

IN THE HIGH COURT OF JUSTICE

[2020] EWHC 837 (QB)

QUEEN'S BENCH DIVISION

MASTER MCCLLOUD

BETWEEN

(1) Valerie Tindall

(2) Valerie Tindall (as Administrator of the Estate of the late Malcolm Tindall)

Claimants/Respondents

V

(1) Chief Constable of Thames Valley Police

(2) Buckinghamshire County Council

Defendants/(1<sup>st</sup> Defendant Applicant)

### Legislation

Section 41 of the Highways Act 1980

### Striking Out

CPR part 3.4(2)(a)

Hughes v Colin Richards & Co [2004] P.N.L.R. 35, CA

White Book 2019, commentary at CPR 3.4.2

Farah v British Airways, The Times, 26 January 2000

Barrett v Enfield LBC [2001] 2 AC 550

Poole Borough Council v GN [2019] UKSC 25

Gorringe v Calderdale MBC [2004] 1 WLR 1057

Mitchell v Glasgow City Council [2009] 1 AC 874

### Summary Judgment

Three Rivers DC v Bank of England (No.3) [2001] 2 All E.R. 513  
Swain v Hillman [2001] 1 All ER 91 (White Book 2019 24.2.3)  
Fashion Gossip Ltd v Esprit Telecoms UK Ltd July 27, 2000, unrep., CA  
Day v RAC Motoring Services Ltd [1999] 1 All E.R. 1007  
White Book 2019 CPR 24.2.5

### Negligence

Sheppard v Glossop Corpn [1921] 3 KB 132  
East Suffolk Rivers Catchment Board v Kent [1941] AC 74  
Dorset Yacht Co Ltd v Home Office [1970] AC 1004  
Anns v Merton London Borough Council [1978] AC 728)  
Smith v Littlewoods Ltd [1987] AC 241 §  
Clough v Bussan [1990] 1 All ER 431  
Ancell v McDermott [1993] 4 All ER 328  
Capital and Counties v Hampshire [1997] QB 1004  
OLL Ltd v Secretary of State for Transport [1997] 3 All ER 897  
Daly v Surrey County Council (QBD, 24 October 1997)  
Gibson v Orr [1999] SC 420  
Palmer v Tees [2000] PIQR P1 CA  
Modbury Triangle Shopping Centre Ltd v Anzil (2000) 205 CLR 254  
Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057  
Couch v Attorney General (No 1) [2008] 3 NZLR 725  
Van Colle v Chief Constable of Hertfordshire [2009] 1 AC 225  
Michael v Chief Constable of South Wales [2015] AC 1732  
A J Allan (Blairnyle) Limited and another v Strathclyde Fire Board Extra Division,  
[2016] CSIH  
Robinson v Chief Constable of West Yorkshire [2018] UKSC 4  
Poole Borough Council v GN [2019] UKSC 25

### Articles / Texts

Craig Purshouse “Arrested development: Police negligence and the Caparo test for duty of care” (2014) 23 Torts Law Journal 1

Clerk & Lindsell (22<sup>nd</sup> ed) 8-50

Negligence Liability of Public Authorities (2<sup>nd</sup> ed.) by Fairgrieve and Squires, para 12.58-12.64

Negligence Liability for Omissions and the Police Tofaris and Steel in their article [2016] CLJ 128

Mr N. Bowen QC and Mr D. Lemur instructed by Messrs Howard Kennedy LLP for the Claimants.

Mr D. Warnock QC instructed by Messrs DAC Beachcroft for the 1<sup>st</sup> Defendant.

**Keywords: Tort – duty of care – acts – omissions – personal injury – road traffic – police – rescue – emergency – ice – negligence - highways**

## JUDGMENT

1. This judgment is about the circumstances in which a duty of care arises falling upon the police in the context of their actions at the scene of a road accident caused by locally icy and dangerous road conditions as a result of a water leak and flooding. Here the Claimant says that the Police attending the scene assumed or fell under a duty of care towards Mr Tindall. The Police say they did not.

