CASE NOTES

Duty of care – police liability – public policy - exceptional cases

Woodcock v Chief Constable of Northamptonshire [2023] EWHC 1062 (KB)

High Court

Facts in *Woodcock*

The claimant had been in an abusive and coercive relationship with RG [at 61]. The trial judge found that, due to an increase in the number and seriousness of threats, the Chief Constable agreed officers would stay in a police car outside the claimant's home during the night of 19 March 2015 (albeit for an indefinite period depending on other policing needs) [at 79]. Officers also agreed a safety plan with the claimant which included advice that the claimant should call the police if RG attended her property and that she should make neighbours aware of the issue [at 80]. The defendant also unsuccessfully 'deployed a substantial group of officers to locate and arrest RG' [at 82].

At 7:32am on 19 March 2015 a neighbour called 999 and said RG was outside the claimant's property, the claimant would be leaving in a few minutes and RG was probably planning an attack [at 84]. Officers were dispatched to the claimant's address. However, neither the neighbour nor the call handler rang the claimant to warn her of the danger.

The claimant subsequently left her house. RG stabbed her with a large knife 7 times and was subsequently convicted of attempted murder [at 89; 5].

The decision at first instance

Following a 5-day trial the claim was dismissed. The trial judge concluded that: first, the police did not owe a duty of care to the claimant; second, in the alternative, there had been no breach of duty; third, that the causation test was not met. The judge noted that the amended Particulars of Claim did not plead that the claimant would have remained inside the property had she been warned about RG's presence by the police [at 117]. Nor was there any evidence on causation, despite the claimant's representatives having been given an opportunity to recall the claimant to give evidence on the point [at 117].

The decision of the High Court

The claimant appealed to the High Court. On the question whether the police owed a duty of care, the High Court concluded the police did owe the claimant a duty to pass on information that the alleged abuser was loitering outside her property. It stated:

> The exceptions to the general rule that the police are not liable and owe no duty of care for failing to act or failing to prevent harm caused by criminals are limited to cases where: (1) the police have *assumed a specific responsibility* to protect a specific member of the public from attack by a specific persons or persons; (2) *exceptional or special circumstances* exist which create a duty to act to protect the victim *and/or it would be an affront to justice* if they were not held to account to the victim. To engage a duty of care on the police to act to protect a member of the public the Courts will carry out a close analysis of the evidence relating to:
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> (a) the foreseeability of harm and the seriousness of the foreseeable harm to the specific member of the public (the suggested victim); and (b) the reported or known actions and words of the specific alleged protagonist in relation to the feared or threatened harm;

> and (c) the course of dealing between the potential victim, the police and the alleged protagonist focussing on proximity; and (d) the express or implied words or actions of the police in relation to protecting the victim from attack by the protagonist and the reliance of the victim (if any) on the police for protection as a result; and (e) whether the public policy reasons for refusing to impose a duty of care outweigh the public policy in providing compensation for tortiously caused damage or injury (emphasis added)

In his judgment, only if factors (a) to (c) and (e) [and in some cases also (d)] are proven, on the balance of probabilities by the claimant, with sufficient weight and severity and immediacy, will the common law combined with public policy exceptionally permit the courts to rule that a civil law duty of care was owed by the police to the specific potential victim to protect him or her from the actions of the specific third party criminal in the circumstances or to warn him or her of danger. [49- 50].

The court then considered each of the factors outlined in (a)-(e) above and felt they were fulfilled. Harm was reasonably foreseeable and the 'detailed safety plan' agreed by officers created:

> A very close tripartite nexus in which the Claimant was relying on the Defendant officers' advice and the safety plan. In my judgment there would be little point in advising the Claimant to ask neighbours to keep watch for RG and to tell the Claimant or the police, if the police were then going to keep any such report secret from the Claimant [at 108].

The judge decided that public policy meant abused women should be protected and that the effort involved in passing on the vital information would have been 'infinitesimal' [109]. Public confidence in reporting matters to the police would be undermined if courts supported the police's omission in this case [at 109].

