Neutral Citation Number: [2022] EWCA Civ 25

Case No: B3/2020/1857

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MASTER MCCLOUD
[2020] EWHC 837 (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2022

Before:

LADY JUSTICE THIRLWALL
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE STUART-SMITH

- -

Between:

(1) VALERIE TINDALL
(2) VALERIE TINDALL (ADMINISTRATIX OF THE ESTATE OF MALCOLM TINDALL)

Respondents/ Claimants

- and –

(1) CHIEF CONSTABLE OF THAMES VALLEY POLICE

Appellant/ First Defendant

(2) BUCKINGHAMSHIRE COUNTY COUNCIL

Second Defendant

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- -

Nicholas Bowen QC, David Lemer and Duncan Fairgrieve (instructed by **Howard Kennedy LLP**) for the **Respondents/Claimants**
Andrew Warnock QC and Ella Davis (instructed by **DAC Beachcroft Claims Ltd**) for the **Appellant/First Defendant**

Hearing dates: 5-6 October 2021

Remote hand-down: This judgment was handed down remotely at 10.30am on 18 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

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Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1. The issue in this appeal is whether the facts pleaded by the Claimant against the First Defendant ["the Chief Constable"] disclose a reasonable cause of action in tort, capable of giving rise to an award of substantial damages. The Chief Constable applied to strike out the Claimant's claim against him as disclosing no reasonable cause of action or, alternatively, for summary judgment, Master McCloud refused both applications. The Chief Constable now appeals against the Master's refusal.

2. The proceedings arise out of a fatal road traffic accident which occurred at about 5.45 am on 4 March 2014 and which, for the purposes of this appeal, must be taken to have occurred in the circumstances set out in the Claimant's Statements of Case. In briefest outline, the Claimant claims as the widow and administratrix of the estate of her late husband, Mr Malcolm Tindall, who was killed while driving on the A413 road between Wendover and Amersham. A car driven in the opposite direction by a Mr Carl Bird went out of control on black ice and collided head-on with Mr Tindall's car. Mr Bird was also killed.

3. There had been another accident on the same stretch of road about an hour earlier, also caused by black ice. In the first accident the driver, Mr Kendall, had lost control of his car, which rolled over and ended up in the ditch, causing him to suffer injuries for which he was taken to hospital. Police officers, for whom the Chief Constable is responsible, attended the scene of the first accident. They arrived about 20 minutes after it had happened and were there for about 20 minutes. While there they cleared debris from the road and put up a "Police Slow" sign by the carriageway. Having done that, they left the scene about 20 minutes or so before the fatal accident that is the subject of these proceedings, taking their "Police Slow" sign with them. It is alleged that their conduct at and on leaving the scene was negligent and that the Chief Constable is vicariously liable to the Claimant in tort.

The Facts

4. Master McCloud provided a summary of the facts as alleged by the Claimant.

> "4. … 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. …"

5. Additional facts pleaded in the Claimant's Particulars of Claim included that during the 13 minutes that he was on the phone to the call handler, which continued up to the arrival of the first police car, Mr Kendall was unable to continue his attempts to stop the traffic. He told the call handler that his back and chest were hurting and that he had tried to flag down a van, which slowed but did not stop. He told the call handler that there was ice all over the road which was the reason he had spun off and was informed by the call handler that officers were on their way and that they had been warned about the ice and that the road was dark and fast. But for his contact with the police call handler and the subsequent engagement and arrival of the police Mr Kendall would have persisted in his attempts to slow or stop the traffic to prevent any further accidents caused by the patch of black ice. At or around the time that Mr Kendall finished talking to the call handler (during which he had not been attempting to alert traffic) police officers had arrived and first placed then removed a single warning sign. The fire and ambulance services arrived at about the same time as the police and Mr Kendall was taken to hospital.

6. In relation to the police response, the Claimant pleads that two police constables arrived at 5.03 am. A third officer attended three minutes later. All three officers understood that they were being called to an incident where there was a hazard consisting of ice in that area. One police officer placed the only "Police Slow" sign that they had with them on the northbound carriageway (i.e. the carriageway for Mr Bird's subsequent direction of travel) after ensuring that Mr Kendall was not seriously injured. A second officer checked the road for debris and swept the road. All three officers were aware of the ice hazard on the carriageway and of Mr Kendall's concern that it was very dangerous. One officer made a call to his control centre requesting a gritter, though it is alleged that his request was insufficiently "robust" and did not communicate the urgency of the situation. The three officers remained on the scene until 5.26 am when they left, taking the single "Police Slow" sign with them. They did so believing that there was no hazard and having failed to discover or inspect the sheet ice. The fatal accident happened about 20-25 minutes later.

7. Apart from alleging that the "Police Slow" sign was placed on the northbound carriageway, the pleadings do not disclose where it was in relation to Mr Kendall's car, the debris that was cleared by the police, or the area of black ice. The Particulars of Claim allege that Mr Bird was travelling northbound when he lost control "on a

localised but large area of black ice outside Mapridge Cottage". His car then crossed into the path of Mr Tindall's car, which was travelling in the opposite direction. The Particulars of Claim also allege that water had been present on the section of the road close to Mapridge Cottage for some weeks prior to the accident. This last allegation appears to be primarily or solely relevant to the claim against the second defendant Highway Authority.

