Neutral Citation Number: [2006] EWCA Civ 239

Case No: B3/2005/1152

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
His Honour Judge Levy, QC
Claim No CL 307623

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2006

Before :

LORD JUSTICE MAY
LORD JUSTICE LATHAM
and
LORD JUSTICE LONGMORE

- -

Between :

THE HOME OFFICE	**Appellant**
- and -	
ROBERT BUTCHART	**Respondent**

- -
- -

Jeremy Johnson (instructed by the **Treasury Solicitor**) for the **Appellant**
Heather Williams (instructed by **Bhatt Murphy**) for the **Respondent**

Hearing dates : 1st February 2006

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Latham:

1. At the relevant time, the respondent was on remand in Winchester Prison. He claims that he was, to the knowledge of the prison authorities for whom the appellant is responsible, psychiatrically vulnerable, in that he was in a depressed and unstable condition, threatening self harm and at one time suicidal. His case is that, despite this knowledge, the authorities placed him in a cell with another remand prisoner known to be a suicide risk who did in fact commit suicide. Because of the stress created by being placed in the same cell as that fellow prisoner, the prisoner's suicide itself, the fact that he said that he was blamed by a prison officer for that suicide, and was subsequently placed in a cell with another suicidal prisoner, he claims that he has suffered psychiatric harm.

2. He claims damages on the grounds that his psychiatric state was the result of a breach of the appellant's duty of care to him whilst in its custody. The appellant seeks to strike out the respondent's claim on the grounds that it did not owe any duty to the respondent to prevent psychiatric damage to him consequent upon the suicide of his fellow prisoner. Alternatively, it is submitted that the appellant should have summary judgment against the respondent on the grounds that the facts do not support the allegations made in the claim. In a judgment of the 29th April 2005, HHJ Levy, QC dismissed both applications. The appellant now appeals to this court.

3. Returning to the history of the matter in more detail, the material before the court shows that the respondent was first referred to a psychiatrist at the end of 1998 and was admitted to a mental health facility in Gosport suffering from "relationship crisis and alcohol intoxication", with depressive thoughts about the future and hopelessness. The doctor then treating him was concerned about his presenting a risk of harm both to himself and others. He was discharged towards the end of January 1999. He first arrived at Winchester Prison on the 9th June 2000 as a remand prisoner, and spent the first six weeks of his time in custody in the Health Care Centre during which time he was prescribed anti-depressants and tranquilisers. On the 29th June a "Prisoner – Exceptional Risk" form was completed referring to him as being "down and emotional" and "at risk from further self harm due to the likely sentence". Reference was made on the form to an episode of self-harm when in police custody prior to the remand. A police officer who had seen the respondent in police custody telephoned the Prison Chaplain because he was concerned that the respondent would harm himself. On the 14th August, as a result of concerns expressed by his legal advisors after a visit to him, a form F2052 SH was opened: this is a form used in respect of prisoners who are at risk of suicide. This form was closed on the 16th August after he had been seen by a doctor at the Health Care Centre who clearly did not consider that the respondent's mental condition justified it. The doctor recommended that he be transferred to normal location, to a shared cell, but that he should be monitored by the Wing Staff.

4. The prisoner with whom he was thereafter asked, or more neutrally permitted, to share a cell, was Ian Holms. Ian Holms had been arrested on the 13th May 2000 charged with the murder of his girlfriend. The police identified him as at risk of suicide; and on his remand to Winchester Prison, he was recorded as stating that he "wants to die but not yet". He was seen by Dr Lodi who noted that he was expressing suicidal thoughts. These concerns increased during the course of May to the extent that by the 3rd June, a Form F2052SH had been opened. During the course of June

there was continuous concern about the risk of suicide. By the 22nd June he was described as a high suicide risk; and on the 29th June he was transferred to the Ravenswood Regional Secure Unit. On the 18th July he was returned to Winchester Prison; but, in the opinion of those discharging him from Ravenswood, he presented a "long term risk of self harm and attempted suicide".

