Case No: A95YP792
IN THE MANCHESTER COUNTY COURT

Before :

HHJ Sephton QC

Between :

(1) Laura Goman
(2) Bonnie Harding
(A child suing by her mother and next friend Laura Gorman)

Claimants

- and -

Defendants

(1) Secretary of State for Justice
(2) Stockport Metropolitan Borough Council

Judgment handed down 20 March 2018

Nicholas Bowen QC instructed by Farleys Solicitors LLP, Manchester for the Claimants

Louis Browne QC instructed by Government Legal Department, London, for First Defendant

Andrew Warnock QC, instructed by BLM, Manchester for the Second Defendant

Judgment

1. This is a claim for damages for personal injuries alleged to have been suffered by the first claimant and the second claimant on 30 October 2011 and 13 November 2011 respectively, caused by the negligence of the defendants and/or for just satisfaction for alleged breaches of the claimants' human rights.

Introduction

2. The first claimant ("Laura") is the mother of the second claimant ("Bonnie"). At the relevant time, Bonnie was ten years of age.

3. Laura began a relationship with David Renshaw in July 2011. Mr Renshaw had a criminal record that included an offence of robbery, battery and harassment. Before associating with Laura, Mr Renshaw had assaulted a domestic partner. He suffered from psychotic episodes. At the time at which Laura met him, Mr Renshaw was due to appear before the Stockport Magistrates on two counts of theft.

4. The first defendant is the successor in title to the Greater Manchester Probation Trust. He is sued as being responsible for the acts and omissions of the Probation Service.

5. The second defendant is the authority responsible for child protection in the Stockport area.

6. The claim arises out of two incidents. In the first incident, Laura alleges that she was subjected to terrifying threats, minor physical injury and rape at the hands of Mr Renshaw. In the second incident, Mr Renshaw broke into the claimants' home, entered Bonnie's bedroom brandishing a knife and demanded to know the whereabouts of Laura. As a result of these incidents, the claimants suffered serious, mainly psychiatric, injury, in respect of which they now claim.

7. The claimants allege that the first defendant was aware that Mr Renshaw represented a high risk of serious harm to them. They allege that the Probation Service ought to have told them; alternatively, warned the court, police and the local authority about the risk he posed. The claimants allege that after the Probation Service had notified the social workers of the risk represented by Mr Renshaw, the local authority did not inform them of that risk, liaise with Bonnie's school or carry out an initial assessment under the Children Act 1989. The claimants allege that the defendants were therefore in breach of a common law duty of care.

8. The claimants bring claims against the defendants for just satisfaction under the Human Rights Act 1998 on account of alleged breaches of Articles 3 and 8 of the European Convention on Human Rights.

9. The defendants defend these claims on the following grounds:

   (a) As public authorities they owed the claimants no duty of care in tort.

   (b) They are not liable to compensate the claimants for injuries inflicted by a third party, namely Mr Renshaw.

   (c) In any event, their employees acted carefully.

   (d) The claims in tort are barred by the provisions of the Limitation Act 1980.

   (e) These claims do not meet the criteria for demonstrating breach of the claimants' rights under the Human Rights Act 1998.

   (f) The human rights claims are barred by section 7 of the Human Rights Act 1998.

10. This claim is relatively modest in monetary terms, but it raises legal issues of some complexity.

The evidence

11. Laura gave evidence before me. I am satisfied that she was a generally honest witness. However she was, on her own admission, an unreliable witness. In her evidence in chief, she explained that she had produced a second witness statement "because I had confusion about dates... there was a lot of confusion about the incident." In re-examination she said, "My memory is rubbish. I have dyslexia and have a poor memory." I identify later in this judgment some of the important respects in which her evidence is clearly inconsistent, or is not consistent with facts that are a matter of record. My view of Laura's evidence is particularly coloured by her presentation in the witness box.

12. Damien Hession gave evidence before me. The main subject of his witness statement was a telephone call he made when he spoke initially to Laura and then to Mr Renshaw. His live evidence expanded very considerably on his witness statement. In particular, when he gave oral evidence, he said that he was certain that the telephone call took place on 13 November 2011. I am sure that if Mr Hession had remembered this crucial date when he made his witness statement on 14 February 2017, he would have referred to it in his witness statement. Accordingly, I do not accept that his certainty about the date is well-founded.

13. The evidence of the witnesses called by the defendants was largely supported by detailed, contemporaneous notes. Several of the witnesses frankly told me that they had no independent recollection of events; they relied heavily upon their notes.

14. I heard evidence about the practice of the Probation Service at the relevant time.

15. The most dangerous offenders were dealt with under a statutory multi-agency scheme called "MAPPA" (Multi-Agency Public Protection Arrangements). Mr Renshaw was not subject to this scheme; he did not fulfil the criteria to be included in the scheme, although it might have been possible to subject him to the scheme on a discretionary basis. In my judgment, nothing turns on the MAPPA scheme, for reasons that I explain below.

16. There was a multi-agency scheme dealing with domestic abuse that bore the acronym MARAC. The agencies involved included the Probation Service, the police and social services, amongst others. This scheme addressed cases in which victims or potential victims were thought to be at high risk of domestic abuse. A case would be referred if the partner in question complained that they were at risk or if there had been call-outs to the domestic violence unit.

17. Kerri Pegg told me, and I accept, that:

- If any person (adult or child) was felt to be at immediate risk of harm from a client, the Probation Service would contact the police.
- If a Probation Officer had concerns about an adult being at high risk of domestic violence from a client, the case could be referred to MARAC (a multi-agency conference on domestic abuse). Ms Pegg said that she could not recall the Probation Service ever warning a potential victim of domestic abuse directly about a risk.
- If a Probation Officer had concerns about a child, the case would be subject to a CAF referral.

18. Laura met David Renshaw in mid-July 2011. Mr Renshaw was due to appear before the Stockport Magistrates on 29 July 2011 for two offences of theft. Mr Renshaw told Laura that he needed an address to present to the court else he would not be granted bail. He told her that his family would no longer have anything to do with him. She felt sorry for him and allowed him to stay at her home. Laura previously alleged that Kerri Pegg, a Probation Officer, was present at court on this occasion and that Ms Pegg had told her that Mr Renshaw required a residence else he would not be granted bail (see Amended Particulars of Claim §22). In paragraph 8 of her witness statement, Laura explains that the Probation Officer completed "the necessary paperwork". This account was clearly incorrect; the court granted unconditional bail and I accept that it is highly unlikely that the issue of a home address would have been raised unless the court were minded to grant bail with a condition of residence. Furthermore, I accept Ms Pegg's evidence that she was not present on this occasion. Laura accepted in evidence that she was wrong about this.

19. David Renshaw was well-known to the Probation Service. Tom Kennington, Mr Renshaw's then Offender Manager, prepared an OASys assessment on him on 6 April 2011, in which was recorded the following:

- Incidents in May 2010 in which Mr Renshaw grabbed his domestic partner by the neck, inflicting bruising and hitting the living room door with a baseball bat;
- Mr Renshaw described serious physical violence towards his ex-partner including threatening her with a broken bottle, strangling her and stamping on her head.
- The assessment was that he represented a risk to identifiable children such that the local safeguarding board meeting had identified concerns with him, and his contact with a child whose name has been redacted should be supervised by a social worker.
- Mr Renshaw had used a number of street drugs and excessive alcohol in the past.
- He reported hearing voices, specifically when he gets angry. He claims these voices have told him to harm [name redacted] and have also told him to harm himself
- In box number 6.9, "... he previously tried to stab his father and sister... Mr Renshaw reported that he always resorted to violence... Mr Renshaw is no longer in a relationship with [name redacted] the victim of his previous offences... Mr Renshaw has developed insight into these issues considerably since the start of his Order. He presents with a high level of disclosure and has persevered with long and emotional discussions which have increased his accountability and his victim empathy..."
- It was recorded that the risk of Mr Renshaw causing serious harm to others "does not appear immediate... there is a reduction in seriousness – violence was threatened but not used. His risk in the community to children and the public was assessed as "Medium".

