IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

B E T W E E N

ARON TRASK

Claimant

and

THE HOLBORN NHS TRUST

Defendant

DEFENDANT'S SKELETON ARGUMENT

Grounds of appeal

(1) The Judge was wrong to find that the defendant did not owe a common law duty to protect Aron from, or warn him of the risk of, the assault by Cal.

(2) The Judge was wrong to find that the defendant did not owe Aron a duty pursuant to Article 3 of the ECHR and that any such duty (if owed) was not breached.

Ground 1

1. There is no established duty of care owed by a healthcare provider to third parties to protect them from, or warn them of, the risk of assault by a dangerous patient. This case is therefore novel. As such, the Court should not extend the law other than incrementally and by analogy with existing authorities. The exercise of judgment in those circumstances involves consideration of factors identified in *Caparo Industries PLC v Dickman* [1990] UKHL 2, namely (i) whether the harm was reasonably foreseeable; (ii) whether there was a relationship of proximity between the claimant and defendant; and (iii) whether imposition of the duty would be fair, just, and reasonable.

2. It is conceded that the harm was reasonably foreseeable, and that due to the family therapy sessions which took place in June 2019 there was a relationship of proximity between the Claimant and the Defendant. However, it would not be fair, just, or reasonable to impose a duty on healthcare providers to protect third parties against physical harm by patients. Creation of such a duty would also be out of step with existing caselaw and would therefore not be an incremental development of the law, but rather a giant expansion.

Imposition of the duty would not be fair, just, or reasonable; nor would it be an incremental expansion

3. In *Mitchell v Glasgow CC* [2009] UKHL 11, the House of Lords addressed the question of whether it was fair, just, and reasonable to impose a duty on a local authority to warn a public sector tenant of potential danger posed by a fellow tenant. The Court unanimously held that it was not.

4. In *Michael v Chief Constable of South Wales* [2015] UKSC 2, the Supreme Court considered whether the police owe a duty to take reasonable care for the safety of an individual where they are, or ought to be, aware of a threat to life or physical safety of that person. The Court held that no such duty is owed.

5. The public policy reasons which operated in *Mitchell* and *Michael* equally apply in the instant case. In particular:

    a. The implication of such a duty for other cases is complex and far-reaching. Many public and private bodies might be aware of potential risks posed by service-users to other individuals. The class of potential duty-bearers is therefore large.

    b. Meanwhile, establishing limits on the class of potential claimants would require consideration of such nebulous questions as the certainty of the harm and the clarity of the potential victim's identification.

    c. Imposition of the duty would require healthcare practitioners to identify their duties to non-patient third parties at each stage of their patient's treatment, and then determine whether those duties are being fulfilled. This would entail significant resource allocation and may lead to defensive practices and delay.

6. In the healthcare context, there is the additional consideration of the duty of confidentiality owed to the patient. In the psychiatric care context, treatment largely relies upon disclosures made by patients to their doctors. As such, any inroads into the duty of confidentiality must be treated with extreme care. Imposing a duty on psychiatrists to breach confidentiality could undermine the trust inherent in the doctor-patient relationship, and may thus impact the effectiveness of psychiatric treatment.

7. For these reasons, imposition of the duty described by the Claimant would be out of step with existing case law and would not be fair, just, or reasonable.

The cases on genetics are distinguishable

8. It has been held that geneticists may owe a duty of care to their patients' family members to warn them about certain hereditable conditions (*ABC v St George's Healthcare NHS Trust* [2017] EWCA Civ 336). That narrow category of cases is

distinguishable from the instant case because the policy considerations outlined at paras 5-6 above do not apply.

a. Where the relevant omission is a failure to warn about a genetic condition, the class of potential claimants is, by definition, closed. The scope of potential liability is therefore clearly defined, and "floodgates" concerns do not apply (*ABC* [42]-[45]).

b. In the context of genetic testing, it is not generally resource-intensive to identify individuals to whom a duty is owed and decide whether to warn them about a potential hereditable condition. Geneticists obtain definite, reliable and critical facts of clinical significance about third parties (*ABC* [40]). This differs significantly from psychiatrist care, and trying to decide how best to respond to a dangerous patient's threat of assault against a third party or third parties would be a much more resource-intensive activity.

c. While confidence in a doctor/patient relationship in the context of care for a genetic condition may be breached by the imposition of a duty to warn, the patient's confidence in the doctor's confidentiality obligations is not of the same fundamental significance as it is in psychiatric care.