5. He remained in the Health Care Centre until the 16th August 2000. He was then placed in a cell with another inmate Terry Whitmore who clearly found him very demanding and eventually asked for a transfer. It was in those circumstances that the respondent came to share a cell with Ian Holms. They both came from Gosport, and it may well be that Ian Holms specifically asked if he could share with the respondent; and the respondent did not object.

6. The respondent's case is that that throughout the time that he was Ian Holms's cell mate, Ian Holms was contemplating suicide and put him under considerable psychological pressure not to disclose that. He accepts that, as a result, he did not pass on information to the prison staff about his concerns. Ian Holms clearly had access to drugs, as he tested positive for amphetamines on the 26th September 2000 when he complained about not sleeping, and appeared "dopy" to a prison doctor Dr Doornbos.

7. On the day before his death, Ian Holms was seen by a Dr Nayani on the instructions of Ian Holms's solicitors in order to prepare a report for the purposes of his defence at trial. Dr Nayani in his evidence at the subsequent inquest said:

> "He didn't come across as a gentleman with striking signs of clinical depression … He came across as an emotional man. He came across as a man who is easily upset; he came across as a man who was obviously finding it difficult to come to terms with his predicament for perfectly obvious reasons."

8. The doctor went on to say that he had not expected suicide.

9. Ian Holms was discovered dead by the respondent at about 4.30 a.m. on the 29th September 2000. He had strangled himself with a ligature attached to his bed.

10. The next day another prisoner, Andrew Page attempted suicide by hanging. The respondent was put on constant watch over that weekend, presumably to obviate the risk of his suicide. According to the respondent, at the end of the weekend a prison officer told him that if anyone were to blame for Ian Holms's death, it was the respondent. The respondent's case is that this was intended to be a criticism of the fact that he had not reported to the prison authorities his concerns about the risk of Ian Holms committing suicide during the time that he was his cell mate. The position was thereafter exacerbated by the fact that the respondent was made to share a cell with Andrew Page.

11. In the amended particulars of claim, the respondent claims damages for pain, injury, loss and damage:

> "In consequence of the suicide of Mr Holms and his feelings of responsibility, the claimant developed an adjustment disorder.

> Symptoms included pronounced distress, nightmares about Mr Holms and interference with sleep, anxiety, impaired appetite and impaired concentration. His own suicide risk was increased for a couple of months. Over time his symptoms have improved, but the adjustment disorder has not yet resolved. His initial condition was exacerbated by the remark made by Officer Walton and/or by being required to share a cell with Andrew Page."

12. The duty of care of which it was alleged that the appellant was in breach was "a duty of care to take all reasonable steps to protect him from reasonably foreseeable harm, including psychiatric injury." That was particularised as extending to taking reasonable steps to protect him from the psychiatric harm he suffered as a result of Mr Holms's suicide. And the failures particularised are directed fairly and squarely at the appellant's alleged failures to assess the suitability of placing two vulnerable prisoners together, to monitor and check the progress of the cell sharing arrangement, to give the respondent any advice or support during the period that he and Ian Holms were together and subsequently failing to provide him with any support, but on the contrary encouraging him to blame himself and then placing him for a time in a cell with another prisoner who was at risk of suicide.

13. The appellant seeks to strike out the claim on the grounds that damages are irrecoverable as a matter of law, as the appellant was not in breach of any duty of care to the respondent to protect him from psychiatric damage resulting from the suicide of Ian Holms, and that in any event even if there was a duty of care, the suicide of Ian Holms was not foreseeable on the basis of the known facts.

