

No Duty of Care Owed by Public Bodies in Providing Information Legitimately in Accordance with Statutory Obligations.

On 11 June 2008, in the case of **Scotcher v Kirklees Metropolitan Council and the Commission for Social Care Inspection** the High Court, Queen's Bench Division (HHJ Roger Kaye QC) ruled that, amongst other things, the Commission for Social Care Inspection ("CSCI") did not owe a duty of care to Mrs Scotcher, an employee in a residential care home, in respect of information, concerning Mrs Scotcher, imparted by employees of CSCI to the employer in the course of furthering its statutory duties and other duties in the protection of vulnerable adults. While the decision is inevitably fact specific, it is important, in that it builds on the line of authorities since ***Hill v the Chief Constable of West Yorkshire [1989] AC 53*** in holding that for reasons of public policy a duty of care should not be imposed upon CSCI, a public body, in relation to acts in furtherance of its duties.

CSCI is the registration authority for care homes. It has general duties and functions in respect of registered social care services provided in England.

Mrs Scotcher was a former owner and manager of residential care homes. One of her homes had been the subject of a cancellation notice under the Registered Homes Act 1984. Mrs Scotcher successfully appealed the cancellation before a Registered Homes Tribunal, chaired by David Hershman. The Tribunal allowed Mrs Scotcher's appeal, noted many of her qualities and held that she was a fit person to be concerned in the carrying on of the home. However, the Tribunal also made findings of nine specific failures in respect of Mrs Scotcher. It described those failures as serious.

In early 2005 Mrs Scotcher was employed, by a provider residential care and nursing homes, as a clinical manager at a home in Bradford. In February 2005 employees of the Council and of CSCI attended a meeting, which was unrelated to Mrs Scotcher, with employees of the provider. In the course of the meeting, having been made aware of Mrs Scotcher's employment, an employee of CSCI made comments about Mrs Scotcher concerning the decision of the Registered Homes Tribunal and about her approach to the care of residents. An employee of the Council also made some comments about Mrs Scotcher. The provider, Mrs Scotcher's employer convened a disciplinary hearing in relation to the information provided, decided that Mrs Scotcher's explanation, in relation to specific facts put to her, was not acceptable and dismissed her, giving her one month's notice and payment in lieu of that notice.

Mrs Scotcher complained about the conduct of the employees of CSCI and the Council. She brought proceedings alleging that the employees had made negligent misstatements at the meeting in February 2005, misrepresenting the decision of the Registered Homes Tribunal and the reason why a complaint had not been made to the Nursing Midwifery Council. She also alleged that CSCI and the Council had committed the economic torts of inducing a breach of contract, unlawful means and interference with contractual relations. As the Court held Mrs Scotcher's claims were inadequately pleaded and particularised. Mrs Scotcher sought damages for her ongoing loss of income, arising from her dismissal and said to amount to nearly £147,300.

CSCI and the Council contended that accurate information had been imparted at the meeting and that they had lawfully imparted it to the provider in accordance with their duties and responsibilities. They applied to strike out the claim and for summary judgement.

No Duty of Care

Following the House of Lords in *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993 and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 the Court accepted the submission of CSCI that, for policy reasons, a duty of care should not be imposed where that was inconsistent with, conflicted with or had a tendency to discourage due performance of statutory duties.

Under section 5 B of the Care Standards Act 2000 CSCI had positive duties to encourage improvement in the quality of registered social care services provided in England and an obligation to make information about registered social care services provided in England available to the public. Those registered social care services included residential care homes in respect of which CSCI is the registration authority (sections 3, 5 (1) a) ii) and 5 B (8) of the Care Standards Act 2000). The duties included duties towards vulnerable adults, ensuring they are placed in the care of proper homes, and under the care and management of proper and fit persons. The Department of Health's, No Secrets, Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse, made it plain that CSCI had a duty to ensure that material is provided to providers of social care services and that it was permitted to provide such information to such providers.

HHJ Kaye QC said

"In my judgment it would not be right to impose a duty of care owed to the Claimant on either of the Defendants in the circumstances of the present case. Both, as I set out at the beginning of this judgment, had and have statutory duties to fulfil as regards protection of adult vulnerable persons. Part of those statutory duties include ensuring that such persons are placed in the care of proper homes, and under the care and management of proper and fit persons. In the case of CSCI it is clear from the issued Guidance that they are clearly expected to air and share relevant and material information that might have a bearing on the fitness of the relevant home or person.