In light of the foregoing, the court concluded that there were 'exceptional or special circumstances' which created a duty to warn and that police had assumed responsibility. On the question of whether that duty had been broken, and the question of causation, the High Court concluded that the police had breached the duty to warn [at 115], and although it could not describe the trial judge's decision on causation as 'wrong', it found that that decision was 'unjust' within the meaning of CPR 52.21(2)(b) and thus the case should be remitted.

Analysis

In *Brooks v The Commissioner of Police* [2005] UKHL 24, Lord Nicholls noted that 'there may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy.' What such an exceptional case might look like has remained a matter of speculation, until Ritchie J handed down judgment in *Woodcock*, which, if it remains good law, is likely to have a significant impact upon the law concerning the liability of the police in the tort of negligence.

In *Woodcock*, the High Court found that the police were under a positive common law duty to warn the claimant of a potential danger. It found the police had assumed responsibility towards the claimant by advising her to set up a 'protective ring' around her property and, in the alternative that this was a rare 'special / exceptional' case in which there was a positive duty to warn. The court also overturned the trial judge's decision on causation, saying that although the learned judge's findings on this point were not 'wrong' they were 'unjust'.

On any view, this case is extremely interesting and will attract a good deal academic and judicial attention. This is (probably) the first time that a higher court has found that 'exceptional/ special circumstances' justified the imposition of a positive, common law, duty on the police to warn. If the decision is left unchallenged, it may open the door for future claims and lead to a gradual widening of the 'exceptional circumstances' in which public authorities can be liable in negligence.

The decision arguably runs contrary to Supreme Court authority that negligence by public authorities should be treated in the same way as negligence committed by private parties (see *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, *Poole Borough Council v GN* [2019] UKSC 25 etc.). In *Woodcock* the High Court concluded that an assumption of responsibility was created by the police's provision of a safety plan and the Claimant's reliance on the unstated implications of that plan. It is questionable whether the High Court would have come to an identical conclusion had similar advice been given by a friendly neighbour, for example.

The decision comes close to developing a common law duty akin to that imposed by Article 2/ 3 ECHR (as explained in *Osman v UK* and other case law). Indeed, the High Court even referred to an 'operational duty' at [at 101]. It is arguably difficult to reconcile this approach with Lord Toulson's comment in *Michael v Chief Constable of South Wales* [2015] UKSC 2 that the common law should not develop in conjunction with the HRA. Perhaps the decision reflects a desire to strengthen the common law given the possibility that the UK may leave the ECHR.

The High Court's criticism of the defendant's operational decision-making is, with respect, open to question. The High Court questioned why officers would ask neighbours to call 999 if any information provided would be kept 'secret' from the claimant [at 108]. There are numerous possible responses to this. One reason for the police wanting to know about any sightings of a wanted suspect was, presumably, so that officers could be dispatched to arrest RG – as occurred in this case. Although it would have been much better to pass on the information to the claimant, there might have been reasons for not doing so. There was disputed evidence that the claimant herself had been aggressive and a concern that she/her estranged husband might attack RG [at 91]. Courts have traditionally been reluctant to intervene in such issues. It is surprising that the claimant was found to have relied on an assurance which was not explicitly provided and when the trial judge found the plan was flexible depending on other policing needs.

Finally, the judgment arguably risks defensive policing. Officers may be concerned that agreeing even a broad safety plan, which does not contain a promise to call the victim with information, may imply greater assurances than had been intended and create a duty of care

Given the nature of the court's conclusions, it is likely the case will be appealed to the Court of Appeal.

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Pre-charge disclosure - expectations of privacy – media freedom – public interest – sexual exploitation - compatibility of domestic law

RTBF v Belgium, Application No 417/15 decision of the European Court of Human Rights, 13 December 2022.

The facts and decision in *RTBF v Belgium*

RTBF, a Belgian public-service corporation, broadcast a report on the role of a couple (Mr and Ms V) in organising private wrestling matches with the participation of girls who were partially undressed, which had occurred in the sports hall of a school. RTBF television news included previews of the report, including some footage, and it was also broadcast on other stations. At the time programme was

broadcast a judicial investigation into the events in question was pending, although no charges had yet been brought.