14. The essence of the appellant's application to strike out the claim is the submission that the control mechanisms deriving from the speeches of their Lordships in *Frost –v- Chief Constable of South Yorkshire Police* [1999] 2AC 455 apply in every case whatever the nature and source of the duty of care if the causative event in a claim for psychiatric damage is witnessing the death of or serious injury to another. These control mechanisms, as described by Lord Hoffman at page 502 G include as a necessary element the fact that the claimant must have close ties of love and affection with the victim. It is submitted that that hurdle quite clearly cannot be overcome by the respondent. If, in truth, the present claim could and should be categorised as the appellant submits that it should, that would be a formidable argument.

15. But it is unnecessary, in my view, to analyse in any detail the line of authority which culminated in *Frost* in order to determine whether or not the control mechanisms relevant to the type of claim with which that case was concerned had been met in the present case. I do not read the respondent's claim in the present case as being one which is narrowly based upon the effects of Ian Holms's suicide and accordingly a "nervous shock" case. The particulars of claim make it clear, in my view, that the psychiatric injury which the respondent alleges that he ultimately suffered was the result of a breach of a primary duty of care owed to him. It was the result of the cumulative effect of being incarcerated with an increasingly disturbed man, who committed suicide in circumstances which gave rise to a feeling of guilt on the part of the respondent which was compounded by the remark of the prison officer apparently ascribing responsibility to him, and a further period, albeit short, of incarceration with yet another prisoner suffering from suicidal thoughts. Whether the respondent will be

able to establish that any psychiatric injury which he sustained was the result of those cumulative effects, or was simply the result of the shock of the suicide may well be a matter for debate at a trial of the issues in this case. But I do not think that the claim as formulated requires the respondent to surmount the hurdles of what have been described as the control mechanisms in cases involving injury caused by the witnessing of the death of or serious injury to another, where the primary duty of care is to that other person.

16. As Lord Hoffmann said at page 504F in *Frost*:

> "The control mechanisms were plainly never intended to apply to all cases of psychiatric injury."

17. The real question, in my view, is whether or not the relationship between the appellant and the respondent gave rise to a duty of care which encompassed a duty to take reasonable steps to avoid psychiatric harm. In the present case there is no doubt that the appellant owed a duty of care to those in its custody. The House of Lords in *Reeves –v- Commissioner of Police of the Metropolis* [2000] AC 360 held that the police owed a duty of care to those in its custody, which could in certain circumstances include a duty to take reasonable steps to prevent a prisoner from taking his own life. This was reiterated by this Court in *Orange –v- Chief Constable of West Yorkshire Police* [2002] QB 347. The question then is whether or not the scope of that duty which can generally be described as a duty to take reasonable steps to ensure the health and safety of a prisoner encompassed taking reasonable steps to protect a prisoner from psychiatric harm.

18. The courts have recognised that the relationship between a client and his solicitor in a criminal case is such that it is capable of giving rise to a duty to minimise the risk of wrongful conviction and of the client therefore suffering psychiatric illness: *McLoughlin –v- Jones* [2002] QB 1312. And the courts have now considered on a number of occasions the circumstances in which an employer can be held liable for psychiatric injury arising from the conditions of his employment. The three most significant authorities are *Hatton –v- Sutherland* [2002] 2All ER 1, *Barber –v- Somerset County Council* [2004] 1 WLR 1089, and *Hartman –v- South Essex Mental Health and Community Care NHS Trust* [2005] IRLR 293. In the latter case the Court of Appeal considered appeals in six separate claims in the light of the decisions of the Court of Appeal in *Hatton* and the House of Lords in *Barber*. From these authorities it is clear that the control mechanisms applicable to claims for psychiatric injury in circumstances such as those considered in *Frost* are not relevant to claims where a claimant can clearly establish a duty of care to prevent or minimise psychiatric harm. The authorities relating to employer's liability essentially show that the duty forms part of the ordinary obligations of the employer's duty of care where an employer knows that a particular employee is vulnerable, or where it is quite apparent that psychiatric injury could well result from a particular task or tasks.