In a spousal risk assessment, Mr Kennington rated the risk of violence towards a partner as "High".

20. On 16 May 2011, Mr Kennington having retired, Kathryn Moynihan (née Thomson) became Mr Renshaw's Offender Manager. In June 2011, Mrs Moynihan became aware that Mr Renshaw had entered into a new intimate relationship. Her note records "(CAF?)" – this means, I think, that Ms Thompson was sufficiently concerned about the fact that Mr Renshaw's new partner and/or her children might be at risk that she was considering a referral to the Social Workers using a Common Assessment Framework ("CAF") referral. As I understand it, the new relationship referred to in this note was not with Laura, but with another woman.

21. On 29 July 2011, Mr Renshaw was granted unconditional bail to appear before the "Problem Solving Court" on 8 August 2011. Ms Thompson prepared a Pre-Sentence Report which focussed principally on the acquisitive offences in relation to which he appeared before the court. Her report mentioned that he was in a relationship which was "mutually supportive." She commented that he had "dissocial traits in his personality leading to violence." She thought that Mr Renshaw posed "a medium risk of serious harm..."

22. On 16 August 2011, Ms Thompson conducted an induction interview with Mr Renshaw. A "Children Form" was completed which identified Bonnie as being a 10 year old who lived in the same house as Mr Renshaw.

23. Ms Thomson told me that once she found out that a child was involved, she would usually contact the Social Services Department by email to see if the child was known to the department. Whilst I accept that such may have been her normal practice, she did not do so on this occasion. Had she done so, I would have expected a record to be made in the first defendant's "Delius" system and for the second defendant to have a record, particularly since, in this case, Bonnie was previously known to the department. No such record exists. Ms Thompson is unlikely to be able to recall sending such a routine email now, some 6 ½ years after the event.

24. On 18 August 2011, Ms Thompson completed a further OASys report. She dealt with "Relationships" as follows (so far as relevant):

> "6.1 ... he previously tried to stab his father and sister... Mr Renshaw reported that he always resorted to violence... 6.6 Mr Renshaw is no longer in a relationship with [name redacted] the victim of his previous offences... Mr Renshaw has developed insight into these issues considerably since the start of his Order. He presents with a high level of disclosure and has persevered with long and emotional discussions which have increased his accountability and his victim empathy. 6.8 Mr Renshaw states that he is in a relationship and they live together. Current partner has one child, social services have been informed of David's link to Probation. 6.4 reports mutually supportive relationship with each other. 6.9 resides with partner therefore some parental responsibilities. 6.10 awaiting confirmation from social services about any involvement."

Ms Thompson also agreed, in a part of the form bearing the rubric "to be completed... if the offender is believed to pose a risk of serious harm to children whose identity is known" that Mr Renshaw represented such a risk. I understand that the child in question was not Bonnie, but the child of one of Mr Renshaw's previous partners.

25. In a spousal risk assessment of the same date, Ms Thompson assessed the risk of violence towards Mr Renshaw's partner as "high". When she was cross-examined about this, Ms Thompson told me that Mr Kennington's assessment, based on the experience with Mr

Renshaw's former partner was "high" and that, since she did not know Mr Renshaw very well, she left the assessment as it was. Ms Thompson says that it was not the practice to notify any other agency that a client represented a high risk of violence to a domestic partner unless the client were subject to MAPPA.

26. In my judgment, Ms Thompson *did* give thought to the risk that Mr Renshaw posed to his domestic partner. She cut and pasted the passage from box 6.9 in the OASys assessment of Mr Kennington referred to above, and then edited the entry, in particular, to add recent factors which she felt indicated that that the risk was reduced. However, she did not make the amendments required elsewhere in the OASys report and the spousal risk assessment forms that were necessary to reflect her modified view of the case. I criticise her for failing to fill out the forms correctly, but I conclude that she gave thought to what level of risk Mr Renshaw posed to his household and the conclusion she reached (namely that the risk was reduced since Mr Kennington's assessment and that there were protective factors that mitigated the risk he posed) was not perverse. In my judgment, the assessment that Ms Thompson made clearly did not justify treating Mr Renshaw within the MAPPA regime.

27. Kerri Pegg took over from Ms Thompson as Mr Renshaw's offender manager on 1 September 2011. Ms Pegg explained to me that she had taken over some 10 files and she did not put a high priority upon a detailed perusal of Mr Renshaw's file since he was not assessed as representing a high risk of serious injury. Her evidence was that she realised that there was some risk to Bonnie at a meeting of MOSAIC (a multi-disciplinary agency dealing with addiction issues) on 29 September 2011, when Mr Renshaw commented that he had some responsibility for his girlfriend's child. Having heard about Bonnie, Ms Pegg made a CAF referral on 4 October 2011.

28. Ms Pegg explained that she did not have concerns about Laura. She told me that the "domestic abuse was in the background." I take this to mean that Ms Pegg assessed that there had been previous incidents, but – as Mrs Moynihan's assessment indicated – the risk appeared to have mitigated. Ms Pegg *did* consider that David Renshaw posed a potential risk to Bonnie, which is why she made the CAF referral. In my judgment, and consistently with the practice of the Probation Service, Ms Pegg did not regard the risk to Bonnie as imminent, or else she would have informed the police. In my judgment, the opinions Ms Pegg formed about the risk to Laura, the risk to Bonnie and the imminence of any harm were within the range of responsible opinion and were not perverse or unreasonable. I take comfort from the fact that Ms Pegg discussed the case with her line manager, Phil Saunders; had Ms Pegg's decisions been unreasonable or perverse, it is likely that Mr Saunders would have questioned them.

29. Ms Pegg told me that she notified the Social Services Department by telephone. She told me that the "Delius" entry of 5 October 2011 records the information that she gave over the telephone:

> "Concerns regarding David Renshaw mental health and his potential to cause harm to female partners and their children. David was in a relationship with [name redacted] and there was information to suggest that he harmed the child [name redacted] causing an injury (*sic*) to the side of the head.
>
> David Renshaw has previously admitted to professionals that he heard voices telling him to harm [name redacted] and her child [name redacted]. [name redacted] was assessed as having a non-accidental injury to his ear and child reported that David Renshaw had done it to him. Social Services and multi agencies are all aware of the concerns... David Renshaw is not to have any contact with the child [name redacted] is only allowed supervised contact and the child is not allowed to be removed from maternal grandmother's address....
>
> David Renshaw is residing with Laura Gorman and her 10 year old child. He talks about the responsibility he has for the child as Laura appears to be suffering from sleep deprivation... David is engaged with the Mentally Disordered Offenders team, MOSAIC and Probation. His compliance with appointments has improved."

30. The CAF referral form records the following, so far as relevant:

> "David Renshaw is residing with Laura Gorman and her 10 year old child. He talks about the responsibility he has for the child as Laura appears to be suffering from sleep deprivation... David is engaged with the Mentally Disordered Offenders team, MOSAIC and Probation. His compliance with appointments has improved.
>
> David Renshaw has a history of domestic violence and mental health difficulties. There have been allegations he has previously assaulted a child of a female he was in a relationship with."

31. I accept that Ms Pegg gave the information referred to in her "Delius" note over the telephone. I think that the referral and information officer ("RIO") who took the call will have told Ms Pegg to put the referral in writing and did not record any further information, upon the assumption that the same material would appear in the written CAF referral as had been communicated over the telephone. I was told that there are many calls every day to a RIO, so that I do not criticise the RIO for the fact that she did not make a note of the call. Ms Pegg ought to have been made aware, during the course of her training, that it was essential to put everything in writing on the CAF referral form.

32. The CAF form was referred to Angela Smith, a social worker responsible for screening referrals. Ms Smith created a document called a referral record. She formed the view that the CAF form did not contain sufficient information. She told me that the CAF form lacked Mr Renshaw's date of birth, his criminal record and mental health history and further information

about the suspected non-accidental injury to a child in his care. She therefore decided that the department should contact the Probation Service "to ascertain up to date info re concerns."

