Defendant before proceedings were instituted. I merely say that I can see no basis for suggesting that an estoppel arises in the circumstances suggested by the Plaintiff. Nor do I find any assistance evidentially from the fact that in a letter the Defendant acknowledged the existence of a duty of some kind. I am satisfied that this is something which is to be determined as a matter of law.

I am also satisfied that the law is now well settled by Poole and that the approach advocated in Caparo is not applicable. Even if it were, I would see no basis for suggesting that it is fair, just and reasonable for such a duty to be inferred. To hold otherwise would be to render the decision in Poole otiose in circumstances such as these.

I therefore take the view that the application succeeds and that the Plaintiff's claim should be struck out accordingly.

I have heard no argument on any ancillary matter and I anticipate that given my ruling the only likely ancillary matter will be the question of costs. I do not know what arrangement the Plaintiff may have entered into with those who have acted on her behalf. I say merely this, therefore, emphasising that I have not heard argument on the subject. If the Plaintiff has entered in to no formal

arrangement so far as her costs are concerned, and if therefore were I to make an order for costs the Plaintiff herself would be notionally liable for those costs, then I would take some persuading that it would be proper to make such an order. As I have made plain from the outset, I have knowledge of the Plaintiff from other proceedings. She has no means of paying any costs. She is very vulnerable largely as a result of the matters alluded to in these proceedings. A costs order could very well have an adverse impact upon her mental health. I have no doubt that these proceedings were brought having been advised that there was a reasonable prospect of success. I would take some persuading that the real difficulties from which she suffers should be added to in this regard. If it were then to be suggested that I should make an order against the Public Solicitor's Office for pursuing a claim that was inherently unreasonable, no doubt the Attorney General would present a potent argument for such a course. But, as I say, I do not know what, if any arrangements have been made for the Plaintiff's costs and I have heard no argument.

Given the sensitive nature of the factual material I direct that nothing should be published which might tend to identify the Plaintiff and that this Ruling should be anonymised before publication. I would ask that Ms Carter undertake that exercise and submit the proposed anonymised Ruling to Ms Nightingale and to Judicial Services for final comment.

Charles Ekins

CHIEF JUSTICE

18/07/19