W v. HOME OFFICE [1997] EWCA Civ 1052 (19th February, 1997)

IN THE SUPREME COURT OF JUDICATURE CCRTF 96/1105/C
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CLERKENWELL COUNTY COURT
(SIR MICHAEL DAVIES sitting as a Judge of the High Court)

Royal Courts of Justice
Strand
London WC2

Wednesday 19 February 1997

B e f o r e:

THE MASTER OF THE ROLLS
(LORD WOOLF)
LORD JUSTICE THORPE
LORD JUSTICE WALLER

- - - - - -

W
Plaintiff/Appellant

- **v** -

THE **HOME OFFICE**
Defendant/Respondent
- - - - - -
(Transcript of the Handed-down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)
- - - - - -
MR N BLAKE QC and MR T OWEN (Instructed by Winstanley-Burgess, London EC1V 2QA) appeared on behalf of the Appellant.

MR J HOWELL QC and MR R TAM (Instructed by The Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent.
- - - - - -
J U D G M E N T
(As approved by the Court)

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JUDGMENT

LORD WOOLF, MR: This is a judgment of the court.

Introduction

The appeal is from a decision of Sir Michael Davies sitting as a Judge of the High Court, given on 6th June 1996. Sir Michael decided two preliminary points in favour of the Defendant, the **Home Office**, against the Plaintiff, **W**, who is seeking asylum in this country and is known by the initial "**W**" to protect his identity. The result of Sir Michael's decision was that he dismissed the Plaintiff's claim.

The Preliminary points had been ordered to be tried by a District Judge on 31st October 1995. They are:

"(1) Whether the defendant owed to the plaintiff a duty of care, and if what duty of care, in respect of the length of time for which the plaintiff was detained, breach of which duty would give rise to a cause of action in negligence.

(2) Whether, if the length of the plaintiff's detention was increased by the defendant's negligence , the additional period of detention constitutes loss or damage in respect of which damages may be awarded to the plaintiff. "

Point one ("the duty point") is the more important point. It involves the question whether the **Home** Secretary or an immigration officer owe a duty of care to an individual who is detained under the authority of such officer by virtue of paragraph 16 of Schedule 2 to the Immigration Act 1971 when making a decision under paragraph 21 of that Schedule whether to release that individual from detention and when taking the steps which are required in order to reach that decision.

The second point, ("the damage point") involves the subsidiary, but connected question, of whether if such a duty of care exists and as a result of its breach an individual is detained longer than he should have been damages can be recovered for the breach in respect of the additional detention, i.e. can the prolonging of detention be a loss for which damages are recoverable in these circumstances in an action which is based on the tort of negligence?

The Facts

For the purpose of the trial of the preliminary points the facts asserted in the particulars of claim (the action was commenced in the Clerkenwell County Court and transferred to the

High Court) were presumed accurate, and no evidence was called by either side. The presumed facts are accordingly as follows:

"The Plaintiff is and was at all material times a citizen of Liberia. On 23rd December 1993 the Plaintiff arrived in Gatwick Airport having embarked from Nigeria. He spent some three hours in transit at Gatwick before flying to Dusseldorf Airport, Germany, where he was refused leave to enter. He then returned to the U.K., landing at Heathrow Airport, where he claimed asylum".

The **Home Office** decided to return the Plaintiff to Germany and certified the Plaintiff's claim was without foundation. The Plaintiff appealed the initial decision under Section 8(1) of the Asylum and Immigration Appeals Act 1993. That appeal was unsuccessful as was an application for leave to move for judicial review, and on 10th March 1994 the Plaintiff was returned to Germany.

On 11th March 1994 the relevant German Authority ordered the Plaintiff to be returned to the U.K. and upon his arrival back in the U.K. the Plaintiff was again ordered to be detained. By letter dated 15th March 1994 the **Home Office** notified the Plaintiff that his asylum claim would be considered in the United Kingdom and that arrangements would be made for him to be interviewed. In the meantime, not withstanding representations by the Plaintiff's solicitor that the Plaintiff should be granted temporary admission to the United Kingdom, the Plaintiff remained in detention.