8. During the hearing, it was necessary to clarify precisely what was being said on each side about Mr Kendall leaving the scene. For the purposes of this appeal the Chief Constable accepts that, but for the arrival of the police, Mr Kendall would have continued his attempts to alert other road users. For her part, the Claimant accepts that it was simply the arrival of the police on the scene that influenced Mr Kendall to go in the ambulance. The police did not say or do anything (either directly to Mr Kendall or generally) to encourage him to stop his attempts or to go in the ambulance; still less did they direct or in any way coerce him to stop what he was doing or to leave. The explanation for his decision to go in the ambulance (if any explanation is needed for someone who was removed on a body board) was his private expectation and assumption that the police would take over and alert road users to the danger. Specifically, the Claimant's reference in her skeleton argument to the police "placing Mr Kendall into the care of the ambulance service" implies no coercion or encouragement to Mr Kendall to stop his attempts to alert other road users. That is clear from the witness statement of Mr Kendall that forms the basis for the reference in the skeleton argument, where Mr Kendall said: "I spoke to one of the police who had arrived and he walked with me back to my car and examined it. He conducted a negative breath test then placed me into the care of the ambulance service, which had also arrived, along with the fire brigade. At this stage, I assumed that the police were clearly in control of the scene so thought no more about it and was treated at the scene then transported by ambulance to hospital."

9. The pleaded allegation that the officers "having promptly attended were in a position to (and did) take control of the accident scene but their negligence in assuming control/responsibility and then relinquishing it *prevented Mr Kendall and other interested members of the public exercising self-help and protective measures"* must also be read in light of the explanation just given about how Mr Kendall came to leave. In my judgment, it is not accurate to suggest that the police "prevented" Mr Kendall from taking additional steps. At its highest, their mere presence caused Mr Kendall to decide to leave. There is no evidence or suggestion that there were other interested members of the public involved.

The pleaded case on liability

10. Having pleaded that the police owed Mr Tindall a duty not to make things worse, the case against the Chief Constable is pleaded at [58]-[61] of the Particulars of Claim as follows:

> "58. Either individually or in concert with each other, all three of the said officers (and Mr Wilkie, the call handler) by their conduct made matters worse in that their attendance, and subsequent negligence, led directly to Mr Kendall (and other drivers who would have come to his aid) ceasing his own attempts to warn other motorists by vigorous arm waving and

gesticulation at the side of the road. In the short time that he attempted to warn incoming cars he had been successful in slowing traffic to safe speeds. Matters were made far worse by the attendance of the police as:

a. had Mr Kendall known they were not planning to attend, he would have persisted and or summoned help from others, in his endeavours to slow the traffic and warn motorists of the hazard ahead.

b. Further, but for the attendance of the police, the fire service would in all probability have taken control and remained at the scene and ensured the safety of road users until the ice hazard was cleared.

59. Further/alternatively the [Claimant] reserves the right to argue (in addition to and distinct from the making things worse duty):

a. failed to carry out any form/or any sufficient form of risk assessment or otherwise to appreciate the icy state of the highway and that there was an imminent danger to the lives of road users.

b. Failed to take any or any sufficient steps to slow the traffic, specifically:

i. not being in possession of at least two police slow/hazard warning signs;

ii. not placing any appropriate signs/warnings/ their own police vehicles to slow the traffic before vehicles encountered the black ice;

iii. having placed a single "police slow" sign removed it when they decided to leave the scene of Mr Kendall's accident.

c. Failed to prevent a further accident by not requesting/pressing the call handler with any urgency to request a gritter from the Highways Agency.

d. Alternatively, if a sufficient request was made by the officers the call handler failed to request the gritter.

e. Not staying at the scene until the gritters arrived or other precautionary safety measures were taken to ensure the safety of road users.

f. Failed to close the road.

> g. Failed to request appropriate support from either the fire service or other police officers.
>
> h. Assumed responsibility/control and then relinquished it.
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> 60. Further, the breaches pleaded at paragraph 59b(i) and 59c above were caused or contributed to by a failure in training, the systemic failures as found by the Misconduct Tribunal and set out between paragraphs 46-51 above, and/or by a failure to train and/or the three officers lack of knowledge of the relevant policies/protocols setting out when and how attending officers should trigger a gritting request or deal with a road traffic accident on a single carriageway.
>
> 61. The actions of the three officers were negligent and their positive acts (and if necessary their failures) were causally connected to the second collision which killed both drivers."

11. It can therefore be seen that, while [58] alleges breach of the duty not to make things worse, [59]-[61] allege breach of a duty to protect Mr Tindall from harm.

The judgment below

12. Having summarised the facts Master McCloud turned to the law:

> "8. … 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. …
>
> 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. … 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.
>
> … [The Master then referred to other authorities on which submissions had been made]
>
> 15. In my judgment what the above cases … 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. …
>
> … [After further reference to cited authority the Master concluded:]
>
> 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 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."

