



25 July 2018

PRESS SUMMARY

James-Bowen and others (Respondents) v Commissioner of Police of the Metropolis (Appellant) [2018] UKSC 40
On appeal from [2016] EWCA Civ 1217

JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Wilson, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

On 2 December 2003 the Respondents, four police officers serving in the Metropolitan Police Service (“the officers”), took part in the arrest of a suspected terrorist, BA. BA subsequently made allegations that the officers had seriously assaulted and injured him during the arrest. In October 2004, the Independent Police Complaints Commission (“IPCC”) decided that one charge should be brought against the First Respondent. That charge was dismissed in April 2005. Between 14 January and 2 February 2005 the IPCC released the officers’ identities into the public domain. This led to threats of serious violence to the officers and their families on a website that supported BA.

On 18 October 2007 BA commenced civil proceedings against the Appellant Commissioner in which he alleged that the Commissioner was vicariously liable for the serious assaults that he alleged the officers had inflicted on him. The officers were not parties to these proceedings. On 18 March 2008 the officers attended a meeting with legal advisers instructed on behalf of the Commissioner. The officers subsequently alleged that they were assured at this meeting that the Commissioner’s legal advisers were also acting for them.

The officers maintain that at a second meeting with legal advisers instructed on behalf of the Commissioner on 11 March 2009 they were told that the legal team was no longer representing their interests but only those of the Commissioner. The trial of BA’s claim commenced on 16 March 2009. The officers declined to give evidence voluntarily without special measures to protect their identity being put in place. On the third day of the trial, the claim was settled with an admission of liability by the Commissioner and an apology for the “gratuitous violence” to which BA had been subjected by the officers. The officers maintain that a press release issued by the Commissioner after trial was tantamount to endorsing their culpability. In June 2011, the officers were all acquitted in the Crown Court of charges of assault occasioning actual bodily harm arising out of the arrest of BA.

On 23 September 2013, the officers commenced the present proceedings against the Commissioner seeking compensation for reputational, economic and psychiatric damage. They advanced three claims: (i) a retainer had arisen between them and the Commissioner’s legal team, (ii) the Commissioner had assumed a duty of care by reason of the assurances, and (iii) the Commissioner owed them a duty to take reasonable care to safeguard their safety, health, welfare (including economic and professional welfare) and reputational interests in the preparation and conduct of the defence of BA’s claim.

On 1 May 2015 the judge struck out these claims. The judge found, amongst other things, that the officers had no direct interest in the litigation between the Commissioner and BA and the possibility of consequential impact on their reputations was insufficient to create such an interest to which the Commissioner would be legally required to have regard. The officers’ appeal to the Court of Appeal was successful in part. The Court of Appeal held that it was arguable that the Commissioner owed a duty of care to the officers to safeguard their economic and reputational interests and that this extended to the Commissioner’s conduct of the litigation. The Commissioner now appeals to the Supreme Court solely on this issue.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Lloyd-Jones gives the judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

Although police officers have no contract of employment, the officers relied heavily on the analogy of the implied term in employment contracts of mutual trust and confidence between employer and employee [16]. However, the Court was not referred to any decided case in any jurisdiction which holds that the duty of care for which the officers contend can be derived from this mutual implied term [17]. To derive such an obligation would be to move substantially beyond the specific derivative duties established in previous cases [18-20].

The existence of the proposed duty must be established in the tort of negligence [21]. This is clearly a case in which it is sought to extend a duty of care to a new situation. In determining whether such a duty should be recognised the law will proceed incrementally and by analogy with previous decisions (*Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4). The proposed duty will also be tested against considerations of legal policy and the coherent development of the law [22-23].

The common law does not usually recognise a duty of care in the tort of negligence to protect reputational interests [23]. The decision in *Calveley v Chief Constable of Merseyside Police* [1989] 1 AC 1228 has an important bearing on the present case. There it was held that a Chief Constable does not, in principle, owe a duty of care to protect the economic and reputational interests of his officers in respect of the prosecution of an investigation or disciplinary proceedings against them. It is therefore difficult to see why a Chief Constable should owe a duty to his officers as to the manner in which he defends a claim brought against him by a third party, especially considering that, in such a claim, the Chief Constable's role is essentially responsive to allegations made by the third party [25-26].

The fact that the recognition of a duty of care may potentially subject an individual to conflicting duties does not necessarily preclude its imposition but in such cases it is necessary to have regard to the competing underlying policy considerations [28-29]. The interests of an employer who is sued on the basis that he is vicariously liable for the tortious conduct of his employees differ fundamentally from the interest of those employees [30]. The possibility of contribution proceedings between employer and employee highlights the potential for conflicts of interests [31]. These stark differences in interests strongly suggest that it would not be fair, just or reasonable to impose on an employer a duty of care to defend legal proceedings so as to protect the economic or reputational interests of his employees. It is not realistic to suggest that this potential for conflict can be overcome by recognition of a duty of care up to the time at which an actual conflict arises [32]. Moreover, in the context of the present case, the Commissioner's public duties are inconsistent with the imposition of such a duty of care [33].

Considerations relating to legal policy and the practical conduct of proceedings also weigh heavily against the duty for which the officers contend. For instance, parties to a dispute should be able to conduct litigation in order to resolve their disputes without fear of incurring liability to third parties [34-38].

Finally, the officers argue that, because both they and the Commissioner had a common interest in the outcome of BA's claim, they would have been able to rely on common interest privilege in asserting an entitlement to the disclosure of material in the possession of the Commissioner which is privileged against disclosure to others. However, the cases show that something more than a shared interest in the outcome of litigation is required before common interest privilege can be used in this manner. Legal professional privilege is, therefore, a further policy consideration that weighs against the recognition of the duty of care for which the officers contend [39-46].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>