On 18th and 19th March 1994 the Plaintiff was interviewed at length and in detail by the **Home Office** at Heathrow Airport. The Plaintiff's solicitor was told by the Chief Immigration Officer that unless and until the Plaintiff had established his identity as a citizen of Liberia, the question of his being released from detention and granted temporary admission would not arise.

Further written representations in support of the Plaintiff's request were made by letter dated 23rd March 1994. On 30th March 1994 the Plaintiff was notified that a further interview would be necessary. A date for that interview was fixed for 11th April 1994. In the meantime the Plaintiff continued to be detained. On 11th April 1994 at 1.30pm the Plaintiff and his solicitor attended a further interview at Heathrow Airport with a Mr Carmichael an Immigration Officer. Mr Carmichael explained that the further interview had been required because it had not been accepted that the Plaintiff was a Liberian citizen in view of his poor performance at an interview on 28th March 1994 at Harmondsworth Detention Centre. It was explained that the Plaintiff had scored 3 out of a possible 15 points and that true Liberians would have found it easy to answer all the questions. The Plaintiff denied that he had taken a test on 28th March but agreed to take a further test there and then. Having given the test to the Plaintiff, who passed it with ease, Mr Carmichael left the interview room. When he returned a short while later he explained that having re-checked the Plaintiff's file he had discovered that by mistake, a test given to someone other than the Plaintiff had been placed on the Plaintiff's file, thus causing the **Home Office** to have doubts about his true identity. He apologised for the error. The Chief Immigration Officer, a Mr Souter, then entered the room and stated that in the light

of the Plaintiff's performance in the test his claim for temporary admission would be re-assessed. He also apologised for the mistake in placing the wrong test in the Plaintiff's file.

After further representations from the Plaintiff's legal representative, the Plaintiff was immediately released from detention and granted temporary admission. Further apologies were tendered to the Plaintiff.

The Duty Point

It is alleged that the detention of the Plaintiff from 19th March, or alternatively from 28th March 1994, was caused by the negligence of the Defendants, its servants or agents. While there are six allegations of negligence set out as particulars in the particulars of claim, the allegations can be divided into two. The first is an allegation that the Defendants conducted the original interviews negligently by failing to ask the right questions and/or by failing to require the Plaintiff to sit the Liberian Nationality Test. The second is that the Defendants were negligent through one of their officers placing someone other than the Plaintiff's questionnaire and answers on the Plaintiff's immigration file. This it is alleged took place on or about 28th March 1994.

Statutory scheme

It is of importance when considering this issue to stress that whatever was done by or on behalf of the Defendants was done pursuant to a statutory regulatory scheme for the control of immigration into this country of those who have no right to enter or remain in this country. The statutory scheme is contained in the Immigration Act 1971 and it is necessary for the particular powers which have to be considered in the context of the statutory policy of the Immigration Act 1971 as a whole (see Stovin v Wise (1996) AC 923 at p952) Section 1(2) states:

"Those not having (the right of abode in the United Kingdom) may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act;..."

Section 3(1) states:

"Except as otherwise provided by or under this Act, where a person is not [a British citizen]-
(a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act; ..."

Section 4(1) states:

"The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, ..."

Section 4(2) states:

"The provisions of Schedule 2 to this Act shall have effect with respect to -

(a) the appointment and powers of immigration officers and medical inspectors for purposes of this Act;

(b) the examination of persons arriving in ... the United Kingdom by ship or aircraft .... and
c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
(d) the detention of persons pending examination or pending removal from the United Kingdom;

and for other purposes supplementary to the foregoing provisions of this Act."

Section 11(1) states:

"A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act."

Schedule 2, so far as material provides by 1(3):

"In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State, ...

and by 2(1):

"An immigration officer may examine any persons who have arrived in the United Kingdom by ship [or aircraft] ..... for the purpose of determining -

(a) whether any of them is or is not [a British citizen]; and

(b) whether, if he is not, he may or may not enter the United Kingdom without leave; and

(c) whether, if he may not, he should be given leave and for what period and on what conditions (if any), or should be refused leave. .....

and by 2(3):

"A person on being examined under this paragraph by an immigration officer ... may be required in writing by him to submit to further examination; .....

and by 16(1):

"A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter. ...

and by 18(1):

"Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct ....

and by 18(4):

"A person shall be deemed to be in legal custody at any time when he is detained under paragraph 16 ....

and by 21(1):

"A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.