The Grounds of Appeal

13. The appeal is pursued on three grounds:

i) Ground 1 is that the Master erred in concluding that it was arguable that the Chief Constable owed a duty to the Claimant because his officers had made things worse by attending at the earlier accident and leaving again even though they did nothing which either created or increased the hazard posed by ice on

the road. In particular it is submitted that the Master erred in holding that the police arguably made matters worse by removing Mr Kendall from the scene and by holding that they made matters worse by placing a warning sign on the road for the duration of their attendance and then removing it when they left the scene;

ii) Ground 2 is that the Master erred in concluding that it was arguable that the police officers owed a duty because they had taken control and assumed responsibility in circumstances where they might be held to have had sufficient power to influence the situation so as to create a relationship of proximity between them and road users;

iii) Ground 3 is that the Master erred when concluding that the point of law in this appeal could only be determined after a trial of the facts.

The submissions

The Chief Constable's submissions

14. The Chief Constable submits that the law about when a public authority may owe a duty of care is settled by recent decisions of the Supreme Court, which reassert principles that can be traced back to *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 ["*East Suffolk*"]. He submits that public authorities stand in the same position as private citizens for the purposes of the law of negligence and the imposition of a duty of care. Like private citizens, public authorities do not generally owe a duty of care to protect individuals from harm. No novel propositions of law are involved in this appeal. Accordingly there is no need or justification for resorting to a *Caparo* analysis. The case is on all fours with the decision in *Ancell v McDermott* [1993] 4 All ER 355 ["*Ancell*"] and to be decided in accordance with established authority.

15. On Ground 1, the Chief Constable submits that the Master misunderstood the facts because nothing done by the police (other than the fact of their arrival) influenced Mr Kendall to leave the scene in the ambulance. Therefore, even if Mr Kendall's departure in the ambulance removed one potential source of warnings for approaching traffic, that was not caused by anything for which the police are responsible. Second, the Chief Constable submits that the removal of their sign by the police was not a negligent act that "made matters worse". It restored the road to the condition in which they had found it, save only that they had swept up debris from the first accident.

16. On Ground 2, the Chief Constable distinguishes cases such as *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 ["*Dorset Yacht*"] because (even assuming that the ice on the road could be equated to the borstal trainees) the police did not control the ice at any stage or at the time of Mr Tindall's accident (as they had by then left the scene) and they had no relationship with Mr Tindall above and beyond the relationship they had with all road users. The conclusion of the Master is therefore submitted to be inconsistent with *Gorringe v Calderdale MBC* [2004] UKHL 15, ["*Gorringe*"] and *Sandhar v Department of Transport, Environment and the Regions* [2004] EWCA Civ 1440 ["*Sandhar*"]. Mr Tindall had no special relationship with the officers arising out of their attendance at an earlier accident of which he knew nothing. The decision is inconsistent with the principle that a public authority does not owe a duty of care merely because it has statutory or other public law powers or duties to improve safety.

17. On Ground 3, the Chief Constable submits that all relevant facts are to be taken as pleaded by the Claimant and are known. There is therefore no advantage to be had in letting the issue go forward to trial.

The Claimant's submissions

18. The Claimant emphasises that the class of persons to whom the relevant duty would be owned is limited to those few people who would pass down the part of the road in question. She submits that the police made things worse through their attendance compared to what the likely result would have been if they had not attended at all. Second, she submits that the actions of the police prevented Mr Kendall from protecting the specific and limited class of road users, including Mr Tindall, from the danger posed by the ice. Third, she submits that the police assumed responsibility so as to create a special relationship between them and Mr Tindall as one of the limited class of road users and therefore came under a duty to protect him from harm. Fourth, she submits that the police had a special level of control over the source of the danger.

19. The Claimant seeks to distinguish *Ancell* on the basis that the police in that case did nothing to affect the scene whereas in the present case the police were responsible for removing Mr Kendall and thereby removing some degree of protection from on-coming motorists. She therefore describes the duty for which she contends as targeted and narrow, being owed to "a limited class of road users, including Mr Tindall, from the danger posed by the black ice, in the specific circumstances in which Mr Kendall was already engaged in an attempt to warn just such road users."

20. On Ground 1, the Claimant supports the Master's understanding of how Mr Kendall came to leave. She describes as "key" that the police came to a situation where the alternative rescuer, Mr Kendall, was already in situ; and she points to her pleaded case that the police made matters worse "in that *their attendance, and subsequent negligence*, led directly to Mr Kendall … ceasing his own attempts to warn other motorists." (Emphasis added). She submits that the temporary sign was erected by the police, in effect, to provide for warnings which, until that moment, Mr Kendall had been undertaking physically by waving at oncoming traffic. "Removing the means of warning, which had previously been undertaken by Mr Kendall, was clearly part of the overall positive actions of the police which made the situation worse than if they had not intervened at all."

21. On Ground 2, the Claimant submits that it is not necessary in a case such as this, where the risk arises not from a third-party human actor, to establish a pre-existing relationship between the police and Mr Tindall. She contends that what she calls "the control exception" can arise in circumstances where a defendant had the power to exercise physical control, or at least influence, over a third party, including a physical scene. Here it is submitted that the police took control of the scene and the dangerous road. They had the ability to control the risk posed by the black ice or at least to influence the outcome. The Claimant again emphasises the limited class of persons to whom the police would owe the duty arising out of their control of the black ice on this particular stretch of road. She relies upon *Gibson v Orr* [1999] SC 420 as being factually and legally analogous.