The imposition of a duty to an employee in such a home which might discourage, undermine or inhibit the expression of proper, well founded and legitimate concerns presented in a responsible and balanced way would, in my judgment, conflict with and undermine the discharge and fulfilment of their statutory duties towards adult vulnerable persons."

Applying the third limb of the test in *Caparo v Dickman* [1990] 2 AC 605 the court held that for the above policy reasons it was not fair just and reasonable to impose a duty of care on CSCI.

Each decision is fact specific in that the Court must consider whether on the facts of each case a duty of care should be imposed. However, this decision is important because it applies and restates the policy arguments that it is inappropriate to impose a duty of care on a public body where doing so will inhibit, damage or undermine the proper discharge of important

statutory and public duties, particularly where those duties are for the protection of vulnerable people such as children, the elderly, the mentally infirm. The position is likely to be different where Article 2 of the ECHR, the right to life, is engaged. In *Smith v the Chief Constable of Sussex* [2008] HRLR 23, the Court of Appeal held that it was arguable that the Police owed a duty of care to a victim of crime, where someone's life or safety had been so firmly placed in the hands of the police as to make it incumbent on them to take at least elementary steps to protect it and that unexcused neglect to do so could sound in damages if harm of the material kind resulted. It reinstated a claim which had been struck out, so that the claim might proceed to trial. This case is on appeal to the House of Lords.

The Court also held that Mrs Scotcher could not establish that she was in a special relationship of proximity to CSCI or (implicitly) that CSCI had assumed any duty towards her, her claim being for economic loss. She was not dependent on CSCI for her economic wellbeing, she was not employed by CSCI, she was not party to the information relayed by CSCI and did not rely on what had been said. The Court rejected the suggestion that sufficient proximity was created by the regulatory function of CSCI, saying that if that were the case then regulatory authorities would owe a duty of care to all who fell within their ambit whether or not those authorities were aware of them. Again the position is likely to be different where Article 2 applies or where the actions of the public body are sufficient to establish that it has assumed a duty of care.

As a result the Court struck out Mrs Scotcher's claim in negligent misstatement. It also gave summary judgement for CSCI on those claims and dismissed them.

Whether bringing or defending a case of this type it is important to consider, at an early stage, the matters of whether there is sufficient proximity for the imposition of a duty of care or whether for policy reasons no such duty should be imposed. When defending such a claim it is important to consider whether the criticism leveled is a criticism of the exercise of a statutory duty, in which case it may be highly arguable that no duty should be imposed, and whether there is sufficient proximity in the relationship of the parties or whether the defendant has assumed a responsibility for the claimant's safety or well being. It is also important to consider the nature of the claim because of the requirement in cases for economic damage for the claimant to establish that there was a special relationship or an assumption of responsibility. As illustrated in Mrs Scotcher's case, a claim may be struck out or summary judgement granted at a preliminary stage on grounds that there is no duty of care and the costs of an expensive trial avoided.

Economic Torts

Somewhat unusually in this type of case, Mrs Scotcher also pursued claims in the economic torts of inducing a breach of contract and unlawful means. She withdrew the claim alleging interference with contractual relation accepting that the decision of the House of Lords in *OBG v Allan* [2007] 2 WLR 920 established that there was no such separate economic tort or other cause of action.

The Court held that Mrs Scotcher could not establish a breach of contract which caused any loss. As a result the claim in tort for inducing a breach of contract failed. It held that the statements of CSCI's employees were made lawfully (and that Mrs Scotcher could not establish that they were made unlawfully) and on the documents, including the public decision of the Registered Homes Tribunal, were substantially accurate. As a result the

claim in the tort of unlawful means also failed. The Court struck out these claims and gave CSCI and the Council summary judgement on them.

Claims in economic torts are relatively rare.