The only other matter to mention is that a right of appeal is given under Section 13(1) of the Act and it is only pending appeal that any person has the right to apply for bail under paragraph 29 of the Schedule.

The particular points in relation to the above scheme to which Mr Howell QC drew attention and which were not contested by Mr Blake QC are the following.

(1) It will be seen that individuals requiring leave to enter enjoy no right or presumption that they should be entitled to be at large before leave is granted.

(2) A wide discretion is given to the Immigration Officers not only whether to admit detain or release but also in respect of the investigations they are entitled to make.

(3) The relevant statutory provisions are concerned with the giving of authority to detain; actual detention is in hands of other persons.

(4) It is not contested in this case that the Plaintiff was lawfully detained at all times and

(5) It is not contended that an invalid decision authorising detention makes the detention unlawful.

The powers given to immigration officers by the Act are quintessentially those which are enforced by judicial review and in the normal way if a decision to release an immigrant is improperly delayed the remedy is an order of mandamus, not to release the immigrant, but to come to a decision whether to release or not. If that decision is improperly taken the remedy is again to seek a prerogative order, this time certiorari. In both cases no personal cause of action exists which could give a right to recover damages for breach of statutory duty and no such breach is alleged.

The arguments

Very detailed and helpful arguments were advanced, both orally and in writing, by Mr Blake QC on behalf of the Plaintiff and Mr Howell QC on behalf of the **Home Office**. In order to resolve this point it is not necessary to set out the arguments in extenso. This is another case where the Plaintiff would wish to push forward the boundaries of the tort of negligence, or as Mr Blake QC would submit, revive a forgotten cause of action of "negligent detention". The number of authorities which have considered and reconsidered in recent years where the boundaries should be drawn are many, and indeed the Deputy Judge sets out quite extensively passages from certain of the Judgments in those cases. However the principles which are applicable to the facts of this case are now well known and can be summarised as follows:

1. For a duty of care to arise, "in addition to the foreseeability of damage, necessary ingredients .... are that there should exist between the party owing the duty and the party to whom the duty is owed a relationship of .... "proximity" ... and that the situation should

be one in which the court considers it fair just and reasonable that the law should impose a duty" (Caparo plc v Dickman (1990) 2 A.C.605 Lord Bridge at 618A).

2. It will normally be unnecessary to embark on any further inquiry whether it is "fair just and reasonable" if a person has assumed responsibility to another in respect of services. As Lord Goff put the matter in Henderson v Merrett 1995 2 A.C. 1145 at 181 "if a person assumes responsibility to another in respect of certain services there is no reason why he should not be liable in damages to that other in respect of economic loss which flows from the negligent performance of those services." Thus the question whether a defendant has assumed a responsibility can be a material question in any analysis.

3. The mere existence of a relationship brought about by one party exercising a statutory power vis a vis another is not sufficient to found proximity on its own. Mr Blake QC sought to rely on what Lord Jauncey said at page 728 in W (Minors) v Bedfordshire CC [1995] 2 A.C.633 as suggesting, as we understood his argument, that any negligent exercise of a statutory power would give rise to a cause of action in negligence. But that is a misreading of what Lord Jauncey was saying since he makes clear that for there is to be a cause of action in negligence it must arise independently from the exercise of a statutory power. He said "Thus careless performance of an authorised act rather than amounting to breach of a new duty removes a defence to a common law action". That that was his view is made clear by the fact that he (and indeed all other members of the House) agreed with Lord Browne-Wilkinson's reasoning including his statements; at 734H-735A.

"In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient."
and at 739D/H
"a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage,the due performance .....of ....statutory duties"

A similar point was made by Lord Hoffman in Stovin v Wise at p 953D when he said:

"the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.

