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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION

BETWEEN:

KEVIN MAGILL

Plaintiff/Respondent:

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Appellant:

Before: McCloskey LJ and McBride J

Representation

Plaintiff: **Mr Liam McCollum KC and Mr Ciaran McCollum, of counsel, instructed by Joseph F McCollum and Company Solicitors**

Defendant: **Mr Tony McGleenan KC and Mr John Rafferty, of counsel, instructed by the Crown Solicitor**

McCloskey LJ (***delivering the judgment of the court***)

Introduction

[1] The appeal determined by this judgment is against the judgment and order of McAlinden J dated 30 September 2021 reversing the order of the Master who had acceded to the application of the Chief Constable of the Police Service of Northern Ireland (the "Chief Constable/Defendant") under Order 18 rule 12 of the Rules of the Court of Judicature (NI) 1980 (the 1980 rules), dismissing the plaintiff's case on the basis that it disclosed no reasonable cause of action.

Interlocutory Orders

[2] On the occasion of the second listing before this court (on 15 September 2022) the court made three formal orders:

(a) granting leave to the Chief Constable to appeal if and insofar as required by section 35(2)(g) of the Judicature (NI) Act 1978;

(b) permitting amendment of the Notice of Appeal; and

(c) permitting amendment of the statement of claim. This amended pleading arose out of certain observations made by the court on the occasion of the first listing of the appeal.

The Amended Statement of Claim

[3] Having regard to the legal principles in play an intense focus on how the plaintiff's case is pleaded is essential in every application/appeal of this kind. In its amended form, the narrative in the statement of claim is in the following terms:

> "On or about 12 July 2013 the Plaintiff was lawfully taking part in an Orange Order Parade at or about the Short Strand area of the Newtownards Road, Belfast when the Plaintiff was assaulted … [and injured] …
>
> The Plaintiff was on the return journey of the parade in the early evening …. The Plaintiff's Lodge …. were around the middle of the long parade. The parade had been brought to a halt as a result of which the Plaintiff's parade was confined and stationary at an interface area close to the Short Strand. The Plaintiff's Lodge came under attack from protestors … who were throwing missiles over a peace wall-type cordon towards the Plaintiff's Lodge. Officers were present in this area and were aware of the ongoing attack, seeking shelter from the attack by standing behind their land rovers and in an area covered by trees. The missiles were thrown for a prolonged period, whilst the Plaintiff's lodge was hemmed into the area in question due to the parade in front having been halted. During the attack the police took no steps to prevent the ongoing attack. The Plaintiff was struck approximately ten minutes after the attack had commenced."

[4] When one juxtaposes the narrative with the amended particulars of negligence in particular the allegations of certain types of conduct (to be contrasted with omissions) on the part of police officers on duty it becomes tolerably clear that the

plaintiff is making the case that the actions of police officers brought the parade to a halt. The second allegation of positive conduct is that the parade then remained stationary for some ten minutes, again by reason of the conduct of police officers.

[5] With the exception of the foregoing the hallmark of the particulars of negligence is the formulation of an extensive series of omissions on the part of the police officers concerned. These include, inexhaustively, alleged failures to provide adequate numbers of police personnel, to prevent the attack and to intervene following its outbreak.

[6] Negligence is the only cause of action invoked by the plaintiff. The claim is for general damages only to compensate him for a crushing-type injury to his left foot inflicted by a heavy object.

Strike Out Applications: Governing Principles

[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:

(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.

(ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

(iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-bycase basis from which, in due course, principles may emerge. Therefore, in a new and

> developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim'.

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated at p--:

> "This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine.

Liability of the Police

[8] The question of whether the police owe a duty of care to members of the public and, if so, in what circumstances has been considered extensively in a series of decisions in the House of Lords and United Kingdom Supreme Court. The task for this court is to decide whether the effect of the principles established by those decisions is that the plaintiff could not conceivably succeed at trial. In the decided cases various formulations have been couched.