2. This judgment is, as with many at this time, produced under less than ideal circumstances due to a pandemic infection affecting court business and it has been delayed due to its author’s own symptoms now resolving. I apologise to the parties for delay, and possibly to the relief of the parties I shall keep this judgment shorter than might otherwise be expected – at least from this judge - whilst nonetheless providing the basis and reasons for my decision. It appears likely that the losing party will wish to appeal either this decision or, ultimately, a final decision at trial and I shall be willing to determine permission to appeal and destination of appeal by email if desired.

3. The losing party in this case are the 1<sup>st</sup> Defendants. I have taken the view that with the law as to imposition of duty of care being in the state of flux which it is, and with any duty of care being a fact-dependant decision if there are issues as to whether the case concerns the issue of ‘making matters worse’ or ‘not making things better’ as illustrated for example in *CC Essex Police v Transport Arendonk BVBA* (2020) [2020] 1 WLUK 192, to strike this case out without trial would be incorrect. It

is a matter for trial on the evidence. I have considered the various authorities and simply put it is going to have to be a matter for trial to determine whether this case is one of 'making matters worse' or not.

### **The facts**

4. Since this is a strike out application I am proceeding on the pleaded facts. Here, a driver called Mr Kendall had an accident on a fairly fast stretch of country road, on a winter morning when a portion of the road had been frozen over causing black ice due to a nearby water leak and flooding. The vehicle came off the road. Mr Kendall sustained non life-threatening injuries. By chance, Mr Kendall had worked as a road gritter, and was familiar with the stretch of road in question. He was very concerned that any further vehicles coming at speed down that road would encounter the unexpected ice and have accidents. At the scene of the accident whilst awaiting for rescue he started to warn vehicles in the road by signalling to them to slow down. When the police attended he stressed to them that the situation was dangerous. He had stressed that when he made his emergency call.

5. During the rescue the police put out a warning sign, and then once the accident was cleared sufficiently and the road swept of any debris and Mr Kendall removed to hospital, the police at the scene removed the sign and left the site effectively as it had been prior to Mr Kendall's accident, which is to say covered in black ice and dangerous. Nobody remained to warn traffic, no signs were left and no functional steps were taken at the site to ensure further traffic knew of the hazard once the police left.

6. Not long afterwards Mr Tindall was driving his vehicle on the same stretch of the road. An oncoming driver (Mr Bird) lost control on the ice, and there was a head-on collision with Mr Tindall's vehicle. Mr Tindall was killed. Mr Bird was killed. A passenger in Mr Bird's car was airlifted to hospital and survived. I understand that there was an investigation and inquest and that there was significant criticism of the police officers who had attended the first accident for not following correct procedure. The IPCC concluded that three officers had a case to answer for gross negligence manslaughter and misconduct in public office, the file went to the CPS but no prosecution ensued. A police disciplinary tribunal found the officers guilty of misconduct and also that there were failures in operational training. The inquest gave a narrative verdict that more should have been done, and as to various facts such as the immediate cause of accident (ice) and that the highway authority and police based on the verbal information received should have carried out an investigation at the scene and that steps should have been taken including placement of signs, requesting gritters and staying on site until they arrived, closing roads, and requesting appropriate support.

7. It is pleaded that by removing Mr Kendall from the scene (and not leaving the road safe) they police took a positive step in that they caused the warnings to other drivers to cease, making matters worse than they would have been if they had never attended. Mr Kendall has produced a statement in support of the claimant's case. He says among other things *"it was obvious to me, and should have been obvious to anyone attending and seeing the sheet ice, that another accident was likely to occur .....if I had realised that no help was going to be forthcoming from the police, I would have done my very best to warn other motorists of the sheet ice and in fact, I tried to do precisely that when attempting to flag down the van described [above] and before dialling 101. ... I would certainly have continued to wave my arms and would have attempted to stop each car that passed by. I considered myself to have been extremely lucky to have avoided serious injury. Something far worse could have happened to me and of course, two other motorists died less than an hour later, with a third receiving very serious injuries. .... I would have tried hard to access [a red warning triangle in the boot of his car] ... in the absence of the police I would have asked the fire service (who were also in attendance) to do whatever they could to make the road safe, most obviously by closing the road, leaving an emergency vehicle with flashing lights or perhaps erecting warning signs."*