33. The second defendant's records indicate that telephone calls were made to the Probation Service on 12 October 2011, 25 October 2011 and 28 October 2011. On one occasion, it was not possible to leave a message. On the other occasions, messages were left for the Probation Service (presumably Ms Pegg) to call back, but no calls were received. It was not until 8 November that Deborah Mather of the second defendant spoke to Ms Pegg and Ms Mather was able to record a detailed account of the perceived risk.

34. I do not criticise Ms Smith's decision to seek further information to supplement what appeared on the CAF form. However, it seems to me that the very fact that the Probation Service had made a CAF referral, together with the content of this particular referral, made it necessary for the Social Services Department to chase up the required information as a matter of urgency. When the Probation Service had provided no response three or four days after the call on 12 October 2011, I think the Social Services Department ought to have escalated the issue, by which I mean that Ms Smith ought to have reported the issue to her manager and asked her manager to take the issue up with the Probation Service. In making this criticism, I am conscious that the social services department is probably hard-pressed and underfunded; nevertheless, it seems to me that this action was appropriate if the department was properly to carry out its core function of protecting children.

35. Had Ms Mather obtained from the Probation Service more detailed information about Mr Renshaw following an enquiry escalated as I suggest, I believe that social workers from the Social Services Department would have visited the claimants earlier than they subsequently did – probably within 2 weeks of the CAF referral.

36. Laura told me that in late October she and David Renshaw were confronted by about 6 people and Laura was punched on the head.

37. Laura told me that she asked her friend, Damien Hession, to find out why these people might have some quarrel with Mr Renshaw. She told me that he responded "in about a week."

38. Laura told me that the first incident the subject of her claim occurred on 30 October 2011. The previous evening, Mr Renshaw had accused Laura of cheating and flirting. Mr Renshaw put a knife to Laura's face and shouted at her. He threatened to chop her breasts off and cut out her vagina. He put her in a cupboard in her bedroom and locked her in. He threatened to burn her by igniting an aerosol spray. He forced her to have sex with him. When Laura received a call on her mobile phone, he thrust the phone into her mouth.

39. Laura said that although she was aware that Mr Renshaw was dangerous after the first incident, she could do nothing about it, because Mr Renshaw was with her at all times; it was for this reason that she took no steps to end her relationship with Mr Renshaw and to make him leave the house.

40. Ms Pegg spoke to Ms Mather on 8 November 2011. Ms Mather made a careful note of the information she was given. Ms Mather decided that it was necessary to make an assessment of Bonnie's position.

41. Kim O'Leary and Anne Marie Christie, social workers employed by the second defendant, attended at Laura's home on 10 November 2011. Mr Renshaw, who had been out to pick up Bonnie from school, arrived at the same time as the social workers; he and Bonnie went upstairs. In cross-examination, Laura accepted that she had been home alone all day. The purpose of the social workers' visit was to warn Laura of the risks to Bonnie posed by Mr Renshaw. There is a conflict of evidence as to what was said. Laura says that the social workers warned her that Bonnie and she were at risk but did not explain or go into detail; she said "I think I know where you're coming from;" she agreed to meet them at the office at a later date. Ms O'Leary and Ms Christie both say that they informed Laura in detail about the information imparted by Kerri Pegg to Ms Mather, using the printed-off duty action form as a prompt. Ms O'Leary told me that Laura had said that she was not shocked as she was aware that when David was younger he had beaten another young person and that he had been in trouble with the police. She agreed to come into the office to discuss matters. The social workers' account is credible: the purpose of the visit was to notify Laura of the dangers to her child and I can see no purpose in the social workers' beating about the bush. Their account is supported by a detailed note made the following day. I believe it.

42. In the afternoon of 11 November 2011, Laura attended the Emergency Department at Stepping Hill Hospital in connection with a blow to the head she sustained during the incident referred to at paragraph 36 above. I find that Mr Renshaw was at a Probation Appointment for at least part of the time when Laura was in the Emergency Department; consequently, he did not accompany Laura throughout the visit.

43. Laura says that once the social workers had explained to her what a risk Mr Renshaw posed, she told him to leave. She says that Mr Renshaw became argumentative, but at that moment, Mr Hession telephoned her. She says that after Mr Renshaw had spoken to Mr Hession, Mr Renshaw agreed to leave.

44. Laura says that "the next thing" Mr Renshaw returned to her home and entered by the back window (on a date she says was 13 November 2011). Laura fled the house in panic, leaving Bonnie in her bedroom. Mr Renshaw, a knife in his hand confronted Bonnie and demanded to know where Laura was.

45. Laura did not attend the meeting arranged with the social workers. Kim O'Leary attended at Bonnie's school on 23 November 2011 and met Laura there. Kim O'Leary recorded that "over the course of the weekend David assaulted her, pulled her hair punched her, locked her in the cupboard under the stairs, lit lighter fuel in her face... and put a knife to her throat. Laura said that the only way she could get him to leave was to call her ex-boyfriend to the house and make David go." The impression that Laura gave Ms O'Leary was that the vicious assault on her had occurred on the weekend after the visit of the social workers on 10 November. Ms O'Leary encouraged Laura to report the attack to the police. Laura told me that it was only at this meeting that she was informed of Mr Renshaw's murky past. I have already found that she was informed of these matters on 10 November 2011.

46. On 24 November 2011, Laura took an overdose of paracetamol.

47. In an incident report made on 28 November 2011, the police record that Laura complained of an incident on 13/10/11.

48. The account Laura gave to the police in her first recorded interview on 7 December 2011 was that she had been assaulted twice, once on 31 October and later "on the Sunday" "he flared up and the knife out walking around throwing things."

49. Laura's account of important issues in the case has been inconsistent.

50. As to the date of the first incident:

(a) Laura told me that she had worked out that the assault must have happened on 30 October, because she was able to correlate the text messages she had sent to Damien Hession about the incident involving the 6 assailants that had occurred a couple of days previously. Those text messages are not available for examination.

(b) I have recorded above the account Laura gave to Kim O'Leary on 23 November 2011 at Bonnie's school.

(c) In an incident report made on 28 November 2011, the police record that Laura complained of an incident on 13/10/11. This could be a typographical error or a mis-hearing of "30th October 2011."

(d) The account she gave to the police in her first recorded interview on 7 December 2011 was that she had been assaulted twice, once on 31 October and later "on the Sunday" "he flared up and the knife out walking around throwing things."

(e) She did not mention the first incident when she attended at Stepping Hill Hospital on 11 November 2011. As I have indicated above, she was not then accompanied by Mr Renshaw, so she could have done so; it is very surprising that she did not do so if she had previously been the victim of a horrifying attack by Mr Renshaw.

(f) She did not mention the first incident when the social workers attended on 10 November. Given that it is common ground that Mr Renshaw was upstairs at the time and could have overheard what was being said, this is perhaps not surprising.

(g) The account Laura gave Dr Pradhan, the consultant psychiatrist whom she called to give expert evidence, was that the incident happened on 13 November 2011. Dr Pradhan had the impression that Laura had been held hostage for 2 days.

(h) A note made by the Probation Service on 28 November 2011 records that "on ending the relationship David Renshaw made threats to her, held a knife, didn't allow her to use her phone and locked her in the cupboard..."

51. As to Laura's explanation that after the first incident she was unable to leave the relationship or even to call the police or get help because she was at all times watched over by Mr Renshaw:

(a) I have found that Mr Renshaw was not with Laura when she attended Stepping Hill Hospital on 11 November 2011.

(b) Laura admitted to me that she had been home alone on 10 November 2011, prior to the visit by the social workers.

(c) After the social workers had visited on 10 November, Laura informed Mr Renshaw that the relationship was over and he would have to move out. This piece of evidence appears to me to be inconsistent with the assertion that she dared not even seek help from the police or from a friend.