22. On Ground 3, the Claimant points to the fact-sensitive nature of any decision on the existence or otherwise of a duty of care in the tort of negligence and submits that the

Master was justified in forming the view that the law is in a state of flux and that the issue should be determined on a trial rather than on a strike-out or a summary judgment application.

The authorities

23. The appropriate starting point is the decision of the House of Lords in *East Suffolk*. The facts are well known. Owing to a very high tide a breach was made in a sea wall, as a consequence of which the respondents' land was flooded. The appellants in the exercise of their statutory powers undertook the repair of the wall, but carried out the work so inefficiently that the flooding continued for one hundred and seventy eight days, thereby causing serious damage to the respondents' pasture land. By the exercise of reasonable skill on the part of the appellants, the breach in the wall might have been repaired in fourteen days. The House of Lords held (Lord Atkin dissenting) that if, in the exercise of its discretion the appellant authority embarked upon an execution of a power to act, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing: see per Viscount Simon LC at 87, Lord Thankerton at 95-96, Lord Romer at 102 and Lord Porter at 105.

24. In the course of their formulations of the principle, the House of Lords distinguished between "positive acts", meaning conduct causing harm that would not otherwise have occurred and "omissions", meaning a failure to act in such a way as to prevent harm. As will be seen later in this judgment, the traditional categorisation of negligent conduct into "positive acts" and "omissions" has not always been helpful and has recently been explained by the Supreme Court as a distinction between causing damage on the one hand and failing to confer a benefit on the other.

25. In *Stovin v Wise* [1996] AC 923 the Highway Authority had become aware of a visibility problem caused by a bank of land at a road junction where three accidents had occurred in the past twelve years. Although meetings had been arranged and the danger recognised, no effective steps had been taken by the time of the claimant's accident. Despite its knowledge of the danger and previous accidents the claim against the Highway Authority failed: the House of Lords by a majority held that there was no public law duty to act and no private law duty of care was owed to the claimant.

26. The full significance of the decision of the House of Lords in *Stovin* may not have been appreciated immediately, not least because of the influence at that time of the successive attempts in *Anns v Merton LBC* [1978] AC 728, *Caparo Industries v Dickman* [1990] 2 AC 605 and elsewhere to achieve a universal formula for the circumstances in which a duty of care should be held to exist. Even so, it represented a further endorsement of the principle that, in general, a public authority would not be held liable for failure to exercise a discretionary power even when it is conscious of danger and has it in its power to remedy it. In explaining the principle, Lord Hoffmann (with whom Lord Goff and Lord Jauncey agreed) first drew attention to the rationale underlying the traditional distinction between "acts" and "omissions". At 945, he said:

> "One must have regard to the purpose of the distinction 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."

27. In addition, Lord Hoffmann pointed to the need to examine the policy of the statute conferring the power to decide whether it was intended to confer a right to compensation for breach. He summarised the position at 953D:

> "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."

28. The leading case on the application of these principles to the emergency services was, until recently, the decision of the Court of Appeal in *Capital & Counties PLC v Hampshire County Council and others* [1997] 1 WLR 1004. The facts are instructive. In the first two cases, the plaintiffs' premises were destroyed by fire after the fire brigade had turned off the sprinkler system then in operation at the premises. The judge below held the fire brigade liable in negligence. In the third case the plaintiffs' premises were destroyed by fire after a fire at adjacent premises had been extinguished and the fire brigade which went to the scene had left. The judge below ruled on a preliminary issue that the fire brigade owed no duty of care to ensure that the plaintiffs' premises had not been affected by the fire. In the fourth case the plaintiffs' chapel was destroyed by a fire which a fire brigade had failed to extinguish because of a lack of water which was alleged to be due to negligent failures to inspect hydrants to ensure that they were in working order. The judge below struck out the action on the basis that, although there was a sufficient relationship of proximity between the fire brigade and the plaintiffs, the brigade owed them no duty. In each case the decision of the judge below was upheld.

29. At 1026C-1030A the court considered whether there was a common law duty upon the fire brigade to answer calls to fires or to take reasonable care to do so. After referring to authority including *Stovin* and *Alexandrou v Oxford* [1993] 4 All ER 328 (where the police attended but intervened ineffectually so that a burglary was subsequently committed), the court held that there was no sufficient proximity to found a duty of care "simply on the basis that an emergency call is sent to the police, even if there is a direct line from the premises to the police station": see 1029F-G. While accepting that the public may hope that the fire brigade will attend and extinguish the fire, the court concluded at 1030A that:

> "the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If therefore they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable."

30. The court then turned to the question: "Does the fire brigade owe a duty of care to the owner of the property on fire, or anyone else to whom the fire may spread, once they have arrived at the fire ground and started to fight the fire?" The question was answered

between pages 1030C-1038F, with the Court's conclusion being that "a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation."

31. The court accepted that "where the rescue/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment the plaintiff can recover." It referred to *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (where the police negligently fired a CS gas cannister into the plaintiff's shop, setting it on fire), *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (where prison officers took borstal trainees onto an island and negligently let them escape in close proximity to the plaintiff's yachts), and *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (where the police created the danger to the Hillsborough crowd by incompetent crowd control). Each of these cases were held to be ones where a new or different danger had been created from that which the police were seeking to guard against (except perhaps the *Alcock* case).