#### **The law**

8. This is not the trial of the action. There are likely to be disputes of fact but I am proceeding on a strike out application on the facts both pleaded and in evidence absent cross examination (the facts in evidence not being fanciful or such as I should clearly disregard). There is also a summary judgment application which adds the additional requirement that I consider what evidence might reasonably become available by the time of trial. I do not feel the summary judgment application adds much, here, since the real argument is as to whether on the current state of the law and without a trial I can determine that there is no reasonable argument that the Police came under a duty of care to Mr Tindall and drivers like him.

9. I have considered the application on the basis of the oral argument before me, the skeleton arguments and the cited authorities, and it is not my intention here to rehearse all submissions or arguments, or all cases cited, though the list of cited authorities appears at the start of this judgment. For that reason I am not repeating citations to them other than by name of case in the body of judgment.

10. The 'orthodox' legal position is that absent a specific statutory provision creating civil liability, public authorities stand in the same position as other individuals in relation to tort. There is, generally, no positive duty to protect individuals from harm. Yet if a public authority takes steps which create or make worse a source of danger they may be held to come under a duty of care

towards those foreseeably affected. Recent important decisions are *Michael v Chief Constable of South Wales Police & others* (Supreme Court), *Robinson v Chief Constable of West Yorkshire Police* (Supreme Court), *Poole Borough Council v GN* (Supreme Court). The existence of a duty of care does not under current understanding of the law, depend on notions of public policy (cf *Anns v Merton LBC*) but rather on the 'long established principles'. Thus simply setting up a protective system such that an emergency call was not categorised adequately did not create a tortious duty (*Michael*), yet the police in *Robinson* came under a duty to an innocent passer-by when they chose to apprehend a suspect in a public place and in the process caused injury to the innocent person (*Robinson*). In *GN v Poole*, the local authority carried out risk assessments of children but were held not to come under a duty of care in tort for failure to protect/failure to exercise statutory powers: the assessments did not amount to the provision of a service upon which the children or the mother were entitled to rely.

11. In *Ancell v McDermott* (a case long pre-dating the recent run of Supreme Court authority) the police negligently failed to take action to protect road users from a fuel spillage. The matter was reported to the highway authority and the source of fuel identified but no other steps were taken by the police such as to make the road safe. The case was struck out on the basis of public policy and on the basis that the law does not generally impose a duty of care to prevent harm to strangers absent a special relationship. (The defendants accept the public policy reasoning no longer remains good law). It was however, on the common law aspect, said to be 'exceptional' to find a duty of care to prevent harm'.

12. In *Capital and Counties v Hampshire* (which also long pre-dates recent authority), in one instance the fire brigade turned off fire sprinklers, which aggravated a fire. A duty of care was found. In the other two instances the fire brigade were found not to have made matters worse than they otherwise were and hence merely turning up and taking steps to control fire did not mean they owed a duty of care to owners of nearby properties or those they attended.

13. In *OLL v SSHD*, also a non-recent case, the search and rescue authorities were held not to owe a duty of care where they misdirected a lifeboat and helicopter to the wrong area. Despite an argument that this was a positive intervention which made matters worse, it was held that since no duty could have arisen if the authority had misdirected itself, no duty could arise where it misdirected others. The decision was approached in part on the basis that the dividing line in law at that time was related to whether an intervention caused physical injury. Not surprisingly the cases of *Capital and Counties*, and *OLL*, were referred to in the more recent case of *Michael* as examples of how duties apply at common law to emergency services.

14. In *Gorringe v Calderdale BC* (House of Lords, 2004) the local authority had painted a 'slow' sign on the road but it had either obliterated it or allowed it to disappear. There was no duty of care to replace it. Merely because they had once decided to paint the sign did not create a duty to keep repainting it.

