

PERSONAL INJURY BRIEFING

Criminal Acts of Third Parties

"A right without an attendant responsibility is as unreal as a sheet of paper which has only one side"
Felix Morley, 1892-1982

IN THIS ISSUE:

Andrew Warnock considers the law regarding claims alleging negligent failure to protect an individual from the criminal acts of third parties and looks at the judgments in the recent cases of *Mitchell v Glasgow CC* and *X and Y v Hounslow LBC*

Claims alleging a negligent failure to protect an individual from the criminal acts of a third party are often thought to turn in large part upon the foreseeability of the third party's conduct. It is often said that there must be a very high degree of foreseeability in such cases. Hitherto, there has been some weighty judicial backing for such an approach, not least in the speech of Lord MacKay in *Smith v Littlewoods* [1987] 1 AC 241. In that case vandals set fire to a derelict cinema. The fire spread to neighbouring buildings and the owners of the affected premises sought to recover their losses from the owners of the cinema. The claim failed. Lord Mackay stated that:

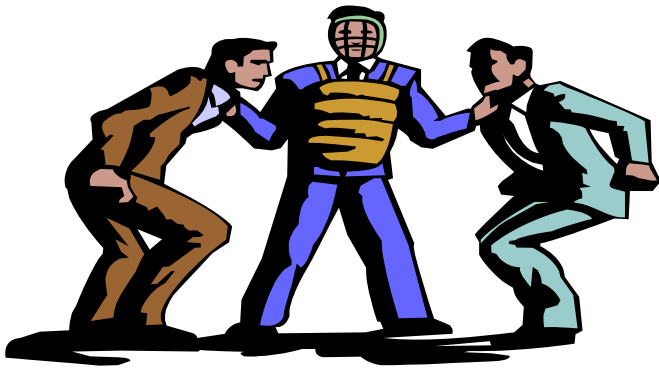
"...human conduct is particularly unpredictable and ...every society will have a sprinkling of people who behave most abnormally. The result of this consideration, in my opinion, is that where the only possible source of the type of damage or injury which is in question is agency of a human being for whom the person against whom the claim is made has no responsibility, it may not be easy to find that as a reasonable person he was bound to anticipate that type of damage as a consequence of his act or omission. The more unpredictable the conduct in question, the less easy to affirm that any particular result from it is probable and in many circumstances the only way in which a judge could properly be persuaded to come to the conclusion that the result was not only possible but reasonably foreseeable as probable would be to convince him that, in the circumstances, it was highly likely. ...Unless the needle that measures the probability of a particular result flowing from the conduct of a human agent is near the top of the scale it may be hard to conclude that it has risen sufficiently from the bottom to create the duty reasonably to foresee it".

Two other law lords in the *Littlewoods* case expressed agreement with Lord Mackay, making his speech the majority one. However, Lord Goff ploughed his own furrow. Although he agreed with the majority that the claim in the *Littlewoods* case should fail, he rejected Lord MacKay's "probability measuring needle" as a gauge of liability. He pointed out that it is not at all likely that a burglar will come along and steal from a house if a decorator leaves the door on the latch for a short time, yet liability for a theft was imposed on a decorator on such facts in *Stansbie v Troman* [1948] 2 KB 48. Therefore foreseeability does not explain why liability is imposed in some cases and not in others. Lord Goff considered that the answer as to when liability would be imposed is to be found in the concept of the duty of care. If a duty of care is owed, then the ordinary standard of foreseeability applies and so the possibility of wrongdoing does not have to be very great before liability is imposed. However, this was no expansionist philosophy: the law lord pointed out that there is no general duty of care to prevent third parties from causing harm; to succeed a claimant has to establish that the facts come within a special situation where the law recognises a duty, such as where the defendant caused or permitted the creation of the source of danger, or had a responsibility for controlling the third party, or voluntarily assumed a duty to protect the claimant from the harm in question.

Two recent decisions of the higher courts have preferred Lord Goff's analysis which must now be regarded as representing the law. Both cases involved violent assaults by third parties on council tenants. In both, attempts to make the local authority liable, whether as landlord or social housing authority, failed. The cases highlight the limits of foreseeability as a test for establishing or avoiding liability and emphasise the role of proximity and "fair just and reasonableness" in establishing a duty of care. However, they also highlight a trend against broad brush and unstructured applications of the concepts of "proximity" and "fair just and reasonableness"; in applying those concepts the courts are increasingly focusing on decided cases in analogous factual situations in determining whether a duty of care was owed and if so its scope.