32. The court held that the true analogy between the facts of *Capital & Counties* and *East Suffolk* would have been if the *East Suffolk* plaintiffs had constructed a temporary wall that contained the flood water to a small area but the authority had negligently destroyed the temporary wall so that the area of flooding increased before repairs were complete. In other words, the court held that (on the findings made by the judge) the fire brigade had made matters worse.

33. The court also accepted that the fire brigade's duty is owed to the public at large to prevent the spread of fire and that this may involve a conflict between the interests of various owners of premises. It held that the statutory provisions that confer on the senior fire brigade officer present sole charge and control of fire-fighting operation (and make it a criminal offence wilfully to obstruct or interfere with a member of the fire brigade engaged in fire-fighting) were there for the benefit of the public generally, where there may be conflicting interests. "By taking such control that officer is not to be seen as undertaking a voluntary assumption of responsibility to the owner of the premises of fire, whether or not the latter is in fact reliant upon it": see 1036D-F.

34. The court was asked to rule on what was then described as public policy "immunity" – a phrase to which I will return. For present purposes it is sufficient to note the passage at 1042C-F in which the court considered previous cases in which the police had been held to owe a duty of care, as follows:

> " In *Ancell v McDermott* [1993] 4 All ER 355 it was held that the imposition of a duty of care on the police to protect road users from hazards caused by others would be so extensive as to divert the police from the proper functions of detecting and preventing crime. And in *Osman v Ferguson* [1993] 4 All ER 344, although the majority of the court considered that it was arguable that there was sufficient proximity between the plaintiff's family and investigating police officers, the imposition of a duty of care towards a potential victim might result in the significant diversion of police resources from the investigation and suppression of crime and was therefore contrary to public policy.

> On the other hand liability has been imposed when, in the course of carrying out their duties, the police have themselves created the danger: see *Rigby v Chief Constable of Northamptonshire* …, *Knightley v Johns* [1982] 1 WLR 349; *Alcock v Chief Constable of South Yorkshire* … and *Marshall v Osmond* [1983] QB 1034."

35. Although the appeals *in Capital & Counties* concerned the actions of the fire brigade, the court's conclusions were founded on principles that are of general application to public authorities performing duties that are intended to be protective of the public and which are derived substantially from decisions concerning the police. In particular, the distinction between actions of the police that are merely ineffectual (e.g. *Alexandrou*, *Ancell*) and those that make matters worse (e.g. *Rigby*, *Knightly*) is firmly embedded in high and binding authority, with their provenance being directly traceable to *East Suffolk*. *Ancell* is particularly relevant to the present appeal: police officers noticed a dangerous spill of diesel on the road but took limited, inadequate and ineffectual steps to protect road users from its continued presence. The Court of Appeal held that the officers owed no duty to the plaintiff's wife, who skidded on the diesel and was killed.

36. The House of Lords returned to the question of affirmative duties to act in *Gorringe v Calderdale MBC* [2004] UKHL 15, [2004] 1 WLR 1057, a decision on facts that bear comparison with the facts of the present case. The claimant, driving her car, approached a sharp crest in the road followed by a curve. Seeing a bus approaching she braked, skidded, collided with the bus and was severely injured. The bus driver was blameless. Some years before the accident there had been a "slow" sign painted on the road before the crest, but it had subsequently disappeared. The claimant brought proceedings against the highway authority alleging negligence and breach of statutory duty, contending that the accident had been caused by the authority's failure to give her proper warning of the danger posed by the crest in the road and, in particular, its failure to provide a "slow" sign. The House of Lords held that the authority owed her no duty.

37. At [32] Lord Hoffmann said:

> "Speaking for myself, I find 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. For example, the majority reasoning in *Stovin v Wise* was applied in *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services: see section 1 of the Fire Services Act 1947. The Court of Appeal held, in my view correctly, that this did not create a common law duty."

38. Lord Scott at [73] identified another reason why no duty was owed:

> "There are, of course, many situations in which a public authority with public duties has a relationship with a member of the public that justifies imposing on the public authority a private law duty of care towards that person. And the steps required to be taken to discharge that private law duty of care may be steps comprehended within the public duties. *Barrett v Enfield London*

> *Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 are examples. But the council in the present case had no relationship with Mrs Gorringe that it did not have with every other motorist driving on the stretch of road in question."

39. Lord Rodger, having pointed out that the common law of Scotland is somewhat more generous to those injured due to the failure to maintain the roads than was the English common law, said at [88] that:

> "… in the present case, the mere fact that the defendants had once painted the "Slow" sign on the road does not mean that they had been under a common law duty to do so, or that they were under such a duty to repaint the sign when it came to be obliterated. When that happened, the situation returned to what it had been before the defendants decided to exercise their statutory powers by painting it in the first place. They were not under any common law duty to exercise their power to repaint it and are not liable because, for whatever reason, they did not do so. Of course, if they had done so, it might have helped motorists. And after Mrs Gorringe's accident, they did indeed repaint the marking and make a number of other changes. But this was something that they decided to do in the exercise of their statutory powers, not something that they were under a common law duty to do."

