

S.117 MHA 1983 re-visited: the liability of the State and the existence of a duty of care

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This article seeks to summarise the movement towards an increased likelihood of branches of the state (in this case, either social services or health trusts) being found to owe a duty of care to specific categories of people. The issue was phrased thus in 2005 by Lord Bingham of Cornhill: *'The question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution'*.² In adopting that Darwinian approach to the development of the law, it is necessary to look at the recent history of duties of care that may be owed by the State. The starting point is *X v Bedfordshire County Council*³ (1995); the end point (so far) is *AK v Central and North West London Mental Health NHS Trust and Royal Borough of Kensington and Chelsea*⁴ (2008).

Evolution of the Law

*X v Bedfordshire*⁵ (1995)

This case cast an extremely long shadow over this area of tort, in terms of creating formidable obstacles for those who sought to establish tortious liability against local authorities in the discharge of their statutory obligations within the specific area of what has come to be known (broadly) as community care law. It informed many of the subsequent decisions of the courts, and in particular insofar as mental health law is concerned, that of *Clunis (Christopher) (by his next friend Christopher Prince) v Camden and Islington Health Authority*⁶ (1998). Hitherto, the latter authority has supported the proposition that

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2. *JD v East Berkshire Community Health NHS Trust and others* [2005] UKHL 23.

3. HL [1995] 2 FLR 276

4. QBD [2008] EWHC 1217; [2008] 11 CCLR 543

5. *f/n 3 above*

6. [1998] 1 CCLR 215

any purported failure to discharge obligations pursuant to s.117(2) will not found an action for breach of a duty of care. As a result of the decision in *AK*⁷, this may no longer be the case.

It is difficult to do justice to the leading judgment of Lord Browne-Wilkinson in *X v Bedfordshire* by way of paraphrase. However, the principles which emerged are now well known and may be summarised as follows. All of the claims raised ‘in one form or another the difficult and important question to what extent authorities charged with statutory duties are liable in damages to individuals injured by the authorities’ failure properly to perform such duties’ (282 B). The answer is in part given at the beginning of the lengthy judgment, thus ‘It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action’ (282 E). Furthermore, the principles applied then (as now) derive from *Caparo Industries plc v Dickman*⁸ (1990), which are (a) was the damage to the claimant reasonably foreseeable?; (b) was the relationship between the claimant and the defendant sufficiently proximate?; (c) is it just and reasonable to impose a duty of care?. It is the final question which was the largest obstacle to establishing whether a duty of care existed. That difficulty is stated thus: ‘the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done’ (290 F).

Lord Browne-Wilkinson had commented earlier that ‘your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals, but for the benefit of society in general ... the cases where a private right of action for breach of statutory duty has been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions’ (283 F-H). Similarly, he held that the mere assertion that that there had been a careless exercise of such a duty or power was also insufficient upon which to base a cause of action. In respect of the co-existence of a statutory duty and a common law duty of care, he drew a distinction between cases where it is alleged that an authority owes a duty of care in the manner in which it exercises that statutory discretion, and cases where the duty of care is said to flow from the manner in which the duty has been implemented in practice. If the decision complained of came within the ambit of an exercise of statutory discretion, then it could not be actionable at common law. However, if the decision was so unreasonable that it must fall outside that discretion conferred upon the authority, then ‘there is no a priori reason for excluding all common law liability’ (287 G). It follows from this concession, however, that the Court must then proceed to consider whether or not the alleged fault derives from an assessment of what are termed ‘policy’ decisions. He concluded that ‘...a common-law duty of care in relation to the taking of decisions involving policy matters cannot exist’ (290 D).

Even if, however, the claim fell into an area where notwithstanding all of the above, the claim was still justiciable, then it might still fall foul of the principle in *Caparo* set out above (the ‘just and reasonable’ argument, within the context of this general area of legislation). In respect of this particular area, it was held that it was not just and reasonable to superimpose a common-law duty of care on local authorities

7. *f/n 4 above*

8. [1990] 2 AC 605

(within the sphere of child protection). Lord Browne-Wilkinson further relied upon *Caparo* for the proposition that (in effect) to extend the law in this area would be to develop a novel category of negligence, and that this could only be done incrementally and by analogy with decided categories. He held that ‘*the plaintiffs are seeking to erect a common-law duty of care in relation to the administration of a statutory social welfare scheme*’ (302 E). It followed that the claims which were predicated by such a statutory basis failed. It should be noted, for the sake of completeness, that some of the claims were also based upon vicarious liability (ie that the professionals involved had been negligent) but these were also dismissed, for similar reasons to those summarised above.