19. In one of the cases considered in *Hartman*, a health care officer employed by the present appellant at HMP Exeter suffered stress related illness after helping to cut down the body of a prison suicide. This was the eighth occasion on which he had had to attend the aftermath of such a suicide. The Court of Appeal upheld the decisions of both the judge at first instance and the High Court Judge on appeal that it was reasonably foreseeable by the appellant that the claimant could suffer psychiatric

damage, and the appellant had indeed put in place procedures to alleviate the risk of such damage to its employees. It should, however, be noted that that was the only issue considered by the Court of Appeal. The question whether the Home Office had been in breach of its duty in that case was a matter which still had to be resolved.

20. None of these authorities are directly in point. But they make it clear that the question in cases such as the present is not the same as the question raised in cases such as *Frost*. As I have said, what has to be determined is the nature and potential scope of the duty of care in the light of the relationship between the claimant and defendant. In the present case, the question is, therefore, whether or not on the pleaded facts, the appellant could have owed a duty of care to the respondent to take reasonable steps to avoid causing him psychiatric harm. In my view the pleaded facts are sufficient to establish, if proved, that the appellant knew or ought to have known that the respondent was a prisoner vulnerable to psychiatric harm. In those circumstances it seems to me to be inevitable that the duty of care which the appellant owed to the respondent included a duty to take reasonable steps to minimise the risk of psychiatric harm. Clearly the assessment of what steps could or should have been taken will be a matter of debate on an assessment of the evidence, bearing in mind the fact that the respondent was a prisoner and that the appellant's responsibilities have to be assessed in the light of the inevitable constraints imposed by what is reasonably practicable in a prison community. But that will be for the trial judge to determine.

21. Further, on the pleaded facts, the decision to place him with Ian Holms is, in my view, capable, depending upon the facts found by the trial judge, of amounting to a breach of that duty. As pleaded, the appellant knew or ought to have known of the risk of Ian Holms committing suicide, and the state of mind that must have given rise to his suicide or thoughts of suicide. In those circumstances, it would clearly be open to the judge to conclude that placing Ian Holms with the respondent, even if the respondent apparently agreed to such a course, was a breach of its duty to the respondent. Again that will be a matter for the trial judge to evaluate. Further, there will be questions as to whether or not adequate monitoring took place of the respondent and Ian Holms during the period leading up to Ian Holms's suicide. Issues will also arise as to the alleged statement by the prison officer, and the decision to place the respondent with Andrew Page.

22. It follows that in my judgment, the claim, as pleaded, discloses a cause of action: the judge was therefore right not to strike it out. The appellant, however, submits that central to the viability of the claim, even if adequately pleaded as a cause of action, is the foreseeability of the risk of suicide presented by Ian Holms. The appellant submits that the evidence of Dr Nayani at the inquest makes it plain that no one could have foreseen that Ian Holms was, at the relevant time, a suicide risk. Accordingly, the respondent has no reasonable prospect of succeeding in establishing his claim, and summary judgment should be given for the appellant.

23. Leaving aside the fact that it is debatable whether Ian Holms's suicide is, in itself, as central to the respondent's claim as the appellant submits, it seems to me that the submission ignores the history. In particular, it fails to recognise that on his discharge from Ravenswood, the opinion was expressed that he was at "long term risk of self harm and attempted suicide." Although there may well have been an amelioration in his condition, that will be an opinion on which the respondent will be entitled to rely to support his argument that, even if the risk of suicide had abated, which may be a

matter for debate, nonetheless that risk remained throughout the relevant time. In my judgment, there is evidence which supports the argument that Ian Holms remained a suicide risk. It will be for the judge to evaluate it and determine the extent to which that evidence helps him to determine whether or not there had been a breach of any duty of care to the respondent.

24. I would accordingly dismiss the appeal. Counsel are particularly asked to consider the proposed direction in paragraph 24, and to make any submissions they wish to make in writing for the Court to consider and the time the judgment is handed down. If both parties are happy with the direction, there will be no need to attend.

Lord Justice Longmore: I agree.

Lord Justice May: I also agree.