40. The principles explained in *Gorringe* were applied by the Court of Appeal in *Sandhar*. The deceased was killed having lost control of his vehicle on ice on a trunk road that had not been salted over the preceding night or on the previous day. In the words of the Court of Appeal, "the department relevantly did nothing" despite having received information that should have indicated a need to salt the roads. The claim failed, the Court of Appeal holding that the highway authority could not properly be taken to have assumed a general responsibility to road users to ensure that trunk roads would be salted in freezing conditions. A general expectation on the part of road users that the Highway Authority would implement a system of gritting or salting was not sufficient to give rise to a duty of care owed to the deceased (or road users in general). There was no element of reliance by the deceased on an expectation that the road had been salted.

41. Three recent decisions of the Supreme Court are directly relevant to the issues in the present case. In *Michael and Ors v Chief Constable of South Wales Police and Anor* [2015] UKSC 2, [2015] AC 1732, the victim made an emergency call to the police saying that she was in danger from her former partner and that he had said he would return to kill her. The call handler told the victim that her call would be passed on to the appropriate police force which would wish to call her back and asked her to keep her phone available for that call. The police response to the call was inadequate in giving the call a lower priority than it should have had. The victim was called again some 15 minutes later and was heard to scream. The police responded immediately but, by the time they arrived, the former partner had stabbed her to death. The victim's estate and dependents brought a claim which included a claim in negligence against the police. The Supreme Court by a majority upheld the decision of the Court of Appeal giving summary judgment on the negligence claim in favour of the Chief Constable.

42. In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736, two police officers attempted to arrest a suspected drug dealer in a shopping street in the centre of Huddersfield. In the ensuing struggle, the three men knocked into the claimant, who was described as "a relatively frail lady then aged 76". They all fell to the ground with the claimant underneath. She brought a claim in negligence against the Chief Constable. The trial judge held that the police had acted negligently since there was a foreseeable risk that passers-by such as the claimant would be injured and that the officers had failed to have regard to the safety of members of the public; but he held that the police had immunity against claims in negligence. The Court of Appeal upheld the judge's decision; the Supreme Court reversed it.

43. In *N and Anor v Poole Borough Council* [2019] UKSC 25, [2020] AC 720, two children were placed (with their mother) by the Council, under its powers as local housing authority, in a property owned by a third party where they were subjected to significant harassment and abuse by a neighbouring family that had been known to the Council as engaging persistently in anti-social behaviour. They brought proceedings against the Council in negligence alleging physical and psychological damage. The asserted common law duty was said to derive from the Council's duty under s. 17 of the Children Act 1989. It was alleged that, if the Council had carried out its duties under s. 17 competently, the Council would have moved them (either with or without their mother) out of the home. The Supreme Court unanimously upheld the striking out of their claim on the basis that the defendant did not owe the children the duty of care for which they contended.

44. The facts of *Michael* involved a failure to act (or to act effectively), whereas the facts of *Robinson* are more readily characterised as the infliction of positive harm upon the Claimant. The facts of *N and Anor* may be thought to lie somewhere between the two, because it was the positive act of the Council in placing the children in the particular property that exposed them to the risk of abuse from the anti-social neighbour, though the claimants also complained of a failure to move them out of the home in which they had been placed.

45. In *Michael*, the leading judgment was given by Lord Toulson. Given the facts of that case, he concentrated on the question whether and when a person may be held liable for failing to prevent harm caused by another person. His analysis was endorsed and restated by Lord Reed in *Robinson*, to whose judgment I shall refer in detail below. Having rejected the proposition that the police enjoy "immunity", properly so called, Lord Toulson at [97]ff re-stated the established principles of English and Welsh law, that it does not as a general rule impose liability on a defendant for pure omissions. "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." However, that rule is not absolute and is subject to two well recognised types of situation in which the common law may impose liability for a careless omission.

> "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 … is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. … The second general exception

> applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, … . It should not be expanded artificially."

46. At [138] he rejected the submission that the call handler's response to the victim was arguably sufficient to give rise to an assumption of responsibility on the *Hedley Byrne* principle.

47. *Robinson* directly addressed the question whether the activities of the police in attempting to arrest the suspected drug dealer should be regarded as a positive act that gave rise to liability or an omission that did not. Lord Reed JSC took the opportunity to provide an authoritative restatement of the relevant principles of the law of negligence. At [21]-[30] he clarified the limited circumstances in which resort may be had to the *Caparo* "fair, just and reasonable" criterion, summarising the position at [29]:

> "Properly understood, the *Caparo* case 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."

48. At [31]ff Lord Reed considered the principles of the law of negligence applicable to the police. Dealing first with the position of public authorities in general, Lord Reed endorsed the orthodoxy of the approach in *Stovin* and *Gorringe* and continued:

> "32. At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: … .
>
> 33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, as explained in *Gorringe's case* [2004] 1 WLR 1057, para 39. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

34. On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson JSC stated in *Michael's case* [2015] AC 1732, para 97, "the common law does not generally impose liability for pure omissions". This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" [2016] 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."

35. As that summary makes clear, there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: … . In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body: see, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241, concerning a private body, applied in *Mitchell v Glasgow City Council [2009] AC 874*, concerning a public authority.

36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well known illustration of that principle is the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be, to say the least, unusual if the mere existence of the statutory duty [or, a fortiori, a statutory power] could generate a common law duty of care": *Gorringe's case* [2004] 1 WLR 1057, para 23.