52. As to the visit by the social workers:

(a) The Particulars of Claim and the Amended Particulars of Claim allege that the visit by the social workers at which the claimant was notified of the risk posed by Mr Renshaw was "on or around 31st October 2011".

(b) Neither the Particulars of Claim nor the Amended Particulars of Claim mention the social workers' visit on 10 November 2011.

(c) In Laura's first witness statement, it seems that the second incident happens on the evening of the day on which the social workers visit.

53. As to the second incident:

(a) The account she gave to the police in her first recorded interview on 7 December 2011 was that she had been assaulted twice, once on 31 October and later "on the Sunday" "he flared up and the knife out walking around throwing things."

(b) The case pleaded in the Particulars of Claim and the Amended Particulars of Claim is that the first incident occurred on 30 October 2011, and the second incident occurred "one or two days later." These documents are attested by a statement of truth.

(c) In Laura's first witness statement, it seems that the second incident happens on the evening of the day on which the social workers visit.

54. I take into account that Laura had been through a terrifying ordeal. This may explain the many inconsistencies in her evidence. The fact remains, however, that her account is unreliable. She has not satisfied me as to the dates on which the two incidents occurred, upon which she bases her claim.

55. I deal with the allegation that, had Laura been warned about Mr Renshaw's background, she would have ended their relationship before 30th October 2011, and the damage to herself and Bonnie would have been avoided. The relevant points are as follows:

(a) Laura's witness statements do not address this important point.

(b) Laura explained to Dr Pradhan that she had been in a relationship with a man named Liam. Liam was verbally and physically abusive; he would whip her and throw her out naked. She told Dr Pradhan that she remained in this relationship for 9 months in order to support her application for custody of Bonnie. This indicates to me that Laura was prepared to tolerate significant abuse in order to avoid trouble with the social services department.

(c) Laura was aware throughout that Mr Renshaw had a criminal record and had, at the very least, been convicted of offences of dishonesty.

(d) Laura accepted in evidence that Mr Renshaw acted in a jealous and controlling manner.

(e) On an occasion in mid-October 2011, Damien Hession came to the house. Mr Renshaw came downstairs with the knife, but Mr Hession had driven off before anything happened. In her witness statement, Laura states that it did not enter her mind that either she or Bonnie were at risk or in danger of physical violence from him. However, in a recorded statement she gave to the police on 19 March 2013, Laura said that she felt intimidated. Tellingly, she continued, "I didn't say something sooner because I was worried about social services getting involved because David had this knife and thought I may get in trouble." In my judgment, she was aware, after this incident, that Mr Renshaw was capable of offering threats with a knife – and Mr Renshaw was walking around the house wielding a knife, where he was – or could have been – seen by Bonnie. In my judgment, the risks to her and Bonnie were evident to Laura from the date of this incident.

(f) On her current account of events, she had been subjected to a horrific attack on 30 October 2011, and yet she took no steps to end the relationship. Her explanation, that she could not seek help, does not bear examination for the reasons set out in paragraph 51 above.

(g) On 10 November 2011, Laura told the social workers that she was aware that Mr Renshaw had previously been in trouble for offering violence to a boy aged 15.

In my view, Laura was aware that Mr Renshaw represented a potential danger, both to her and to Bonnie, well before the social worker's visit on 10 November 2011. She did not terminate the relationship with Mr Renshaw when she became aware of the danger he posed. In my judgment, it was not the realisation that she and Bonnie were in danger that prompted her to terminate her relationship with Mr Renshaw – she was well aware of that danger already: it was the perception that the relationship might jeopardise her custody of Bonnie.

The law

Liability of public law bodies in private law

56. The law relating to private law duties owed in tort by public law bodies has undergone profound and rapid change over the past 40 years. The starting point is *Anns v London Borough of Merton* [1978] AC 728, in which, so far as relevant for the purposes of this judgment:

The House of Lords suggested that it was no longer necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist; rather, reference should be made to a single general principle (see *per* Lord Wilberforce, at 751).

(a) The House held that a non-exercise or mis-exercise of statutory powers could amount to a breach of the common law duty of care.

57. In *Caparo Industries plc v Dickman* [1990] 2 A.C. 605, the House of Lords resiled from the view that the touchstone of liability was the single general principle proposed by Lord Wilberforce in *Anns*. At p 617, Lord Bridge of Harwich said this:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1 , 43-44, where he said:
>
> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.' "

Lord Roskill also rejected the "single principle" approach: see p 628. In the light of Lord Bridge's comments, it is somewhat ironic that his formulation of the general approach to identify a duty of care has been given much the same status as a general principle as Lord Wilberforce's previously enjoyed[1].

58. The return to an incremental rather than a "single principle" approach was emphasised by Lord Toulson JSC in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 [102] and by Lord Reed JSC in *Robinson* [2018] UKSC 4 [21] – [25].

59. The second feature of *Anns* has also undergone radical change.

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[1] Lord Reed JSC makes the same point in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 [24], reported after I wrote this paragraph.

60. In *Stovin v Wise* [1996] A.C. 923, Lord Hoffman (with whom the majority of the House of Lords agreed) said (at p 952):

> "Whether [a duty imposed by statute] can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson said in *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633, 739C in relation to the duty of care owed by a public authority performing statutory functions:
>
> > '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.'
>
> The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.
>
> In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care... But 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."

61. In *Barrett v Enfield LBC* [2001] 2 A.C. 550, the House of Lords refused to strike out a claim founded on the alleged negligence of a local authority in making arrangements for a child in its care. It seems to me that the basis of this decision was that, at the stage of deciding whether the claim should be struck out as disclosing no reasonable cause of action, the court could not exclude the possibility that the claimant could establish a situation in which a common law duty of care might arise. In view of the subsequent authority of *Gorringe*, such a claim will almost inevitably rest upon "a solid, orthodox common law foundation," and will not depend on the duty or power under which the public authority carelessly performed or failed to perform: see *Gorringe* [2004] UKHL 15 at [40] *per* Lord Hoffman.

62. In *Gorringe v Calderdale MBC* [2004] UKHL 15 Lord Steyn said [3]:

> "... in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a

private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy?"

Lord Hoffman, at [32]

> "... [found] it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide."

Lord Hoffman explained at [38] that

> "... this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the 1977 Act, but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it."

63. *X v Bedfordshire CC* [1995] 2 AC 633 addressed the issue whether the terms of the Children Act 1989 necessarily exclude the possibility of a claim in negligence in respect of an alleged error on the part of a local authority. Lord Browne-Wilkinson identified (at 749) the various reasons why no such common law duty should arise:

> "(1) A common law duty of care would cut across the whole statutory system set up for the protection of children at risk. This is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. It would be almost impossible to disentangle the respective liability of each for reaching a decision found to be negligent. (2) The task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. (3) If there were potential liability for damages, it might well mean that local authorities would adopt a more cautious and defensive approach to their duties. (4) The relationship between the social worker and the child's parents is often one of conflict. This would be likely to breed ill feeling and often hopeless litigation which would divert money and resources away from the performance of the social service for which they were provided. (5) There were other remedies for maladministration of the statutory system for the protection of children in statutory complaints procedures and the power of the local authorities ombudsman to investigate cases. (6) The development of novel categories of negligence should proceed incrementally and by analogy with decided categories. There were no close such analogies. The court should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoings of others."[2]

[2] This convenient summary was given by May LJ in *S v Gloucester County Council* [2001] Fam 313, 329

64. Lord Browne-Wilkinson also addressed the question whether a public body is liable for exercising its powers in a careless fashion. He said (at 734H)

> "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):

> "in my judgment 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 by the local authority of its statutory duties."