[9] Public policy features prominently in the leading decisions belonging to this field. It is on the basis of public policy that a discrete code of legal principles strictly limiting the liability of police officers in negligence for their acts and omissions has developed. Before turning to these principles we take as our starting point section 32 of the Police (NI) Act 2000. Under the rubric of "General Functions of the Police", this provides:

"**General functions of the police**

(1) It shall be the general duty of police officers—

(a) to protect life and property;

(b) to preserve order;

(c) to prevent the commission of offences;
(d) where an offence has been committed, to take measures to bring the offender to justice.

(2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.

(3) In subsection (2)—

(a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a constable whether at common law or under any statutory provision,

(b) "United Kingdom waters" means the sea and other waters within the seaward limits of the territorial sea,

and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection."

[10] Section 32 may be viewed through the prism of a statutory demarcation of the fundamental difference between police officers and other members of society. The duties which it formulates provide at least in part the rationale for the public policy considerations already noted.

[11] In some of the leading cases the matrix has been that of the conduct, or inaction, of a police organisation in their investigation of actual or suspected offences. This was the framework in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, *Brooks v Commissioner of the Police of the Metropolis* [2005] 1 WLR 1495 and *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225. In *Hill*, the House of Lords made a clear distinction between the liability in tort of police officers to persons injured as a direct result of their acts or omissions and, on the other hand, the absence of any

general duty owed to identify or apprehend an unknown criminal, rendering the police immune from liability except where their failure to apprehend the criminal had created an exceptionally added risk. This reasoning was based on both public policy and the lack of proximity between the injured citizen and the police organisation.

[12] The framework of *Brooks*, like that of *Hill*, was also some distance removed from the present case. It concerned whether a duty of care was owed by the police organisation concerned to a person who had witnessed a brutal, notorious murder in their conduct of the ensuing investigation. Adopting fully the public policy considerations expressed in *Hill*, the House of Lords held that the police generally owed no duty of care in this kind of context. They were articulated by Lord Steyn, author of the leading judgment, at para [30]:

> "But the core principle of Hill has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in Hill, arose for decision today I have no doubt that it would be decided in the same way. It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police Conduct Regulations 2004 (No. 645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence: see section 29 of the Police Act 1996, read with Schedule 4 as substituted by section 83 of the Police Reform Act 2002; section 17 of the Police (Scotland) Act 1967; Halsbury's Laws of England, Vol 36 (1), para 524; The Laws of Scotland, Stair Memorial Encyclopaedia, 1995, para 1784; Moylan, Scotland Yard and the Metropolitan Police, 1929, 34. A retreat from the principle in Hill would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would,

> as was recognised in Hill, be bound to lead to an unduly defensive approach in combating crime."

Lord Nicholls' pithy concurring judgment is to be noted. See para [6]:

> "Like Lord Bingham and Lord Steyn, in reaching this conclusion I am not to be taken as endorsing the full width of all the observations in Hill v Chief Constable of West Yorkshire [1989] AC 53. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in Hill's case should not stand in the way of granting an appropriate remedy."

[13] The framework of the decision in *Van Colle* was somewhat different, involving the killing of a prosecution witness just before the trial in question (in the first case) and the infliction of severe injuries on a person by his estranged former partner (in the second case) in circumstances where, in both cases, reports of threats to both victims had been made to the police. The claims in negligence were struck out as disclosing no reasonable cause of action. The House of Lords, by a majority of 4/1, affirmed this order. The rationale of their decision was, once again, public policy. See in particular per Lord Hope at paras [75] – [76] and Lord Phillips at para [97].

[14] The matrix of the decision in *Michael v Chief Constable of South Wales Police* [2015] AC 1732 is comparable to that of *Van Colle*. Once again, factually, the claim focused on the responses of the police to emergency calls from a person, ultimately killed, reporting threats by her former partner to kill her. The Supreme Court, by a majority of 5/2, in substance, though not without elaboration, affirmed the public policy rationale of the *Hill*, *Brookes* and *Van Colle* decisions.

[15] The Supreme Court revisited this legal territory in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. The distinguishing feature of the factual framework in this case is its "operational" dimension, involving as it did one of two police officers inadvertently knocking the plaintiff, a frail lady aged 76, to the ground when attempting to arrest a suspected drugs dealer in a public place. Both at first instance and on appeal the plaintiff failed essentially on the ground of the espousal by both courts of an immunity from suit approach. On further appeal, the Supreme Court held that on the particular facts a duty of care was owed by the police officers to the claimant.