37. A further point, closely related to the last, is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: … . In *Michael's case* …, para 97 Lord Toulson JSC explained the point in this way:

"It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a

> person liable in damages for failing to prevent harm caused by someone else."
>
> There are however circumstances where such a duty may be owed, as Tofaris and Steel indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The first type of situation is illustrated by the *Dorset Yacht* case, and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 .... The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable* [2013] QB 579, as explained in *Michael's case*, para 69."

49. Turning to the position of the police in particular, Lord Reed contrasted the wide-ranging public law duty owed by the police to the public at large for the prevention of violence and disorder with the more limited circumstances in which a private law duty might be owed to an individual member of the public. He adopted Lord Toulson's analysis of the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 as recognising that the general law of tort applies as much to the police as to anyone else; and, at [48] he deprecated any attempt to explain the various cases on police liability by reference to particular categories of case such as cases of outrageous negligence, cases which did not relate to core functions, and cases where police officers had assumed responsibility for a claimant. "On the contrary", he said, "these cases are examples of the application to the police of the ordinary common law duty of care to avoid causing reasonably foreseeable injury to persons and reasonably foreseeable damage to property."

50. At [50] Lord Reed reiterated that:

> "50. On the other hand, as Lord Toulson JSC noted in *Michael's case* [2015] AC 1732, para 37, Lord Keith [in *Hill's case*] held that the general duty of the police to enforce the law did not carry with it a private law duty towards individual members of the public. In particular, police officers investigating a series of murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. That was again in accordance with the general law of negligence. As explained earlier, 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. This was recognised by Lord Toulson JSC in Michael's case. As he explained, at paras 115–116:
>
> "115. The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or

> potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police …
>
> "116. The question is therefore not whether the police should have special immunity, but whether an exception should be made to the ordinary application of common law principles …""

51. As a final iteration of the principles underlying the distinction between "acts" and "omissions", Lord Reed said at [69.4]:

> "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."

52. These statements of principle rendered the resolution of the remaining issues in *Robinson* relatively straightforward. It was reasonably foreseeable that, if the police attempted to arrest the suspected drug dealer at a time when pedestrians – especially vulnerable persons such as a frail and elderly woman – were in close proximity, they might be knocked into and injured in the course of his attempting to escape. That was sufficient to impose on the officers a duty of care towards the pedestrians in the immediate vicinity when the arrest was attempted, including Mr Robinson. The officers had failed to exercise reasonable care in assessing the situation and attempting the arrest, and their failure caused Mrs Robinson's injury. In slightly different words, by attempting to arrest the suspected drug dealer the officers negligently created a risk that had not otherwise been present and the eventuation of that risk caused Mr Robinson to suffer injury. On normal principles of the law of negligence, that was sufficient to found a cause of action – just as it would have been if the circumstances had involved members of the public rather than police officers.

53. Lord Reed DPSC gave the only substantive judgment in *N v Poole*. The main significance for present purposes lies in his analysis of the concept of "assumption of responsibility" in the context of public authorities exercising their statutory duties and powers. At [80]-[82] he said:

> "80. … a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.
>
> 81. In the present case, on the other hand, the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by rehousing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield* [2001] 2 AC 550. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.
>
> 82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred."

54. In my judgment this statement of principle applies to the police as to other authorities. However, when considering whether the police are to be taken as having assumed responsibility to an individual member of the public so as to give rise to a duty to exercise reasonable care to protect them from harm, I must apply the principles derived from the decisions of high authority to which I have referred . In particular:

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 (e.g. *Ancell, Alexandrou*) and making matters worse (e.g. *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 the authority and the individual is any different from the relationship between the authority and other members of the same class as the individual: see *Gorringe*, per Lord Scott.

55. The Claimant relied upon two Scottish authorities to which I must refer.

56. In *Gibson v Orr* the bridge over a river collapsed after heavy rainfall. On being advised of the collapse, police officers coned off the north side of the bridge and placed their vehicle on that side with its blue light flashing and headlights illuminated so as to give warning to those approaching the bridge from the south side. They later left the scene without having received confirmation that any barrier or warning was in place on that

side. Shortly thereafter a car in which the pursuer was a passenger drove onto the bridge and fell into the river, killing all the occupants apart from the pursuer. The defender, who was responsible for the officers, conceded that the accident was foreseeable but contended that no duty of care existed so as to attach liability for the accident to him. The Lord Ordinary, Lord Hamilton, rejected that submission and held that a duty of care had been owed.

57. The Lord Ordinary reached his conclusion by applying *Caparo's* tri-partite test. He held that, in addition to the conceded foreseeability, there was a sufficient relationship of proximity and that it was fair just and reasonable to impose a duty. He considered that, having taken control of the hazard on the public road, the police were in a sufficiently proximate relationship with road users likely to be immediately and directly affected by that hazard and that the duty might extend not merely to the manner of their exercise of control but also their relinquishing of it. In concluding that it was fair just and reasonable to impose a duty of care, he took into account that there was no problem of inconsistency with their instructions or with duties owed to other persons.