9. The current position is that the law has been incrementally developed to cover a very specific and narrow set of cases in which the main public policy concerns do not apply. Imposition of an equivalent duty in respect of potential assault by a dangerous psychiatric patient would open floodgates that the Court of Appeal deliberately kept shut in *ABC*.

Ground 2

The defendant owed no duty to the claimant under Article 3

1. Article 3 of the ECHR requires the state to take certain measures to protect its citizens from inhuman or degrading treatment (the positive obligation).

2. The ECtHR has consistently reiterated that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, including in respect of the operational choices which must be made in terms of priorities and resources (see, for example, *Osman v United Kingdom* ("***Osman***") (2000) 29 EHRR 245 [116]).

3. The ECtHR has also described the incidence of the operational duty as "well-defined" (*Osman* [115]).

4. It is submitted that the references to "well-defined" and to not imposing unreasonable burdens on the state are designed to set limits to the situations in which the operational duty can even arise.

5. This desire to confine the categories of circumstances in which the operational duty will be found to exist can be seen in decisions of the ECtHR in cases such as *Powell v United Kingdom* (2000) 30 EHRR CD 362, where the court held (at p 364) that in the generality of cases involving ordinary acts of negligence by public health authorities there is no operational duty under Article 2.

6. In light of the above, it is submitted that in circumstances in which a duty has not previously been imposed (as in the present case), the Court should adopt a cautious approach.

7. It is conceded that the state has a duty to protect individuals from torture and other forms of ill-treatment, even if that risk emanates from a private sphere (as in *A v United Kingdom* (1998) 27 EHRR 611; *Z v United Kingdom* (2002) 34 EHRR 3). However, it does not follow from those decisions that a state will be responsible for <u>all</u> acts of torture committed in the private sphere; a state's responsibility still has to be engaged in some way.

8. The defendant's responsibility was not engaged in the present case because:

    a. The defendant had not assumed responsibility for Aron's welfare and safety;

    b. Aron was not under the control of the state; and

    c. Aron was not especially vulnerable by reason of his age or any physical or mental condition.

<u>Any duty under Article 3 was devolved on local law enforcement agencies</u>

9. *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11 is authority for the proposition that the police have a positive obligation under Article 3 in relation to the manner in which officers prevent and investigate crime.

10. It is the responsibility of <u>the police</u> to prevent crime, to protect the public, and to maintain law and order in local areas. These functions are not for NHS Trusts, whose work is primarily carried out in hospital settings.

11. The police have statutory powers and effective ways of assessing and managing risk. If it became aware of a real and immediate threat to his safety, the local police authority should have taken preventive operational measures to protect Aron, a potential victim of crime, from the risk posed by Cal.

12. Aron may therefore advance a claim for breach of Article 3 against the local police authority, resulting from the failure of officers to apprehend Cal.

In any event, even if the duty had been owed by the defendant there was no breach as the risk of harm to Aron was not immediate

13. It is established law that, in order to claim a breach of the operational duty under Article 3, it must be shown that the relevant defendant knew or ought to have known of the existence of a real and immediate risk to the person's life or of their suffering inhuman or degrading treatment (the "real and immediate risk" test) (*Griffiths v (1) Chief Constable of Suffolk (2) Suffolk NHS Foundation Trust* ("***Griffiths***") [2018] EWHC 2538 (QB)).

14. The threshold for the real and immediate risk test is high: *Rabone v Pennine Care NHS Trust* ("***Rabone***") [2012] UKSC 2 [36].

15. An "immediate" risk is one that is "imminent", or at least "present and continuing" (*Griffiths* [620]; *Rabone* [39] respectively). Importantly, a risk that will arise at some time in the future is not an immediate risk (*Rabone* [39]). The threshold of immediacy can thus be framed as one of emergency, or requiring urgent action (*Griffiths* [620]).

16. In the present case, there was a real, but not an immediate risk:

    a. There was clearly a risk of Cal assaulting Aron following discharge of which the defendant knew on 14.07.19. But there was nothing to suggest that it was an imminent risk, against which measures were required that same day. Aron attended the hospital on two occasions in June 2019 and took part in therapy sessions with Cal. Both sessions passed without incident. The risk was only that, at some point, Cal might assault Aron following discharge (i.e. it was a *future* risk, rather than an immediate risk).

    b. The assault occurred more than a fortnight post discharge. Immediacy has typically been assessed by the court with reference to a short timeframe. It is submitted that the gap of 17 days (between Cal being discharged and the assault taking place) does not fall within this short timeframe.

17. In those circumstances, there was no breach of Article 3.

Aislinn Kelly-Lyth Senior for the Respondent
Natalie O'Connell Junior for the Respondent
22nd October 2021