I think that the minimum preconditions for basing a duty upon the existence of a statutory power, if it can be done at all, are , first, that it would in the circumstances have been irrational not to have exercised the power, so that there was a public law duty to act, and secondly there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.
"

4. There can be no liability in respect of anything done within the ambit of a discretion conferred by statute. Somebody may act so unreasonably as to be acting outside the ambit of the discretion (see again the speech of Lord Browne-Wilkinson in the above case at 736-737 and Lord Hoffman in the passage already cited from his speech in Stovin.) Lord Browne -Wilkinson emphasised the drawing of a distinction between the exercising of a discretion, and the manner in which a statutory duty has been implemented in practice, and at 737E, Lord Browne-Wilkinson continued:

"It follows that in seeking to establish that a local authority is liable at common law for negligence in the exercise of its discretion conferred by statute, the first requirement is to show that the decision is outside the ambit of the discretion altogether; if it was not a local authority cannot itself be in breach of any duty of care owed to the plaintiff."

5. It is less likely that a duty of care will be imposed on a person exercising his public duty i.e. even where the statutory duty is being implemented, if:

(1) a potential conflict could arise between the carrying out of the public duty, and acting defensively for fear of an action in negligence being brought;

(2) where the category of public servant is one similar to the police or CPS as considered in Hill v The Chief Constable of West Yorkshire [1989] 1 A.C. 53 and Elguzouli-Daf v The Commissioner of the Metropolis [1995] Q.B. 335, and where(a) the general sense of public duty of such servants is unlikely to be appreciably reinforced by the imposition of liability;

(b) the recognition of the existence of a cause of action even in quite limited circumstances would likely to lead to the bringing of a substantial number of cases, and a diversion of the public servants concerned away from their duties contrary to the general public's interest; and

(c) where there are other private law remedies available if there is a deliberate abuse of power, and public law remedies available to challenge decisions.

It seems to us that the application of each of these principles to the situation under consideration is inconsistent with the existence of a duty of care being owed by the immigration officer to the immigrant who has been detained.

Part of Mr Blake QC's argument was that there had been some assumption of responsibility by the immigration officers acting in this case. An attempt was made to equate the circumstances with those in Barrett v Ministry of Defence [1995] 3 W .L.R.968 in which the Court of Appeal held that once a drunken naval airman had collapsed the Ministry of Defence assumed responsibility for him. There is nothing in the circumstances alleged in this case which would support a finding of an assumption of responsibility.

Furthermore (as Mr Blake realistically almost accepted) having regard to the principles set out, there could be no question of the court imposing a duty of care in relation to the asking of questions pursuant to the inquiries being carried out. There could not be a clearer example of part of the decision making process involved in the proper exercise of this discretionary power than the actual conducting of the interview, and the asking of questions.

The debate during submissions concentrated ultimately on the allegation that someone had placed a questionnaire relating to another person on the Plaintiff's file, which had led to a decision that the Plaintiff had not established that he was Liberian. That allegation must, for the purposes of the Preliminary Points, be taken as true, and Mr Blake QC's submission was that such conduct was "operational carelessness in failing to take reasonable steps to secure that accurate information was brought to mind for the purpose of exercising a discretion ...". As it seems to us, there may be circumstances in which someone assumes responsibility to another for providing accurate information to a decision making body, as for example a doctor supplying a medical certificate, where a cause of action may exist against the Doctor if he does not act to the level a reasonable Doctor should. In Everett v. Griffiths [1920] 3 K.B.163 (C.A.), and 1921 1 A.C.631 (House of Lords), a Plaintiff who had been detained as a lunatic as the result of the decision of Griffiths, a Justice of the Peace and Chairman of the Board of Guardians in reliance on a medical certificate signed by Anklesaria, a Doctor, sued them both in negligence. In the Court of Appeal Bankes LJ and Atkin LJ thought the Doctor (the relevant Defendant for the point we are seeking to make) owed a duty of care (see page 183 and 218), and in the House of Lords the matter appears to have been argued on the facts only on the assumption there was a duty, that point being expressly left open (see for example Lord Finlay at 669 at the bottom and Lord Moulton at 697), but Viscount Haldane did comment that he thought it "probable that if the matter were argued out Anklesaria would have been found to have been under a duty to the appellant to exercise care, the precise nature of this duty would require consideration before it could be exactly defined." (657). But the circumstances as alleged in the present case are not of a third party assuming responsibility to produce the questionnaire.

The essence of the allegation made is that the decision making body has "negligently" taken into account matters it should not have taken into account by having regard to some irrelevant, and indeed if the allegation be right, misleading information, namely that contained in the questionnaire. But this cannot constitute the tort of negligence. If it did it is difficult to see why any maladministration does not give rise to a liability to pay damages at common law. In fact it is because there is no liability to pay damages for maladministration in the ordinary way that the Central and Local Government "Ombudsmen" are required to investigate maladministration and where they find a complaint proved to exercise their discretion as to whether to recommend the payment of compensation.