[16] One striking feature of this decision is the adoption of a starting point based not on immunity from suit, rather a principle expressed in positive terms: the police generally do owe a duty of care to members of society in the discharge of their duties and functions in accordance with the ordinary principles of the law of negligence <u>unless</u> otherwise provided by statute or the common law. Thus, there is no general

rule that the police do not owe a duty of care in the discharge of their functions of preventing and investigating crime' no general rule of immunity from suit. Applying these principles, therefore, a duty of care to prevent a person from a danger of injury created by police officers could arise. There is a second important element of this decision. The Supreme Court, having formulated the foregoing principles, applying the prism of actual conduct of police officers then turned its gaze to the different scenario of omissions. In so doing it espoused the central theme of the decisions considered above. Thus, it held, the police are not normally under a duty of care to protect an individual from a danger of injury which they themselves did not create (including injury caused by the acts of third parties) in the absence of circumstances such as an assumption of responsibility by them.

[17] The formulation of the starting point in *Robinson*, noted above, is discernible in paras [31] ff and paras [45]-[46] in particular. However, the proposition that police officers are subject to liability for causing personal injury in accordance with the general law of tort – *Robinson*, para [45] – leads to a second stage of the analysis. It is at this stage that the limited nature of this liability emerges clearly. Fundamentally, the common law generally does not impose liability for omissions and, more particularly, for a failure to prevent harm caused by the conduct of third parties. It follows that public authorities are not generally under a duty of care to provide a benefit to individuals through the performance of their public duties: see para [50]. The qualifying word "*generally*" in this passage is of self-evident importance; so too the final clause:

> "… The common law does not **normally** impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, **generally** under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility."
> [emphasis added]

[18] In our review of the jurisprudence belonging to this sphere, we have taken into account also *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550, the key feature whereof is that of assumption of responsibility coupled with the express acknowledgement in evidence at trial by the defaulting police officer of a professional duty to provide assistance in the relevant circumstance. We have also considered *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25.

[19] Factual comparisons being unavoidable in the discrete jurisprudential sphere to which the present appeal belongs, *Tindall* was, in substance, a case of alleged police omissions in an operational situation where police had attended the scene of a traffic accident caused by black ice, had taken certain measures and then left the scene, following which a fatal collision at the same location. The Court of Appeal found in favour of the police. Their core reason for doing so was based upon the principle that

the non-conferral of a benefit on a given person by a public authority in the exercise of a statutory power or function cannot render it liable in negligence: this is our somewhat more elaborate formulation of what is stated in para [69] of the judgment of Stuart-Smith LJ. We do not overlook the other ingredients in the court's reasoning and take into account in particular the code of principles formulated (inexhaustively, NB) in para [54]:

> "(i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. In general the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible: see East Suffolk, Stovin;
>
> (ii) If follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently: see Capital & Counties, Gorringe, Robinson;
>
> (iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see East Suffolk, Capital & Counties;
>
> (iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger: see Stovin;
>
> (v) Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger: see Capital & Counties, Sandhar;
>
> (vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all): see Gorringe;

(vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (eg Ancell, Alexandrou) and making matters worse (eg Rigby, Knightly, Robinson);

(viii) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property (Alexandrou) or injury to members of the public at large (Ancell) or to an individual (Michael);

(ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between

[20] Before this court neither party demurred from this formulation. We confine ourselves to the single limited observation that it may not fully reflect that in *Robinson* the Supreme Court took as its starting point a positive statement, namely public authorities and police organisations, in common with private individuals and agencies, are subject to liability for causing personal injury in accordance with the law of tort: *Robinson*, paras [32], [43] and [45] in particular. It is the scope of this liability which falls to be examined in cases of the present kind.