Clunis⁹ (1998)

As mentioned above, the first litigation which arose on this point within the context of the *Mental Health Act 1983* immediately fell foul of the principles referred to above. For the general purposes of this article, it is as well to set out the current relevant statutory provision at this point:

S.117 (2) Mental Health Act 1983 (as amended)

It shall be the duty of the Primary Care Trust or Local Health Board and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Primary Care Trust or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services....

The facts of *Clunis* are well known. Beldam LJ immediately fastened upon the ratio of Lord Browne-Wilkinson to identify this statutory provision as being ‘*designed to promote the social welfare of a particular class of persons and to ensure that the services required are made available to individual members of the class*’ (224 J). He adopted the caution of **X** in respect of permitting a claim unless there was ‘*exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages...*’ and concluded (based upon **X**) that the wording of the section was not such as to create a private law cause of action for failure to carry out duties under the statute. Further, in dismissing the claim, it was accepted by the Court that ‘*the question of whether a common law duty exists in parallel with the authority’s statutory obligations is profoundly influenced by the surrounding statutory framework the duties of care are, it seems to us, different in nature from those owed by a doctor to a patient...*’ (225 I-K). It followed that *Clunis* has remained since as authority for the prevention of a private law action for breach of a statutory duty, or a claim for an action in breach of a common-law duty of care.

Barrett v Enfield LBC¹⁰ (1999)

In the meantime, the issue of litigation as against local authorities continued, and again required the attention of the House of Lords, and in particular that of Lord Browne-Wilkinson. The facts of this case involved an allegation that children’s services had failed to make proper provision for a child once he had been taken into its care. By the time that the matter came to be determined, two cases had been decided

9. See *fn 6* above

10. [1999] 2 CCLR 203; [1999] 3 WLR 79. This case was reviewed in *JMHL* October 1999. See ‘A Duty of Care?’ by Fenella Morris and Matthew Seligman @ pp 159-164.

which were to have a profound impact on this area of law. The first was *Phelps v Hillingdon LBC*¹¹ (which at that stage had only reached the Court of Appeal) and the second was *Osman v United Kingdom*¹². *Phelps* is considered at greater length below. In respect of *Osman* it is clear that at this stage in the evolution of the law, Strasbourg jurisprudence was beginning to make a significant difference in the way in which the domestic courts were interpreting the law in respect of local authority/state liability. Lord Browne-Wilkinson held that ‘In my speech in the *X* case I pointed out that unless it was possible to give a **certain** answer to the question whether the plaintiff’s claim would succeed, the case was inappropriate for striking out....In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial...’ (207 H). Further, despite his comments on the reasoning in *Osman* he held that ‘In view of the decision in the *Osman* case it is now difficult to tell what would be the result in the present case if we were to uphold the striking out order. It seems to me that it is at least probable that the matter would then be taken to Strasbourg....In the present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 Article 6 will shortly become part of English law, in cases such as these it is difficult to say that it is a clear and obvious case for striking out’ (209/210).

In general terms, the propositions set out in *X* remained, save that the distinction between operational and policy decisions was again emphasised. In essence, if the operational conduct of an authority (ie day to day implementation of a decision made) were sufficiently deficient, and the conditions in *Caparo* were fulfilled, then it might be possible that the authority owed a duty of care, and be in breach of that duty of care.

*Phelps v Hillingdon LBC*¹³ (2000)

The specific statutory context of the claim arose out of legislation in respect of the provision of education, and particularly special educational needs. As Lord Slynn of Hadley observed (citing Auld LJ in the Court of Appeal in *Re G (a Minor)*)¹⁴ ‘The law is on the move, and much remains uncertain’ (158 K). He held that: ‘It does not follow that the local authority can never be liable in common law negligence for damage resulting from the acts done in the course of the performance of a statutory duty... This House decided in *Barrett v Enfield LBC*... that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should not be held that no claim for negligence can be brought in respect of them [166 F] I do not see why as a matter of principle a claim at common law in negligence should never be possible. Over-use of the distinction between policy and operational matters so as respectively to limit or create liability has been criticised, but there is some validity in the distinction. Just as the individual social worker in *Barrett v Enfield* could be ‘negligent in an operational manner’ ... so it seems to me that the local education authority could in some circumstances owe a duty of care and be negligent in the performance of it’ (171 C-D). Although framed by way of vicarious liability (of a psychologist employed by the local authority in this instance) it is clear that between 1995 and 2000 there had already been a substantial alteration in the substantive law regarding the potential for the existence of a duty of care owed by the state towards an individual where there was prima facie evidence of negligence (ie in an operational sense).