The process whereby the decision making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account the

Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply. As Lord Moulton put it in Everett v Griffiths (supra) :

"If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of the duty to the public and then leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision."

Lord Moulton may in the context of that case have been contemplating immunity from suit for negligence but the sentiment supports the concept of it not being fair or reasonable to impose liability for negligence in the case of an immigration officer performing his public duty.

The Damages Point

The second point does not have to be decided However here we would be in favour of the Plaintiff. It is recognised by Mr Howell QC on behalf of the Defendants that there are authorities recognising that damages for detention when, produced by the negligence of medical practitioners are recoverable. In the skeleton argument reference is made to De Freville v Dill (1927) 96 LJKB 1056 and Everett v Griffiths [1920] 3 K.B. 163 CA, a decision in the Court of Appeal and House of Lords to which we have already referred.

It is however suggested that in the judgment of Scrutton LJ at [1920] 3 K.B. p.191 he would have ruled that damages for detention were irrecoverable. It is said that he thought that recoverability was inconsistent with a decision of the Court of Appeal in Thompson v Schmidt (1892) 56 JP 212. It seems to us the point of doubt in De Freville v Dill and the point with which Scrutton LJ was dealing at the passage in the judgment to which we have been referred, was one of causation. What was being suggested was that albeit a negligent certificate might be produced, that did not cause detention because of the intervening decision of a magistrate or the chairman. On causation however, McCardie J in De Freville v Dill recognised the force of the observations of Lord Finlay in the House of Lords in Everett v Griffiths at 667 and held that causation was established.

There is no suggestion in the judgments referred that "detention" could not in some way amount to damage so as to preclude there being any action for negligence for detention.

More recently in Welsh **v** Chief Constable of Merseyside Police [1993] 1 All ER 692 a negligent failure to inform the justices that an offence had been taken into consideration resulting in a warrant being issued not backed for bail and consequent further detention, appears to have been assumed to give rise to a cause of action as resulting in damage. In Elguzouli Daf **v** Commissioner of Police [1995] Q.B. 335 CA there was no suggestion that prolongation of detention was not sufficient injury to constitute damage. In Olotu **v** **Home Office** and CPS Transcript 29th November 1996, the Lord Chief Justice certainly appeared to assume that detention was damage for the purpose of any action that the plaintiff in that case might have had against his solicitors in negligence (see p.17).

It is true that in Reilly **v** Merseyside RHA Court of Appeal Transcript 28th April 1994 persons negligently detained in a lift failed in their action for damages. But, it does not appear that they sought damages on the basis simply of having been detained and no consideration accordingly was given to that aspect. Furthermore there is an obvious distinction between being detained in a lift and being detained in prison.

The lack of more substantial authority is no doubt due to the difficulty that a plaintiff will have in establishing liability. That has meant that the courts have not normally been required to investigate this issue as to damages. However if the outcome of this appeal turned on the second point we would have been in favour of the Plaintiff.

Conclusion

However, for the reasons given, we would dismiss the appeal.

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The appellant is seeking asylum in this country. The appeal raises two points of law in general application in relation to immigrants, including asylum seekers, who are detained on arrival in this country. Point 1 is a more important involving the question whether the **Home** Secretary or an immigration officer owes a duty of care to an individual who is detained in such circumstances. The second point involves the subsidiary but connected question of whether if such a duty of care exists, and as a result of its breach an individual is detained longer than he should have been, damages can be recovered for the breach in respect of the additional detention. So far as point 1 is soncerned, the court has decided that no duty of care is owed. The result is that the **Home Office** are not liable to the immigrant in an action for negligence. The immigrant has to rely on his other remedies in public law, but is not entitled to damages.

The second point did not strictly need to be decided in view of our decision on the first point. However, we decided the point in favour of the appellant which meant that if the appellant had succeeded on the first point there would be a right to damages.

Order: Appeal dismissed. Section 18 costs Order. Legal Aid taxation. Leave to appeal to House of Lords refused.