15. In my judgment what the above cases (which are cited by the Defendants) show is that what amounts to an intervention which makes things worse is a very fact dependant exercise. In this case, we have police who actively attended, placed a warning sign, arranged removal of a person who was engaged in warning traffic, then removed the warning sign after having taken only minimal steps (sweeping the road of debris) to render the road safe. This may very well, on the facts, amount to sufficient intervention that they made matters worse, both in relation to how the position was at the time when Mr Kendall was warning traffic and at the time when they had erected the warning sign. I cannot say that the case as pleaded discloses no good legal grounds, or stands only a fanciful chance of success. It may lie on the spectrum of cases between 'no duty' and 'duty' and where the line is to be drawn cannot fairly be an exercise based on assumed facts and argument at a strike out application given the evident flux which the law is experiencing in the light of the recent run of Supreme Court authority post-dating the various cases cited above: I refer to the recent case of *CC Essex v Transport Arendonk BVBA* (2020) where on appeal to Laing J, a recorder was held not to have erred in refusing to strike out a claim where a cargo in a lorry was stolen at night while a driver was held by police on suspicion of drink driving. The existence of a duty of care arising to the cargo owner and owed by police was not precluded by the authorities. The matter required a trial on evidence and it was noted that the common law proceeded incrementally and by analogy with other cases. The ambiguity of whether steps were acts or omissions (or 'made things worse' versus 'did not make things worse') could be resolved at trial.

16. The Essex case seems to me to be on point and is High Court authority on facts which have relevant similarities here, namely that the removal of the driver may have rendered the lorry more vulnerable, and in this case the argument is that the removal of the person at the scene who was already warning traffic, made the situation even more dangerous than it was already (as may also be said, arguably, about the removal of the warning sign which police had initially erected). It does not seem fanciful to me that under the current state of the law, where an emergency service attends, takes control, and changes the situation such as by removing someone who is warning traffic, or where it renders the situation safer by their signage but then positively decides to remove that signage, they may have crossed the line and assumed a duty of care under the current state of the law. I cannot say the case is bound to fail. It may well be a case as in one of the instances in *Capital*

and Counties where removing a feature of the scene which was helping to keep it safer (in that case, by stopping sprinklers) sufficed to give rise to a duty.

17. In *Daly v Surrey CC* (a case cited by the Claimants) a worker was buried in a trench. Colleagues at the scene were in the process of trying to rescue him using a digger. The fire officer instructed them to stop the effort. That was held to be an act of a sufficiently positive nature to give rise to a duty of care. Yet one might argue that all the fire officer did was to restore the situation to the position it had been before the accident, or that this was a 'misdirection' akin to the misdirection of rescuers in *OLL*.

18. In *Gibson v Orr*, also relied on by the Claimants police attended and took control of a situation which presented a danger to traffic, placed warning signs on one side of a bridge but then left without placing signs on the other side. The Scottish court held that a duty of care was owed and that the law regarded a constable as having sufficient proximity with other road users using the collapsed bridge. The duty related not just to exercise of control but also the relinquishing of it; see also *Van Colle v CC Hertfordshire*.

19. As noted at the start I have not exhaustively rehearsed the content of the skeletons or the authorities, nor have I referred expressly to all cases mentioned to me. For the reasons above, I dismiss this application on the basis that the argument that the Police made matters worse is not bound to fail on present authority. Indeed, nor is the alternative argument (which I have not needed to consider in detail given my view as to the first argument, namely that this is a case which may amount to 'making matters worse') that the police had taken control and assumed responsibility in circumstances where the police may be held to have had sufficient power to influence the situation so as to create a sufficient relationship between them and road users at that time and place and in those circumstances.

20. In view of the current pandemic this decision is deemed to have been handed down at 4pm on 7 April 2020, time for permission to appeal has been extended pending submissions.

MASTER VICTORIA MCCLLOUD

7/4/20