[21] The limited scope of this liability is based upon two well established, inter-related principles. First, public authorities generally owe no duty of care to prevent the infliction of harm upon a person by a third party. Second, public authorities generally owe no duty of care to confer a benefit upon a person by protecting them from harm. See *Robinson*, paras [35] and [37]. Notably the word "*generally*" is employed in each of these formulations of principle. Furthermore, the leading cases make clear that the circumstances in which the police may owe a duty of care to a member of the public include cases where (a) the police create a danger of harm which would not otherwise have existed – ie by positive conduct and actions – and (b) the police assume responsibility for another person's care. See *Robinson*, para [37] where, notably, the language is that of "include." Para [37] of *Robinson* provides the foundation for the submissions of Mr McCollum KC and Mr McCollum of counsel. This entailed a recognition that if plaintiff's case is to overcome the hurdle presented by this application/appeal it will have to fit within one of the two narrow formulations found in this passage.

[22] The task for the court in applications and appeals of the present genre is stated in *Robinson* at para [29], in the context of a discussion about the landmark decision of the House of Lords in *Caparo Industries v Dickman* [1990] 2 AC 605, firstly at para [27]:

> "It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo,* the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable." As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper."

Next at para [29]:

> "Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries."

These passages provide the cornerstone of the submissions of Mr McGleenan KC and Mr Rafferty.

[23] Paras [27] and [29] of *Robinson* are undoubtedly couched in strict terms. Their espousal of the values of coherence, predictability and certainty is unmistakable. On the other hand, these passages simultaneously recognise one of the shining virtues of the common law, namely its flexibility and adaptability, coupled with its accommodation of the search for justice inherent in the "*fair, just and reasonable*" test and, simultaneously, its eschewal of rigid legal rules and principles.

Analysis and Conclusions

[24] The Statement of Claim, in its original incarnation, made a case of pure omissions against the police officers concerned. The amended Statement of Claim reflects a realistic recognition that something more is required if the plaintiff's case is to be permitted to proceed. As highlighted above, the main novel ingredient in the amendments is the incorporation of certain allegations of positive conduct on the part of the police. This serves to provide some distinction between the factual framework of the present case and that of other decided cases, in particular *Hill* and *Brooks.* In the language of *Robinson* para [27] the "*legally significant features of the situations*" in those cases are not precisely mirrored in the present case. In short, by reason of the amendments, the present case has become one of careless acts coupled with omissions causing or making a material contribution to personal injury to the plaintiff.

[25] It is in this context that one must consider the associated argument, namely that on the face of the amended Statement of Claim the plaintiff could succeed on an assumption of responsibility basis. This concept in the law of negligence is expounded in para [69](4) of *Robinson* in the following terms:

> "The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing

> harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that 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."

We would observe that the doctrine of assumption of responsibility is not characterised by either exhaustive definition or rigid boundaries. It is, rather, open textured in nature and we consider that its application will always be intensely fact sensitive.

[26] This court is not impressed by the lengthy list of omissions which characterised the plaintiff's case as originally pleaded and are now supplemented – but not substituted – by newly pleaded allegations of positive actions on the part of the police officers concerned. We consider that in its unamended incarnation the plaintiff's case could not have withstood this application. We would have reinstated the order of the Master, differing with respect from McAlinden J. However, the juxtaposition of the amended pleading with para [69](4) of *Robinson* impels us to conclude that the plaintiff's case by a narrow margin overcomes the applicable threshold. The ingredients of this conclusion are conveniently expressed in *Robinson* para [70]:

> "Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht* and *Attorney General of the British Virgin Islands v Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of

> special circumstances such as an assumption of responsibility."

Order

[27] For the reasons given, in what is a finely balanced case, we affirm the order of McAlinden J and dismiss the Chief Constable's appeal. It is otiose to add that this decision, a purely interlocutory one, betokens no forecast of ultimate success for the plaintiff. The final outcome will be determined by the future course of these proceedings which will include discovery of documents and, possibly, interrogatories and admissions, together with the vagaries of the trial process. In this context one final observation is appropriate. It is clear that in *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550 the plaintiff would not have succeeded but for an important concession made by a fellow police officer when giving evidence at the trial: see in particular p 563i – 564b and p 564e/f. Fact sensitivity is a critical element of all cases of this kind.

[28] Finally, taking into account in particular the nature and timing of the amended Statement of Claim the court considers the appropriate costs order to be both parties' costs in the cause in respect of all three judicial levels at which the Chief Constable's application has been considered.