65. In *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151 Lord Phillips of Worth Matravers MR pointed out that the Human Rights Act 1998 had come into force since the decision in X *v Bedfordshire* and that a claim that a child had been removed from a parent without justification could therefore be subject to a forensic examination under Article 8 of the European Convention on Human Rights ("ECHR"). He asked (at [82]):

> "Can there, in these circumstances, be any justification for preserving a rule that no duty of care is owed in negligence because it is not fair, just and reasonable to impose such a duty?...
>
> In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *X (Minors) v Bedfordshire County Council [1995] 2 AC 633* cannot survive the Human Rights Act."

The Court of Appeal dismissed a claim by parents who claimed to be victims of a wrong decision to take a child into care.

66. The submission that a common law duty of care ought to exist to complement a right under the ECHR was rejected in *Van Colle v CC Hertfordshire* [2008] UKHL 50, [82] *per* Lord Hope, [99] *per* Lord Phillips of Worth Matravers, [136]-[138] *per* Lord Brown of Eaton-under-Heywood.

67. In *Michael v CC South Wales Police* [2015] UKSC 2, Lord Toulson said:

> "[112] In some areas, such as health care and education, public authorities provide services which involve relationships with individual members of the public giving rise to a recognised duty of care no different from that which would be owed by any other entity providing the same service. A hospital and its medical staff owe the same duty to a patient whether they are operating within the National Health Service or the private sector: *Roe v Minister of Health* [1954] 2 QB 66. A school and its teaching staff owe the same duty to a pupil whether it is a state maintained school or a private school: *Woodland v Swimming Teachers Association* [2014] AC 537. Educational psychology is a professional service linked to education. An organisation which provides an educational psychology service, and its educational staff, owe the same duty to a pupil whether they

are operating in the public or the private sector: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

> [113] Besides the provision of such services, which are not peculiarly governmental in their nature, it is a feature of our system of government that many areas of life are subject to forms of state controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.
>
> [114] It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law."

He addressed the issue whether a common law duty of care ought to be fashioned around rights arising under the ECHR. He accepted that the common law in relation to privacy had been affected by the ECHR. However, in relation to Articles 2 and 3 of the ECHR, he held,

> "[125]... The suggested development of the law of negligence is not necessary to comply with articles 2 and 3. On orthodox common law principles I cannot see a legal basis for fashioning a duty of care limited in scope to that of articles 2 and 3, or for gold plating the claimant's Convention rights by providing compensation on a different basis from the claim under the Human Rights Act 1998. Nor do I see a principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the Convention."

68. In *CN v Poole BC* [2017] EWCA Civ 2185 the local authority had housed a family in accommodation close to another family that persistently engaged in anti-social behaviour. The minor claimants sued the authority, alleging that it owed them a duty of care arising out of the Children Act 1989 to accommodate them elsewhere. (This would have involved the authority exercising its powers to undertake an assessment and removed the children from their homes and from their parents' care.) A proper analysis of this decision seems to me to be as follows:

(a) In *X v Bedfordshire CC* the House of Lords considered the novel proposition that a local authority owed a private law duty of care and rejected the notion.

(b) In *D v East Berkshire Community Health NHS Trust* the Court of Appeal held that it could move beyond *X v Bedfordshire CC* owing to the effect of the Human Rights Act 1998.

(c) *Michael* demonstrated that it was not correct to fashion a private law duty of care out of a convention right; therefore the reasoning of *D v East Berkshire Community Health NHS Trust* was flawed, and it must be deemed to be overruled.

(d) The consequence is that the law is back in the position as established by *X v Bedfordshire CC.*

The court held further that "the case does not fulfil any of the established exceptions in common law to the general rule that a Defendant is not liable for the wrongdoing of a third party."

69. Mr Browne QC drew my attention to *W v Home Office* a decision of the Court of Appeal apparently only reported on Lawtel. Having referred to the passages from the speech of Lord Browne-Wilkinson cited at paragraph 64 above Lord Woolf MR asserted (at [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..."

The factual issue for determination was whether immigration officers had asked an asylum seeker the appropriate questions. Plainly, the Court of Appeal concluded that the immigration officers were acting within the scope of the discretion conferred on them by statute. Mr Bowen QC referred me to *ID v Home Office* [2005] EWCA Civ 38, in which, on similar facts, the Court of Appeal reached the opposite conclusion. It seems to me that the judgment of Brooke LJ (who gave the opinion of the court) did not attack the principle I have cited above; rather, he concluded that the immigration officers acted so egregiously that their conduct fell outwith the ambit of the discretion imposed by statute.

The statutory framework

70. The statutory framework underpinning the powers and duties of the first defendant, so far as material to this action, are set out in the Offender Management Act 2007.

71. Section 1 of the Act defines "the probation purposes" as follows:

> (1) In this Part "the probation purposes" means the purposes of providing for–
> (a) courts to be given assistance in determining the appropriate sentences to pass, and making other decisions, in respect of persons charged with or convicted of offences;
> (b) [the giving of assistance to persons] 1 determining whether conditional cautions should be given and which conditions to attach to conditional cautions;
> (c) the supervision and rehabilitation of persons charged with or convicted of offences;
> (d) the giving of assistance to persons remanded on bail;
> (e) the supervision and rehabilitation of persons to whom conditional cautions are given;
> (f) the giving of information to victims of persons charged with or convicted of offences.

(2) The purpose set out in subsection (1)(c) includes (in particular)–

(a) giving effect to community orders and suspended sentence orders (or, in the case of persons mentioned in subsection (3), any corresponding sentence which is to be carried out in England and Wales);

(b) assisting in the rehabilitation of offenders who are being held in prison;

(c) supervising persons released from prison on licence;

(d) providing accommodation in approved premises.

72. Section 2 provides, so far as is relevant:

(1) It is the function of the Secretary of State to ensure that sufficient provision is made throughout England and Wales–

(a) for the probation purposes;

(b) for enabling functions conferred by any enactment (whenever passed or made) on providers of Probation Services, or on officers of a provider of Probation Services, to be performed; and

(c) for the performance of any function of the Secretary of State under any enactment (whenever passed or made) which is expressed to be a function to which this paragraph applies;

and any provision which the Secretary of State considers should be made for a purpose mentioned above is referred to in this Part as "probation provision".

...

(3) The Secretary of State must have regard to the aims mentioned in subsection (4) in the exercise of his functions under subsections (1) and (2) (so far as they may be exercised for any of the probation purposes).

(4) Those aims are–

(a) the protection of the public;

(b) the reduction of re-offending;

(c) the proper punishment of offenders;

(d) ensuring offenders' awareness of the effects of crime on the victims of crimes and the public; and

(e) the rehabilitation of offenders.

73. Section 14 is headed "Disclosure for offender management purposes" and at the material time provided as follows:

(1) This section applies to–

(a) the Secretary of State;

(b) a provider of Probation Services (other than the Secretary of State);

(c) an officer of a provider of Probation Services; and

(d) a person carrying out activities in pursuance of arrangements made by a provider of Probation Services as mentioned in section 3(3)(c)

(2) In this section *"listed person"* means–

...

(b) a relevant local authority;

...

(3) Information may be disclosed–

(a) by a person to whom this section applies–

...

(ii) to a listed person, or

(b) by a listed person to a person to whom this section applies,

but only if the disclosure is necessary or expedient for any of the purposes mentioned in subsection (4).

(4) Those purposes are–

(a) the probation purposes;

(b) the performance of functions relating to prisons or prisoners of–

(i) the Secretary of State;

(ii) any other person to whom this section applies; or

(iii) any listed person; and

(c) any other purposes connected with the management of offenders (including the development or assessment of policies relating to matters connected with the management of offenders).

...

(6) Nothing in this section–

(a) affects any power to disclose information that exists apart from this section; or

(b) authorises the disclosure of any information in contravention of any provision contained in an enactment (whenever passed or made) which prevents disclosure of the information.

...

(8) In this section *"relevant local authority"* means a county council in England, a Welsh county council or county borough council, a district council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly.

74. Section 17 of the Children Act 1989 imposes on a local authority a "general duty" to safeguard and promote the welfare of children within their area who are in need. "Children in need" includes a child who is unlikely to achieve a reasonable standard of health or whose health or development is likely to be significantly impaired without the provision of services.