The report had been prepared by a journalist, D, after he had learnt about a complaint by a girl (VB), who was a pupil in the school in question. VB had gone to a family planning centre to complain about the actions of Mr and Ms V and was received by the centre's doctor, who happened to be the partner of the journalist D. According to RTBF, the girl, on the doctor's advice, contacted D, who decided to carry out a journalistic investigation. He interviewed the applicant and three other girls who wished to remain anonymous. In the course of his investigation, he discovered the existence of the female wrestling matches, including, among other aspects, the recording of sex videotapes and their commercialisation, and the suspected involvement of Mr and Ms V. After VB had lodged a formal complaint with the police, D was informed by a judicial source about a search that was due to be carried out at the home of Mr and Ms V and the journalist and his team were waiting for the police officers as they arrived to conduct the search and filmed Mr V at the door of his home as the police officers entered. The journalist asked the neighbours what they knew about the couple and the alleged female wrestling matches in which they were involved.

Sometime after the search, in possession of the information given by the girls, D asked Mr and Ms V for an interview, which they accepted. The interview revealed that the couple arranged gatherings which they described as "female wrestling matches" in their home; these involved young women who were often naked, and some young women agreed to participate, for remuneration, in "mixed matches" with men known as "sponsors", and to be filmed during those matches. In the interview Mr V acknowledged a certain form of libertine conduct between consenting adults. He denied that he had forced the girls to participate in the matches or to be filmed.

Mr and Ms V considered that they had been insulted by the filmed sequences and the report, and applied to the Belgian courts seeking compensation for the damage they had allegedly sustained as a result of what they described as "a trial by media". The Namur Court of First Instance granted their claim in part and ordered RTBF to pay them compensation of 2,500 euros (EUR) each and EUR 1,000 in court fees. RTBF appealed against that decision and the Liège Court of Appeal upheld the judgment against RTBF and ordered it to pay each of the spouses one euro in respect of non-pecuniary damage; The Court of Cassation dismissed an appeal by RTBF. In the same year, Mr V was sentenced to 18 months' imprisonment, suspended, for several offences, including some related to the activities denounced by D. A mere finding of guilt was pronounced against Ms V in respect of some of the alleged offences.

RTBF lodged an application under the European Convention, claiming that the civil judgment against it had represented an unjustified interference with its right to freedom of expression under Article 10. The Court considered that the civil judgment constituted an interference with its right to freedom of expression, that the interference had a legal basis - namely Article 1382 of the Civil Code - and had pursued the aim of "protection of reputation". Then, in deciding the necessity of the interference in a democratic society, it began by noting that the programme undoubtedly concerned matters of public interest, its purpose being to inform the public about the suspicious conduct of Mr and Ms V and the investigation carried out by the judicial authorities. Thus, the programme had concerned not only "child protection" in the general sense, but also addressed a particularly serious form of violence against children, namely sexual exploitation and abuse. The programme referred to the existence of a particular aspect of the sex industry, specifically so-called "female wrestling" shows with a sexual connotation, and the involvement in that activity of several young girls, at least one of whom had been a minor at the relevant time, and at the behest of a person belonging to their social environment. The programme also reported on the authorities' lack of trust in the girls' statements and the difficulties encountered by these girls in seeking protection and asserting their rights, evidenced by the footage in the report concerning the police's reluctance to act on the first complaint lodged by one of the girls testifying anonymously, and by the school head teacher's refusal to believe VB's account.

The Court also noted that the report had been broadcast three months after the investigation had begun, and by that date, the judicial authorities had made no statement about the conduct of the investigation. Given the importance of the issues raised in the report and the lack of an official statement by the

investigating authorities, the public thus had an interest in being informed of the pending proceedings, including in order to be able to exercise its right of scrutiny over the functioning of the criminal justice system and, where necessary, to be alerted to the potential danger for girls who were likely to associate with Mr and Ms V. Lastly, at the end of the report broadcast. D. had stated that the judicial authorities" were expecting further witnesses to come forward.