Mitchell v Glasgow City Council [2009] UKHL 11

Mr. Mitchell and Mr. Drummond were both council tenants and neighbours on the same estate. Mr. Drummond was anti-social and violent. He made many threats against Mr. Mitchell, including threats to kill him.



The defendant council served notice of proceedings for the recovery of possession against Mr. Drummond on the grounds of his anti-social behaviour. Mr. Drummond continued to abuse Mr. Mitchell who in turn reported the abuse to the council. Following an incident which led to his arrest, the council invited Mr. Drummond to a meeting without warning Mr. Mitchell of what it was doing. At the meeting Mr. Drummond was warned that continued anti-social behaviour would result in his eviction. After the meeting Mr. Drummond went round to Mr. Mitchell's house and killed him. Mr. Mitchell's estate brought proceedings against the council. An argument that the council should have taken eviction proceedings against Drummond at an earlier point in time was abandoned by the estate when the case reached the House of Lords, it being accepted that the scope of any duty owed by the council did not extend to the exercise of discretionary powers conferred on the council by statute. The case therefore turned on allegations that the council ought to have warned Mr. Mitchell of the fact that it was having a meeting with Mr. Drummond and of the latter's behaviour during that meeting. Had such a warning been given, Mr. Mitchell would have taken steps to avoid Drummond and would probably have avoided being killed.

The House of Lords held that the claim should be struck out. Although it was foreseeable that Mr. Drummond might attack Mr. Mitchell following the meeting, it would not be fair just and reasonable to impose a duty of care on the council to warn Mr. Mitchell of the actions it was taking, despite its relationship with Mr. Mitchell as his landlord and despite the fact that it had kept Mr. Mitchell informed of the steps it had taken in the past. Such a duty would potentially deter social landlords from intervening to prevent anti-social behaviour. In reaching its conclusion, the Court paid close attention to other decided cases and drew parallels with the position of the police (who owe no duty of care to victims in the investigation of crime). Liability could only have arisen if the council had assumed a responsibility to keep Mr. Mitchell informed of the steps that it was taking, which it had not.

X and Y v London Borough of Hounslow [2009] EWCA Civ 286

The claimants in this case sought to argue that their council had assumed a responsibility to protect them from the criminal acts of third parties. They were adults with learning difficulties who lived in a council flat on an estate. They were known to be vulnerable to exploitation. During the summer of 2000 their flat was

gradually taken over by local youths who treated it as a doss house, using it for drug taking, underage sex and storing stolen goods. The council had assigned a social worker from its Community Team for People with Learning Difficulties to support the claimants and was also involved with them through its Child and Family Section because the claimants had two children. The claimants' assigned social worker was aware that they were frightened of the youths who were staying in the flat and tried unsuccessfully to get the police to take action against them. She also contacted the council's housing department asking them to consider re-housing the claimants urgently. Before that application had been considered, the youths held the family hostage over a weekend in November 2000, subjecting the claimants to degrading and vicious sexual and physical assaults.

The Judge at first instance held that by late October/early November 2000 there was a high degree of foreseeability that the claimants would be subjected to an attack of the type that took place. Having found foreseeability, he considered it was fair just and reasonable to hold that a duty of care was owed and that the council was liable for failing to re-house the claimants prior to their ordeal. The Court of Appeal disagreed. Applying *Mitchell*, that Court held that a high degree of foresight was not required to establish liability for the acts of the youths. They thus rejected the council's ground of appeal that what had happened had not been sufficiently foreseeable. On the other hand, the council could only be liable if the situation was one where it was readily understandable that the law should regard it as under a duty of care to protect the claimants from the risk of assault. This was not such a case. It did not fall within any of the categories of decided case in which a duty of care to protect individuals from the acts of third parties had been established. The position of the claimants was different from those of children in cases where social services department had been held to owe a duty of care, because local authorities have more extensive statutory powers and obligations in relation to the protection of children. It would not be fair, just or reasonable to impose a duty of care on the council's housing department because as a supplier of social housing and as landlord it had many obligations in potential conflict with the interests of the claimants. There were other analogous cases where duties had not been imposed on housing authorities for these reasons. Nor had the council or its employees voluntarily assumed a duty of care to the claimants because of the steps they had taken to achieve a move for them or the close relationship which existed between them; rather, the council and its employees had merely been exercising statutory powers and duties which were not in themselves actionable. The claim was dismissed.

Edward Faulks QC and Andrew Warnock of 1 Chancery Lane acted for the London Borough of Hounslow in the above case.

Editor:

Jack Harding

1 Chancery Lane, London, WC2A 1LF

T: 0845 634 66 66 F: 0845 634 66 67

www.1chancerylane.com

pi@1chancerylane.com