75. Section 47 of the Children Act 1989 requires a local authority to make such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare if they have reasonable cause to suspect that a child who lives in their area is suffering, or is likely to suffer, significant harm. The enquiries should be directed towards establishing whether the authority should apply for an order under the Act and whether it would be in the child's interests for him to be in local authority accommodation.

76. Section 10 of the Children Act 2004 makes provision for co-operation between a local authority and its "relevant partners" with a view to improving the well being of children relating to protection from harm and neglect (amongst other things). The "relevant partners" are identified in subsection (4), which provided, at the relevant time, as follows:

(4) For the purposes of this section each of the following is a relevant partner of a local authority 1 in England–

...

(b) the police authority and the chief officer of police for a police area any part of which falls within the area of the local authority 1 ;

(c) a local probation board for an area any part of which falls within the area of the authority;

(ca) the Secretary of State in relation to his functions under sections 2 and 3 of the Offender Management Act 2007, so far as they are exercisable in relation to England;

(cb) any provider of Probation Services that is required by arrangements under section 3(2) of the Offender Management Act 2007 to act as a relevant partner of the authority;

...

The "relevant partners" were placed under a corresponding duty to co-operate with the local authority in the making of arrangements, and all parties were required to have regard to any guidance given by the Secretary of State.

77. Section 11 of the Children Act 2004 imposed upon a local authority and the Probation Service a duty to make arrangements to ensure that their functions were discharged having regard to the need to safeguard and promote the welfare of children. They were required to have regard to guidance given by the Secretary of State.

78. Sections 325 – 327 of the Criminal Justice Act 2003 required the "responsible authority" (sc. the first defendant) to establish arrangements for assessing and managing the risks posed by relevant sexual and violent offenders and other persons who "by reason of offences committed by them... are considered by the responsible authority to be persons who may cause serious harm to the public."

79. Trial Bundles 6 and 7 contain a multi-agency document called "Public Protection Manual."

80. Chapter 1 of the Manual is entitled "MAPPA" which stands for "Multi-Agency Public Protection Arrangements." The MAPPA guidance was significantly revised in 2012.

81. Chapter 2 of the Manual consists of the Statutory Guidance issued pursuant to section 11 of the Children Act 2004. The Guidance makes clear that the focus of the work of the Probation Service is on the offender, and any risk to children is managed by communicating the risk to other agencies:

> "Probation staff will work within agency protocols to safely and appropriately share information across key agencies that will promote the safety and welfare of the child." (taken from paragraph 6.8) [7/3553]
>
> "The National Probation Service is responsible for the assessment of risk that an offender poses and the planning and delivery of the interventions required to meet their needs. The National Probation Service works with adult offenders who pose a risk of harm to children and young people. Where an offender poses a risk to children the National Probation Service will continue to work with other agencies through the

MAPPA (Multi Agency Public Protection Arrangements) and LSCBs, to protect the individual child and safeguard and promote the welfare of all children in the area." (taken from paragraph 6.9) [7/3553]

82. During closing submissions, I was provided with a copy of "Working Together to Safeguard Children," a document issued by the Government in March 2010 as statutory and non-statutory guidance to inter-agency working to safeguard and promote the welfare of children.

Liability for the acts of a third party

83. The law does not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties. "The fundamental reason is that the common law does not impose liability for what are called pure omissions." *Smith v Littlewoods Organisation*[1987] 1 AC 241, 271 per Lord Goff of Chieveley. Lord Goff said, "any affirmative duty to prevent deliberate wrongdoing by third parties, if recognised in English law, is likely to be strictly limited." One of the legal issues for my decision is whether the current case falls within one of the limited exceptions to the general principle identified above.

84. In the course of argument, there was debate about the difference between acts and omissions. Reference was made to "mixed cases". In considering this issue, I am assisted by the words of Lord Hoffman in *Stovin v Wise* [1996] AC 923, 945:

> "One must have regard to the purpose of the distinction [between acts and omissions] as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did."

85. In *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, Lord Toulson JSC identified two well-recognised types of situation in which the common law may impose liability for a careless omission:

> "99 The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. The *Dorset Yacht* case [1970] AC 1004 is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Attorney General* [2008] 3 NZLR 725, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument...
>
> 100 The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v*

Guardian Assurance plc [1995] 2 AC 296 . It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive... There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

86. *Couch v Attorney General* [2008] 3 NZLR 725, to which Lord Toulson referred, was a decision of the Supreme Court of New Zealand. Although not binding upon me, it should be treated with great respect. In that case, a man named Bell was convicted of aggravated robbery. He was released on parole, and his Probation Officer allowed him to take up employment with Panmure Returned Services Association ("the RSA") where large quantities of cash and alcohol were available. Bell murdered 3 workers and severely injured Ms Couch, who sued the Attorney General as being liable for the negligence of the Probation Officer. The Attorney General applied to strike the claim out on the grounds that no duty of care was owed to the plaintiff. As Lord Toulson observed, Tipping J (who gave the judgment of the majority) identified the importance of two relationships: (1) that between the Probation Service and Bell and (2) that between the Probation Service and the victims of Bell's crime. So far as (1) is concerned, Tipping J said this:

"[83] ... Whether that relationship is sufficiently special is conventionally assessed by reference to the concept of control. Did the defendant have sufficient power and ability to exercise the necessary control over the immediate wrongdoer? Unless that is so, it would be inappropriate to impose a duty of care on the defendant in favour of the plaintiff, fulfilment of which necessarily requires that power and ability.

[83] We should add that it is conventional to examine whether a duty of care exists and its scope without reference to questions of breach. In most cases that yields a satisfactory result but this approach should not be rigidly applied. Sometimes the nature of the breach can be relevant to the scope of the duty. For example, in circumstances of the present kind, it may be appropriate to hold that, in the case of a failure to warn, a duty is owed more widely than in the case of a failure to control. Indeed, it is possible to posit a case in which a duty to warn might be owed to a substantial number of people and, perhaps, though it would be rare, even to the public in general, albeit difficult causation issues might then arise. However, in this particular case that is not so. The Department's ability to control Bell related, so far as is relevant, only to where he was to be employed. There is no basis for holding that the Department owed a duty requiring a warning to be given to anyone not connected in some way with Bell's employment. Hence, we will not distinguish, for duty purposes, between the allegations of failure to control and failure to warn.

[84] In the present case it is possible that Ms Couch will be able to establish that the Department, through the Probation Officer, had sufficient power and ability to control Bell in a way which would have prevented the harm which Ms Couch suffered. The following discussion will therefore proceed on the premise that there was a special relation in that sense between the Department and Bell."

It seems to me that Tipping J regarded the touchstone of the *existence* of a duty of care as being *control*, in particular, "sufficient power and ability to control Bell in a way which would have prevented the harm..." The foundation of the decision of the Supreme Court that the case should not be struck out proceeded on that premise. In short, this exception to the general principle only applies where the defendant has "sufficient power and ability to control [the malefactor] in a way which would have prevented the harm."

87. This conclusion is consistent with the authorities, particularly the *Dorset Yacht* case: the majority of the House emphasised as a touchstone of liability the control that the officer exercised over the Borstal boys whose escapades injured the plaintiff's boats: see [1970] AC 1004, 1039A (Lord Morris of Borth-y-Gest), 1055F-G (Lord Pearson), 1061H – 1062A (Lord Diplock).

88. As Lord Toulson JSC pointed out in the passage cited above, the second exception to the principle that a person will not be held liable for the crime of another ("assumption of responsibility") includes cases where liability is not assumed but imposed (though the examples Lord Toulson gave of the sort of relationships in which the duty of care arises are limited to extremely close connections between the alleged tortfeasor and the claimant). My attention was drawn to *Modbury Triangle Shopping Centre Pty Limited v Anzil* [2000] HCA 61, a decision of the High Court of Australia which, though not binding upon me, deserves great respect. In that case, Gleeson CJ (cited with approval part of the judgment of Mason J in *Kondis v State Transport Authority* (1984) 154 CLR 672, 687) said:

> "... in these situations, the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety in circumstances where the person affected might reasonably expect that due care will be exercised."