Given that the exercise of freedom of expression in the context of a television programme on a subject of major public interest was at stake, the Belgian authorities had had only a limited margin of appreciation in determining whether there was a pressing social need to take the measure that they did in this case. Further, although Mr V's status as a former head teacher did not confer on him the status of a public figure, Mr and Ms V had agreed to be interviewed by the journalist – for RTBF, which is a national and international television company – thus agreeing to be placed in the spotlight, so that their "legitimate expectation" that their private life would be effectively protected had been limited.

Further, the manner in which D had obtained the information could not be regarded as unfair, and the veracity of the events described in the report had not been disputed by the parties to the domestic proceedings, nor by the parties to the proceedings before the Court. Neither had D's good faith been in issue as he had a sufficient "factual basis" for his value judgment and the style and means of expression used by the journalist corresponded to the nature of the issues raised in the report.

The European Court stressed that the Court of Appeal had not established that the report had had an impact on the direction of the investigation or the decisions taken by the investigating courts, and that at no point had D asserted that the charges on which the search of Mr and Ms V's home was based had been proven, or that the couple had committed the offences under investigation. During the television news and at the end of the broadcasted report, viewers had been reminded that the investigation was ongoing and that the couple were presumed innocent. Viewers had been put in a position to understand that the case had not yet come to trial, accordingly, the Court held that taken as a whole, the report had merely described a state of suspicion against Mr and Ms V, without exceeding the threshold of that suspicion. The Court concluded that the reasons put forward by the domestic courts had not been sufficient to establish that the interference complained of had been "necessary in a democratic society", and that although the penalty imposed on RTBF had been lenient, it could have had a chilling effect and that in in any event it had been unjustified. In view of the importance of the media and of the reduced margin of appreciation enjoyed by the domestic authorities in respect of a television programme on a subject of considerable public interest, the Court considered that the need for restrictions on freedom of expression had to be convincingly established, and that there had been a violation of Article 10.

Analysis

In *Bloomberg LP v ZXC* [2022] UKSC 5, the UK Supreme Court confirmed that, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Consequently, as a starting point at least, the revelation of those details will amount to a breach of an individual's expectation of privacy, unless justified by any public interest defence, or other circumstances which refute or outweigh that initial expectation of privacy. The question now is whether such a rule is compatible with principles of free speech and press freedom, and the case law of the European Court of Human Rights in this area, in particular following the ruling in *RTB*, above.

The decision in *Bloomberg*, and the High Court ruling in *Cliff Richard v BBC* ([2018] EWHC 1837 (Ch)), gave rise to several areas of concern with respect to media freedom and the public interest defence. First, there were concerns that the starting point might make it more difficult to justify any interference via the defence of public interest once the expectation of privacy has been established as that starting point. Second, in *Bloomberg*, the Supreme Court insisted that the possible criminal nature of investigations into the claimant's activities was irrelevant, possibly, conflicting with the principle that individuals should not be allowed to suppress evidence of their own (admittedly in these case suspected) wrongdoing. Accordingly, the Supreme Court's decision might be regarded as unduly

restrictive of press freedom and investigative journalism, thus clashing with many of the principles that the Court has established in the area of public interest free speech (*Sunday Times v United Kingdom* (1979) 2 EHRR 245*, Lingens v Austria* (1986) 8 EHRR 407, *Oberschlick v Austria* (1995) 19 EHRR 389, *Observer and Guardian v United Kingdom* (1991)14 EHRR 153, and *Axel Springer v Austria* (2012) 55 EHRR 6), including the decision in *RTB*.