11. [1998] ELR 587

12. (23452/94) [1999] 1 FLR 193

13. HL [2000] 3 CCLR 156

14. Unreported 27/7/2000.

JD v East Berkshire Community Health NHS Trust and Others¹⁵ (2005)

This case again gave cause for the House of Lords to reconsider the law in relation to a duty of care in this area¹⁶. Lord Nicholls observed ‘*the law has moved on since the decision of your Lordship’s house in X ... There the House of Lords held that it was not just and equitable to impose a common law duty on local authorities in respect of their performance of their statutory duties to protect children. Later cases ... have shown that this proposition is stated too broadly. Local authorities may owe common law duties to children in the exercise of their child protection duties*’ (211 I-J). It should be noted that by the time the case came to be determined in the House of Lords, the defendant health authorities already accepted that there was a duty of care owed to the children in respect of whom a diagnosis of abuse (which had turned out to be unfounded) had been made. The sole issue was whether or not a duty was owed to the parents of the children. For reasons that are not of specific relevance to the purpose of this article, such a duty of care was found not to exist.

Evolution and Current Law**AK v Central and North West London Mental Health NHS Trust and Royal Borough of Kensington & Chelsea¹⁷ (2008)**

The factual background to this case is sadly all too familiar. The claimant had been detained under the MHA 1983, and was entitled to after care. He was discharged from hospital, but subsequently made a substantial attempt on his own life, which failed, but left him with very serious injuries. His assertion (framed in negligence) as against both the NHS Trust and Local Authority was that (a) there had been a failure to appoint a competent social worker or care co-ordinator, and (b) a failure to provide appropriate accommodation (the suicide attempt was by way of jumping from a second floor window of B&B accommodation). However, he also asserted that there had been a breach of Articles 2, 3 and 8 of the *European Convention of Human Rights* (ie a failure to take positive steps to preserve his life; that the consequences of incompetent after-care amounted to inhuman or degrading treatment; that there had been a failure to protect his family life by virtue of the same failures in effective care planning and the consequences that flowed from the failure). Initially, summary judgment was given in favour of the defendants upon the basis that there was no reasonable prospect of success. The appeal against that decision was successful (apart from that aspect which was founded on Article 2), upon the following basis. It is that success that brings together all of the above points in respect of the changes in the law over the past decade or so, and which are of particular significance for practitioners in this area.

King J commences his judgment with reference to both the *X* case, and *Barrett, JD v East Berkshire*, and *Phelps*. He stated that ‘*I was reminded that notwithstanding the apparent definitive ruling of the House of Lords in X ... that it was not just and equitable to impose a common law duty on local authorities in respect of their performance of their statutory duties to protect children, subsequent case law has (to cite the words of Lord Nicholls in JD v East Berkshire HA) ‘shown this proposition to be stated too broadly’. It is now clear for example that common law duties can exist, albeit they mirror or arise out of a statutory duty owed both by a local*

15. [2005] UKHL 23; [2005] 8 CCLR 185

16. *The European Court of Human Rights had considered X in the interim (TP & KM v UK [2001] 2 FLR 549 and Z & Ors v UK [2001] 2 FLR 612)*

17. See *f/n 4 above* [2008] 11 CCLR 543

authority both under various child protection statutes... and under the Education Act (as in **Phelps v Hillingdon LBC**). A publicly employed health care professional may now owe a common law duty of care to a child with whom that professional is dealing, albeit 'until recently it would have been unthinkable' (per Lord Nicholls in **JD supra**) since 'the law has moved on since the decision of your Lordships house in **X...**'. (para 4; page 546 E-G).

Basis of Claim

Despite an apparent lack of clarity in the formal pleadings as against the Defendants, King J held that 'I have no doubt that the pleaded case in negligence is an allegation of common law negligence in the carrying out of a particular statutory function/duty and in negligently failing to provide services pursuant to that particular statutory duty, namely that falling within section 117.' (551 G-H). The purported liability of each of the Defendants was one of joint liability for the consequences of that negligence.