89. A person cannot be said to have *assumed* responsibility so as to give rise to a duty of care where he has a legal obligation to act: see *Customs & Excise Commissioners v Barclays Bank plc* [2006] UKHL 28 [14], *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598.

90. In *Mitchell v Glasgow City Council* [2009] 1 AC 874, Lord Hope said (at [29]):

> "I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk."

91. In *Robinson v CC West Yorkshire Police* [2018] UKSC 4, at [34] Lord Reed JSC referred to Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

Lord Reed discussed category (ii) at [37]. His discussion, and in particular his reference to *An Informer v A Chief Constable* "as explained in *Michael* at [69]" shows that Lord Reed considered that category (ii) requires A to have assumed a responsibility towards B; as I read the case, Lord Reed was not saying that merely doing something that prevents another from protecting B amounts to a breach of duty.

At [69] Lord Reed JSC cited with approval the following examples of the sorts of relationships in which liability for the wrongs of another might be imputed:

> "the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm."

Human Rights Act claim

92. It is common ground that in order to found liability for the alleged breach of the claimants' Article 3 rights, they must establish that the authorities knew or ought to have known at the time of the existence of a real and immediate risk and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

93. The finding should not be made lightly: *Van Colle v CC Hertfordshire* [2008] UKSC 50 [30], [115].

94. The court must have regard to what the authorities knew or ought to have known at the time of the risk under consideration: *Van Colle v CC Hertfordshire* [2008] UKSC 50, [32]. At [86], Lord Phillips of Worth Matravers favoured the view that "ought to have known" means "ought to have appreciated on the information available to them".

95. Ill-treatment must be of a certain minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of

the case, such as the nature and context of the treatment, its duration, its physical and mental effects, and where relevant, the sex, age and state of health of the victim. *Kudla v Poland; Z v United Kingdom* (2002) 34 E.H.R.R. 3. My attention is drawn to *V.C. v Slovakia* (Application 18968/07) at §102 in which examples are given of treatment which has been held to violate Article 3; "injury to a person's leg which caused necrosis and subsequently to have the leg amputated, a gunshot wound to a person's knee, a double fracture of the jaw and facial contusions..."

96. The requirement that the risk be "real and immediate" was considered in *re Officer L* [2007] UKHL 36. Lord Carswell, giving the leading speech, approved the formulation that "a real risk is one that is objectively verified and an immediate risk is one that is present and continuing". He added that "the criterion is and should be one that is not readily satisfied. In other words, the threshold is high."

Discussion

97. I consider first the liability of the defendants in tort.

98. Rightly, there is no suggestion that either defendant owes the claimants a statutory duty. The first part of my enquiry, therefore, is whether, properly construed, the statute excludes the possibility of a common law duty of care owed to the claimants: *Stovin v Wise*; *Gorringe v Calderdale MBC* cited above.

99. In relation to the first defendant, it seems to me that the focus of the statutory provisions I have identified above is upon managing offenders. It is true that section 2(4)(a) of the Offender Management Act 2007 refers to the protection of the public, but it seems to me that this represents a "target duty" of the kind that is enforceable, if at all, by a public law claim in the Administrative Court. The provisions of section 14 of the Act are particularly relevant, given that the first claimant asserts that the first defendant ought to have notified her about Mr Renshaw's previous convictions. Section 14 is headed "Disclosure for offender management purposes" – and consistently with its heading, the section is concerned with disclosure for the purpose of managing offenders rather than for protecting individual members of the public. The focus of this section is upon inter-agency co-operation and working with the aim, not principally of protecting individual members of the public, but of managing offenders.

100. There exists statutory guidance which enjoins the Probation Service to co-operate with other agencies in the management of high risk clients and risks to children through forums such as MAPPA and MARAC. Decisions around these issues have significant resource implications. A

decision to refer involves complex inter-agency working, each agency having differently-focussed statutory responsibilities. In my view, the nature of these decisions and of this co-operation is inimical to a duty of care owed to individuals who might be affected.

101. In my judgment, upon their true construction, the statutory provisions I have identified are incompatible with the imposition upon the Probation Service of a duty of care owed to individuals who might be affected by a client of the Probation Service.

102. The parties made additional submissions following the publication of the Supreme Court's decision in *Robinson*. Mr Bowen QC submitted that the court is required to consider whether the claim falls within existing categories recognised by the court. In the event that the claim did not fall within an existing category, it would be open to the court to adopt a *Caparo* analysis. He asserted that Mr Browne QC had moved straight to the second stage and relied upon a *Caparo* analysis. I am not persuaded that this is a fair characterisation of the first defendant's argument. No English authority was brought to my attention in which a court has found that the probation service owes a private law duty of care arising out of its statutory remit. The court is therefore required to construe the statutory provisions to consider whether they are inconsistent with the existence of a private law duty of care. The proper construction of the statute requires the court to consider the framework in which the probation service operates. As I have indicated above, it seems to me that the framework is not compatible with a private law duty of care.

103. I next consider the position of the second defendant. It seems to me that I am bound by authority to conclude that the statutory provisions do indeed exclude the existence of a duty of care: see *CN v Poole BC* (cited above). In any event, it seems to me that the considerations that impelled Lord Browne-Wilkinson to conclude that there was no duty in *X v Bedfordshire* continue to exclude the existence of a duty.

104. Mr Bowen QC submitted that *CN* has been overruled by *Robinson*. The Court of Appeal's decision in *CN* is not referred to in the judgments of the Supreme Court; it would be very surprising if it had been mentioned, since *CN* was decided several months after argument in *Robinson*. *CN* was not explicitly overruled in *Robinson*. I reject the submission that in *CN* the Court of Appeal resorted to *Caparo* style reasoning; as I explain in paragraph 68 above, the Court of Appeal merely restored the decision of the House of Lords in *X v Bedfordshire CC*. It seems to me that *CN* is the most recent Court of Appeal authority on the issue; it has not been overruled explicitly (or, as I find, implicitly) in *Robinson* and I must follow it loyally.

105. In any event, it seems to me that the defendants are not liable in negligence for failing to warn the claimants about the danger posed by Mr Renshaw so as to prevent the injury that they suffered for the following reasons:

106. Applying ordinary principles of causation, I conclude that the injury in this case was inflicted by Mr Renshaw. The alleged fault of the defendants amounts to a failure (i.e. an omission) to warn. I reject the submission that the defendants are guilty of commission rather than omission. Accordingly, the general principle is that the defendants are not liable unless they fall within one of the exceptions to the rule.

107. In my judgment, the first defendant does not fall within Lord Toulson's first exception to the general rule: he had not sufficient power and ability to control Mr Renshaw in a way which would have prevented the harm. Mr Renshaw was not under the control of the first defendant in any real sense: he was not, for example, subject to a licence which rendered him liable to recall to prison. Mr Bowen QC submitted that the first defendant is liable because he had the ability to control the *risk* posed by Mr Renshaw by warning the claimants about the danger he posed. However, the authorities demonstrate that the touchstone of liability is control over the *person* who inflicts the damage, not control over the *risk*. Mere control over the risk would, it seems to me, encroach much too far on the principle that a person is generally not liable for damage inflicted by a third party. Such an extension of the exception is not supported by authority.

108. I can see no basis upon which it could be said that the second defendant had control over Mr Renshaw: this case does not fall within the first exception to the general rule that there is no liability for omissions.

109. Neither, it seems to me, does either defendant fall within Lord Toulson's second exception to the general rule: neither assumed responsibility for the safety of the claimants. There was no representation by either defendant to either claimant; there existed no relationship of the particularly close kind recognised by Lord Reed in *Robinson* at [69] between the claimants and either defendant.