It is apparent from the decision in ***OBG v Allan*** that to establish a claim in inducing a breach of contract a claimant must show that:-

1. The defendant is inducing such a breach and knows that it is doing so, see ***OBG Ltd v Allan* [2007] 2 WLR 920 HL per Lord Hoffman 939 E-F, Lord Nicholls pages 968 H -969 B, Lord Walker pages 984 -985, Baroness Hale page 995 E and Lord Brown page 1001;**
2. The defendant intended to procure such a breach rather than intending to achieve some other end which, as a consequence, causes a breach, see ***OBG per Lord Hoffman at 940 E-H.***
“..... *if the breach of contract is neither an end in itself or a means to an end, but merely a foreseeable consequence, then for this purpose in my opinion for this purpose it cannot be said to have been intended*”.
And see ***OBG per Lord Nicholls pages 972 F- 973 A, Lord Walker pages 984 -985, Baroness Hale page 995 E and Lord Brown page 1001 F.***
3. There is a breach of the contract between the contracting parties namely the Claimant and a third party, which is induced by the conduct of the Defendant, see ***OBG per Lord Hoffman at 940 H- 941 B, Lord Nicholls pages 968 H -969 B, Lord Walker pages 984 -985, Baroness Hale page 995 E and Lord Brown page 1001.***

It is a defence to an allegation of intentionally procuring a breach of contract to show that the actions of the defendant were justified, see ***Clerk & Lindsell on Torts 19th Ed para 25-63.*** There is no general rule about the nature of this defence. Regard may be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure the breach, the relation of the person procuring the breach to the person breaking the contract and the object of the person procuring the breach. The issue is whether the conduct of the defendant can be justified objectively.

To be liable for causing loss by unlawful means a defendant must have a) wrongfully interfered with the actions of a third party, in which the claimant has an economic interest and b) intended thereby to cause loss to the Claimant, see ***OBG per Lord Hoffmann pages 941 H, 943 A and 945 A and F.*** To amount to unlawful means, the conduct must consist of acts intended to cause loss to the claimant by interfering with the freedom of a third party, in a way which is unlawful as against that third party and which is intended to cause loss to the claimant, see ***OBG per Lord Hoffmann pages 943 A and 945 A.*** There must be more than a causal connection between the wrongful nature of the conduct and the loss caused, the loss must be intended as well, see ***OBG per Lord Hoffmann page 944 H.*** Further an evil or capricious motive is not of itself enough, unlawful means must have been employed, see ***Clerk & Lindsell on Torts 19th Ed para 25-92.***

On this basis it seems that a negligent misstatement is not enough. The statement must be made unlawfully intending to cause the claimant loss. Given the required intent, it is difficult to understand how anything less than a fraudulent statement would suffice.

In Mrs Scotcher's case the court accepted that where the intention of the defendant is to further a lawful purpose it will not be liable for the tort of causing loss by unlawful means.

Again whether bringing or defending a case alleging economic torts it is important to consider, at an early stage, whether the necessary ingredients of the torts can be established. If they cannot then as in Mrs Scotcher's case it may be possible for a defendant to strike out the claims or seek summary judgement on them.

Strike Out and Summary Judgement

In determining the applications to strike out the claim and for summary judgement, the Court considered the principles set out in *D Wetherspoon plc v Van de Berg & Co Ltd* [2007] EWHC 1044 (Ch). In that case Lewison J summarised the correct approach of the court as follows

- a. The court must consider whether the claimant has a "realistic" as opposed to a fanciful prospect of success. It is not the probability or not of success that forms the focus, but the absence of reality;
- b. A "realistic" claim is one carrying some degree of conviction, i.e. more than merely arguable;
- c. The court should not conduct a "mini-trial";
- d. Nevertheless it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents;
- e. The court may take into account not only the evidence before it, but also the evidence that can reasonably be expected to be available at trial;
- f. The court should be slow to strike out a case where reasonable grounds exist for believing that a fuller investigation at trial would affect the outcome of the case;
- g. The court should be especially slow to strike out a claim in an area of developing jurisprudence.

The Court also considered the decision of the Court of Appeal in *Harris v Bolt Burden* [2000] LTL Feb 2 2000 CA in which the Court of Appeal said that statements of case which are suitable for striking out include those which raise an unwinnable case where continuance is without any possible benefit to the Respondent (to the application) and would waste resources on both sides.

As above the Court struck out Mrs Scotcher's claim and gave summary judgement to CSCI and the Council. HHJ Kaye QC said "*I have given this matter some anxious consideration Nevertheless I have come to the clear conclusion that the Defendants are correct in their submissions*". As such the case is a useful illustration of the circumstances in which a Court will strike out a claim or give summary judgement. In that sense and in the sense of the matters concerning the imposition of a duty of care it is of general use and application to all public bodies.

Giles Powell of Old Square Chambers 10-11 Bedford Row, London (0207 269 0300), instructed by Philip Farrar of Hill Dickinson was counsel for CSCI, on the successful application to strike out the claims and for summary judgement.