The Claimant also asserted that the Care Programme Approach (CPA) guidance, with which the Defendants could have been expected to comply, was the source of further responsibilities which in turn formed the basis for a duty of care (and one which was unaffected by the ratio in **Clunis**). However, this argument failed in that it was held that 'the Care Programme Approach cannot be the source of responsibilities imposed on these defendants independently of their responsibilities under section 117 [32] ... the reference to the CPA cannot in my judgment derogate from the basic premise of the claim namely that in purporting to follow the CPA guidance the defendants were exercising their section 117 function' (35; 553). Moreover, an attempt to incorporate into the claim a suggestion that the Trust were in addition bound by virtue of sections 1 and 3 of the *National Health Service Act 1977* was also rejected, not only on the grounds that the claim was framed as one of joint liability, but also since those sections only created a target duty, whereas s. 117 'places an enforceable joint duty on both local authorities and health bodies to consider the aftercare needs of **each individual** to which it relates' (37; 554 B). Similarly, the *National Health Service and Community Care Act 1990*, the *Chronically Sick and Disabled Persons Act 1970* (s.2) and section 29 of the *National Assistance Act 1948* 'can have no relevance to the pleaded cause of action ... which as indicated is expressly pleaded as a joint liability with the first defendant. These statutory provisions only apply to the local authority' (37; 554 C). Further, King J held (by reference to **R v Manchester CC ex parte Stennett**¹⁸ (2004) that 'services provided under section 117 are provided under section 117 alone. It is not a gateway provision which leads to services under other statutes' (38; 554 D). The proposition that s.117 stands apart from other community care legislation has been recently reaffirmed in **R (on the application of M) v (1) Hammersmith & Fulham LBC (2) Sutton LBC; R on the application of Hertfordshire CC v Hammersmith & Fulham LBC**¹⁹ (2010).

Analysis of Claim

The starting point in respect of the reliance of the Defendants upon **Clunis** is summarised thus: 'The submission of both Defendants that the decision in **Clunis** effectively excludes the existence of the common law duty of care to support such a private law action in negligence is on any view a formidable one' (43; 555 F). King J then referred to parts of the judgment in **Clunis** to which reference has already been made in this article. That ratio was distinguished on the following basis: 'In reaching the conclusion which the Court of Appeal undoubtedly did on the facts of **Clunis** that it would not be fair and reasonable to impose a common law duty of

18. HL [2004] 4 A11 ER 124; [2002] 5 CCLR 500

19. [2010] EWHC 562 (Admin)

care on the defendant health authority in relation to the performance of its statutory duties to provide after-care, in parallel with its statutory obligations to make such provision under section 117.... the court clearly had regard not only to its view of the statutory framework but also to its characterisation of the duties which **in the instant case** it was alleged that the defendant had failed to perform as essentially 'administrative' ones, which the court crucially regarded were different in nature from those owed by a doctor to a patient whom he was treating and for whose lack of care in the course of such treatment it was conceded in the local health authority might be liable. Thus although I fully accept that the overall thrust of the judgment ... is to support the proposition put forward by the defendants...it is still nonetheless the position in my judgment that the court in **Clunis** was addressing its mind specifically to the nature of the 'errors and omissions of the kind alleged' .. in that case' (45; 555-556). On the facts of the case in **Clunis**, it was 'easy to understand why the court felt able to characterise the duties which the defendants had allegedly negligently failed to perform as 'essentially in the sphere of administrative activities in pursuance of a scheme of social welfare in the community' in respect of which it would not be 'fair and reasonable' to superimpose on the defendant local authority a common law duty of care to provide those particular after-care services'.

The analysis of this distinction allowed the Court to continue to reach the judgment that 'it seems to me that one has to be careful in using **Clunis** as authority for the proposition that in all circumstances any alleged failure of an authority to provide an after-care service under section 117 is necessarily an allegation of a failure to carry out simply an 'administrative duty' not amenable to the imposition of a common law duty of care, or that any alleged failure under that section which can be characterised as failure to carry out an 'arrangement duty' as opposed to a 'treatment duty' ... necessarily excludes the existence of a common law duty of care in relation to the performance of that duty' (47; 556-557).

Analysis of outcome

King J held that 'on a narrow reading of **Clunis** its ratio is no more than that simply because a person is cared for under section 117, no **general** (ie general to the class of persons whose social welfare it is designed to promote....) common law duty of care to provide section 117 after-care services automatically arises and a claimant cannot lay claim to the benefit of such a duty just because he can show he is a member of the particular class' (49; 557).