110. Contrary to the submission of Mr Bowen QC, the more elaborate classification made by Tofaris and Steele referred to by Lord Reed in *Robinson* at [34] does not avail the claimants. Exception (ii) does not apply because neither defendant assumed a responsibility to either claimant in the manner required before liability attaches. Exception (iii) does not apply because, as I have already pointed out, neither party exercised control over Renshaw in the

manner required to found a breach of duty. As to exception (iv), the status of neither defendant was such as to create an obligation to prevent the claimants from danger.

111. In my judgment, the fact that employees of the defendants made attempts to warn the claimants of risk posed by Mr Renshaw (of which I am critical in the limited respects set out earlier in this judgment) does not mean that they had assumed a liability to the claimants in the relevant sense. They were exercising their statutory powers, and they did so in a manner which was squarely within the scope of those powers – that is, they did not act perversely or unreasonably in a *Wednesbury* sense. They are therefore protected from liability along the lines identified in *W v Home Office*.

112. If I am wrong on the question whether the defendants or either of them owed the claimants a duty of care, the claimants have nevertheless failed to convince me that any breach by the defendants was causative of the loss complained of. As I explain above, the claimants have not persuaded me that the warning given on 10 November 2011 was given too late – I remain unsure when the incidents complained of occurred, and it is entirely possible that they occurred after 10 November 2011. Furthermore, as I have explained above, I do not accept that Laura would have heeded a warning that Mr Renshaw was a dangerous man, even if given in ample time. In short, the claimants cannot demonstrate that the alleged breach was causative of their losses.

113. In the light of my conclusions, I have not addressed the issues of limitation.

114. I next consider the liability of the defendants under the Human Rights Act 1998.

115. In my judgment, the claimants have not cleared the high bar of demonstrating that the defendants or either of them was aware of a real and immediate risk that Mr Renshaw would inflict inhuman and degrading treatment on either of them. Mr Kennington expressly addressed the issue of whether there was an immediate risk in his OASys assessment of 6 April 2011 and concluded that there was not; and Kerri Pegg and her line manager specifically discussed whether there was an imminent risk before concluding that there was none. Adopting the test proposed by Lord Phillips in *Van Colle*, I ask myself whether the defendants ought to have appreciated on the information available to them that such a risk existed. The information was that the risk appeared to be mitigating: Mr Renshaw appeared to have developed some insight into his violent behaviour and there had been no recent reports of domestic abuse. I reject the submission that either defendant ought to have appreciated that there was a real and immediate risk that the claimants would be subjected to inhuman and degrading treatment.

116. Further, in my opinion, frightening though Bonnie's ordeal was, it does not cross the threshold of "inhuman or degrading treatment." Bonnie's claim pursuant to Article 3 must fail on this additional ground.

117. The claim pursuant to the Human Rights Act 1998 must be brought before the end of a period of one year beginning with the date on which the act complained of took place "or... such longer period as the court or tribunal considers equitable having regard to all the circumstances:" Human Rights Act 1998 s 7(5)(b). The factors I take into consideration in deciding this question are these:

(a) The public interest requires litigation to be finished promptly. This consideration appears to me to have added weight where issues of public administration are involved. It is no doubt for this reason that section 7(5)(a) imposes a short period.

(b) Fairness requires that just claims should be met. The prejudice to a claimant in having his claim statute barred is directly proportionate to the strength of his claim: barring out a strong valuable claim is a different matter from barring out an insignificant weak claim. Since I would dismiss the claims in the present case for the reasons given earlier in this judgment, the prejudice to the claimants in barring their claims is negligible.

(c) The length of the delay – in this case slightly over 2 years. This is a significant extension given that the primary period is only one year.

(d) The reasons for the delay: In the present case, the first claimant relies upon her poor health in the period following the matters in issue.

(e) The effect of the delay on the quality of the evidence. In my view, the quality of the evidence is not significantly impaired.

The claims were brought more than one year beginning with the date on which the acts complained of took place and, having regard to the above factors, I do not consider it equitable to extend the period of one year..

Injury

118. In the event, it is unnecessary for me to address the issue of quantum. However, I heard evidence about the quantum of these claims and I here record my findings.

119. Laura suffered violent threats and was raped under threat of extreme violence. The parties agree that Laura suffered a serious psychological reaction to her ordeal, but they disagree about the diagnostic label to be placed on her condition.

120. In my view, the questions for my consideration are how serious was the condition attributable to the incident in question? and for how long did it last? These issues are complicated by the following matters that arose independently of the incident:

(a) Laura had long-standing generalised anxiety disorder;

(b) Laura had an eating disorder;

(c) Laura had borderline personality disorder;

(d) Laura had made previous attempts on her own life.

(e) Laura was apparently subject to assaults in August 2013 and March 2014, one of which led her to attempt an overdose.

I find that Laura's condition was also affected by the guilt she felt about exposing Bonnie to the risk of violence from Mr Renshaw and the worry she felt that Bonnie might be taken away from her.

121. I heard from Dr Pradhan, a consultant psychiatrist called by the claimant. The history that Laura gave Dr Pradhan differed from the account which she now gives. When Dr Pradhan gave evidence, she said that she understood that Laura was held hostage; she told me that she thought that Laura had been held against her will for 2 days. This account is not one on which Laura now relies. In my view, I must treat Dr Pradhan's views with caution because her views are founded upon an inaccurate history.

122. I also heard from Dr Holden a consultant psychiatrist called by the defendants. Dr Holden is clearly a highly experienced and polished witness. After he was closely questioned by Mr Bowen, QC, I was left with the impression that Dr Holden had adopted a view favourable to the defendants and had not explained as fully as he ought that there was room for other opinions more favourable to the claimant. I treat his evidence with some caution, too.

123. I find as follows:

(a) There was no convincing evidence before me that Laura had enjoyed any other than very short-term casual work prior to the incident. In my judgment, this was because of Laura's pre-incident condition, which was debilitating and persistent. Her condition would have prevented her from undertaking any employment in the future. There is thus no claim for disadvantage on the open labour market.

(b) In the period immediately before the incident, the medical notes before me indicate that Laura's attendances were less frequent. However, she was taking anti-depressant

medication continuously. I accept that Laura's underlying condition was episodic in nature. Even if the incident complained of had not happened, Laura would have had periods in which her condition deteriorated such that she would have sought medical attention.

(c) Unfortunately, Laura continues to suffer from significant life events, such as the assaults in 2013 and 2014 referred to above. Having regard to her fragile psychological condition, her reaction to such events was always likely to cause her significant distress.

(d) The incidents of 2011, and particularly her realisation that Bonnie might have suffered serious harm had an immediate effect upon Laura which persisted for a period which, doing the best I can, I find was about 2 years, when Mr Renshaw was finally sentenced. During this period, she took overdoses; she drank alcohol excessively; she suffered panic attacks. Bonnie stayed with her father, another source of sorrow to Laura.

124. Laura had a complex pre-incident condition and the picture is further complicated by unrelated post-incident factors. She suffered a terrifying attack involving rape. No sum of money could compensate Laura for what she went through, but I attempt to arrive at an appropriate figure. In my judgment, the appropriate award for general damages for pain, suffering and loss of amenity in Laura's case would be £25,000.

125. The only evidence advanced in relation to Bonnie's condition was the reports of Dr Jasti and Dr Kumar. The valuation of the claim being merely a matter of submissions based on that evidence, it seems to that it is unnecessary for me to state what award I would make.

Conclusion

126. I conclude that the defendants owed the claimants no common law duty of care in the present case: the defendants are statutory authorities and their employees were exercising statutory powers in a manner that was not perverse or *Wednesbury* unreasonable; they are not liable for the acts of Mr Renshaw. The claimants have not satisfied me that any breach by the defendants was causative of their losses. The claimants have not crossed the high threshold required to bring a successful claim under the Human Rights Act 1998. It follows that the claimants' claims must be dismissed.