Specifically, the decision in *Bloomberg* might be difficult to reconcile with the principle that Article 8 should not be relied on in order to complain of a loss of reputation that resulted from the claimant's own actions (*Gillberg v Sweden* (2012) 34 BHRC 247), although the Supreme Court held that this only applied where a person is actually convicted of a criminal offence or investigated and found to have committed the alleged misconduct. Thus, in *Axel Springer v Germany* (2012) 55 EHRR 6), in the Grand Chamber held that in principle the public did have an interest in being informed—and in being able to inform themselves—about criminal proceedings, whilst strictly observing the presumption of innocence. That interest, in its view, will vary in degree, as it may evolve during the course of the proceedings—*from the time of the arrest*—according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings (at [99]). At first glance, the Grand Chamber's judgment in Axel Springer is clearly confined to reporting of public events and judicial proceedings post arrest and charge; very different from the facts *in Bloomberg*, where the individual has not yet been charged. Clearly, therefore, an individual would have a greater expectation of privacy pre-charge, or arrest, although the ruling in RTB casts doubts on the starting point established in *Bloomberg*.

The European Court has certainly imposed limitations on the press when reporting on criminal investigations, both as a means of upholding due process and individual privacy, including the right to be forgotten and to facilitate the process of rehabilitation *(Egeland v Norway* (2010) 50 E.H.R.R. 2 and *Mediengruppe Österreich GmbH v Austria* (Application No. 37713/18, decision of the European Court of Human Rights 26 April 2022). The Court has also approved of restrictions that uphold the administration of justice, and where the media have misused confidential information in the reporting on the case, as the appellants had of course been guilty of in *Bloomberg* (*Bedat v Switzerland* (2016) 63 EHRR 15).

The question, therefore, is whether the decision in *RTB* shows that the decision, or rule, in *Bloomberg* is inconsistent with European jurisprudence, or whether RTB can be seen as an exception to the starting point of privacy expectation lawfully established in *Bloomberg*. The facts and context of both cases are certainly very different; most notably, in *RTB* the applicants had openly debated the investigations with the media and could, therefore have forsaken their legitimate expectation of privacy under Article 8. Further, the public interest in those proceedings could be regarded as higher than in *Bloomberg*: not only did it raise issues of sexual exploitation of young people, the programme was part of an ongoing public debate that the applicants had participated in. True, the applicants had not admitted guilt, but neither had the programme insinuated criminal liability or otherwise disturbed the presumption of innocence. In that respect the European Court's trust in the media to draw a clear line between discussing ongoing criminal proceedings and insinuating guilt contrasts with the approach taken in *Bloomberg*.

On the other hand, the difference in the facts between this cases and *Richard v BBC* are probably substantial enough to justify the ruling in *Richard*, where it was held that intensive coverage of a police operation at the claimant's property investigating possible sexual abuse offences was in breach of the claimant's Article 8 rights. Both cases involved a strong public interest, but the present applicant's involvement in the broadcast, as well as the media's careful reporting of the investigation, are sufficient to draw comparisons with the domestic decision.

Conclusion

It is still suggested that the starting point established by the UK Supreme Court in *Bloomberg* risks attaching undue weight to the fact that the media might breach the practice of confidentiality whilst reporting on ongoing criminal proceedings. Thus, in subsequent cases, the media might find that they

have damned themselves by their breach of confidentiality and the presumption of privacy in these cases. Further, the claimant's expectation of privacy in *Bloomberg* survived despite being an officer a large corporation who was being investigated for fraud and corruption; facts outweighed by the dominant element of harm to reputation and the presumption against pre-charge disclosure. On the other hand, it is more than acceptable to apply the starting point in appropriate cases. Thus, in *WFZ v BBC* [2023] EWCH 1618 KB, the court granted an interim injunction restraining the BBC from publishing the identity of a high-profile man, who had been arrested in connection with sexual offences but not charged, was granted. In the court's view, the press's freedom to publish and the public's "right to know" were outweighed by the powerful public interest in the criminal justice proceedings not being impeded or prejudiced. Specifically, a suspect's interests, was the public interest specifically protected by the Contempt of Court Act 1981, although in the alternative the court would have granted the action under misuse of private information.

It is far from clear whether the European Court would regard the starting point, or presumption, as an unnecessary or disproportionate impediment to free speech and the media's opportunity to defend itself from actions in misuse of private information. In any case, following *RTB*, the domestic courts should, at the very least, exercise great caution in applying the starting point too inflexibly to cases where there is a clear public interest in investigating and reporting on ongoing criminal investigations.

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