In terms of the application to strike out the claim, it followed that upon the basis of the facts in the case which he was considering 'it would be wrong to debar the appellant from arguing at trial that on the facts of his case there was a relationship and proximity between him and the defendants that was far closer than between the claimant and the defendant health authority in **Clunis**' (50; 557). He accepted that it was arguable that the defendants were not involved simply in an administrative capacity but 'were directly responsible on an ongoing basis for aspects of the care of a person whom they already knew to be vulnerable and reliant upon them' (50; 557). It is a reflection of the strength of the judgment that (in part at least) this proposition implicitly and seamlessly draws upon the partial concession by Lord Browne-Wilkinson referred to at the beginning of this article (and contained in **X**) that if the decision was so unreasonable that it must fall outside that discretion conferred upon the authority, then there 'is no a priori reason for excluding all common law liability' (287 G).

King J also relied for his judgment on **Gorringe v Calderdale MBC**²⁰ (2004) in that: 'The observations of Lord Steyn at paragraph 3 emphasise that in his judgment in the case of a claim framed in negligence against the

20. [2004] UKHL 15

background of a statutory duty or power, a basic question is whether the statute **excludes** a private law remedy which was not a question directly addressed in **Clunis**. Secondly even Lord Scott who said at paragraph 71 in a passage heavily relied upon by the defendants, that he was 'inclined to go further' and expressed the opinion that 'if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there', did however in paragraph 73 make the further point that 'there are of course many situations in which a public authority with public duties has a relationship with a member of the public that justifies imposing on the public authority a private law duty of care towards that person and the steps required to be taken to discharge that duty of care may be steps comprehended within public duties. **Barrett** and **Phelps** are examples' (52; 558).

Finally, he relied by way of analogy on **Smith v Chief Constable of Sussex**²¹ (2008). He acknowledged that in that case, sanctioning the removal of any blanket ban on claims in negligence against the police (within a different statutory context) 'which was thought to exist by reason of the House of Lords decision in **Hill v Chief Constable of West Yorkshire**,²² the court did demonstrate **how the very proximity of the parties on particular facts** may lead to a different conclusion being reached than hitherto, and that that which might have been regarded as definitive expositions of principle at the highest level as to when a common law duty of care might or might not arise, have to be considered in the light of that proximity. Thus Sedley J ... observed at paragraph 17 that nonetheless 'it has become clear ... that in some cases involving the police the very proximity of the parties can not only create a duty of care but can overcome the public policy considerations which would otherwise bar the claim' (54; 558).

As a consequence of the above, 'even if contrary to my present view, **Clunis** has to be read as authority for the proposition that a common law duty of care in the exercise of a statutory duty under section 117 is absolutely excluded in all cases whatever the facts, such a wide proposition is no longer tenable in the light of subsequent legal developments in this area at a level higher than that of the the Court of Appeal, and that **Clunis** cannot be regarded as 'the final chapter on the destiny of claims such as the present' (to adapt the words of Rimer LJ in **Smith**) and that this is not a case where a strike out application of the claim of common negligence should succeed when there has been no investigation on the facts' (55; 558-559).

Conclusion

This article began with a reference to the words of the late Lord Bingham in relation to the evolution of the law. In many respects, the decision in **AK** marks the end of a period of some 15 years during which the basic principles of the tort of negligence had become occluded by a reluctance to permit an organ of the state to be liable within the context of community care law.

The propositions that can be extracted from that process are (not exhaustively) as follows. Generally, the impact of the *Human Rights Act* 1998 has plainly had a considerable effect upon the domestic courts (primarily Article 6). In addition, where there is a proximate relationship between an individual and an agent of the state discharging duties conferred by a statute, and where there has been a specific assumption of responsibility towards that individual, then all things being equal, if the traditional elements of the tort of negligence can be made out, then liability and damages will follow as in any other case of negligence. Specifically, it will be no longer possible for a defendant to rely upon the assertion that a statute designed to promote social welfare is (in itself) impervious to assault by way of a claim in negligence. This is certain where the facts may reveal (a) the necessary degree of contiguity between the

21. [2008] EWCA Civ 39

22. [1998] 2 All ER 238

claimant and the defendant, (b) an assumption of responsibility towards the claimant, and (c) the necessary lack of competence in discharging the duties so imposed. Finally, the exegesis of the higher courts in respect of the manner in which the relevant statutes are phrased and the inferences that may or may not be drawn from parliamentary draftmanship have now been almost completely reversed. The warning sounded in *X* that *'the question ... must be profoundly influenced by the statutory framework...'* (supra) has now been replaced with *'a basic question is whether the statute excludes a private law remedy'* (*AK* supra).

It has been quite a long journey from *X* to *AK*, but the consequence must now be that the law of tort has evolved (to paraphrase the words of Lord Bingham) so as to fashion a remedy for what are very contemporary and human problems, without merely leaving those problems to be *'swept up by the Convention'*.