58. The Lord Ordinary was referred to some of the authorities to which I have referred above, including *Hill v Chief Constable of West Yorkshire*, *Alexandrou*, *Ancell*, and *Capital & Counties*, all of which he distinguished. He was also referred to "the proposition that the common law does not impose liability for what are called "pure omissions."" His response was:

> "Of course, where no pre-existing relationship exists, a failure to act may not, whatever the moral obloquy, amount in law to a breach of duty of care (as in failure to stop a blind stranger stepping out in front of busy traffic), while a positive act (as in carelessly walking into such a stranger and propelling him in front of such traffic) may well do so. However, where a relationship does pre-exist, whether with an individual or with a limited group of persons, the distinction between acts and omissions becomes less important."

59. It is evident that the Lord Ordinary regarded the attendance of the police (and, possibly, having stationed their car for a time on the south side of the bridge) as giving rise to a pre-existing relationship. He also drew the distinction between cases where the police were not acting within the scope of their "core duty" to prevent and detect crime, but within the scope of their civil function in relation to road traffic operations. In that regard, it is material that neither *East Suffolk* nor *Stovin* was cited to him. It is also material that the decision was reached at a time when *Caparo* had taken over from *Anns* as the dominant attempt to achieve a single universal formula for the circumstances in which a duty of care should be held to exist.

60. I accept that Lord Hope of Craighead at [79] of *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 said that the Lord Ordinary's decision deserved to be read carefully. However, Lord Hope's observation was before the corrective re-emphasis of the principled orthodoxy of *East Suffolk*, *Stovin* and *Gorringe* in the recent decisions of the Supreme Court to which I have referred. If *Gibson v Orr* were to fall for decision now in England or Wales, it would in my judgment be both unnecessary and inappropriate to resort to a *Caparo* approach as if the facts of the case were outside the ambit of previously established decisions and principle: see [46] above. I do not

accept that drawing a distinction between the core duty to prevent and detect crime and their civil function in relation to road traffic operations is appropriate. What matters in either case is that the police are acting in accordance with powers conferred upon them. The Claimant in the present case did not submit that the policy of the statute conferring such powers on the police to discharge their road traffic functions was to create a right to compensation; and I am not aware of any such policy either as affecting the present case or as affecting *Gibson v Orr*: see [27] above.

61. The second Scottish authority relied upon by the Claimant is *A J Allan (Blairnyle) Ltd. v Strathclyde Fire Board* [2016] SC 304. The owners of a farmhouse called the fire service to attend a fire that had broken out from a stove in the kitchen. The fire brigade attended and extinguished the fire. However, their extinguishing of the fire was ineffectual because it reignited in the early hours of the following morning and burned down the house completely. The claim failed on the basis that the duty of the fire brigade was not negligently to add to the damage which the owners would have suffered if the fire service had done nothing. In other words, it was a duty not to inflict a fresh injury, and no breach of that duty of care was averred to have occurred.

62. All three judges referred to *Gibson v Orr*. Lady Paton considered that "the carefully developed, policy-based, more restrictive approach currently approved and adopted by the UK Supreme Court must be followed by the Scottish courts contrary to the views expressed in the Outer House in … *Gibson v Orr* …": see [26]. Lady Dorrian considered that "*Gibson v Orr* may not unreasonably be analysed as a case where their taking control of and then abandoning a known hazard was at least analogous with a situation where the authority created the damage or made the situation worse, having regard to the reference to *Knightly v Johns and ors* and *Rigby v Chief Constable, Northamptonshire Police*": see [50]. To similar effect, Lord Drummond Young referred to the Lord Ordinary having said that *Gibson v Orr* "could be regarded as one where the necessary proximity was brought into existence through an assumption of responsibility. The same approach might well be taken where the police undertake the direction of traffic; once again there is an assumption of control of a situation which may present a hazard. The notion of control also underlies the liability of roads authorities in Scots law to take reasonable care to remove hazards, …": see [62]. At [91] he drew a distinction between cases involving the police dealing with traffic or hazards on the roads and work performed in the detection of crime and the detection of the perpetrators of crime.

63. If the decision in *Gibson v Orr* represented the law of England and Wales it would provide persuasive support for the Claimant in this case. However, and in respectful agreement with Lady Paton, I consider that the decision and reasoning in *Gibson v Orr* is inconsistent with the weight of authority to which I have referred above

64. Whatever the reason for the difference of approach, the application of the principles to which I have referred would indicate that what the police did in *Gibson v Orr* was a failure to confer a benefit (in the form of warning by lights or otherwise) upon the road users who might drive along that stretch of road. Theirs was an ineffectual intervention, just as if they had failed to respond to a call out, or had got lost, or had hit a tree on the way. As it was, they did arrive but their response was inadequate and transient. As such, what was complained of was an omission to act so as to protect the pursuer from harm. Nothing about their temporary intervention made the position more dangerous for those who drove along the road after they had left than it would have been had they

never attended. The situation after their temporary intervention was exactly the same is it had been before they arrived: the bridge was down and there were no lights or other warnings of danger. It is therefore wrong to suggest that they made matters worse.

65. With all respect to the judges who have expressed a contrary opinion, it is in my view incorrect to suggest that the police in *Gibson v Orr* assumed responsibility for the safety of the road, since that is palpably what they did not do. In my judgment a finding of assumption of responsibility on the facts of *Gibson v Orr* is inconsistent with the decisions in *East Suffolk*, *Stovin*, and *Capital & Counties*. It is also inconsistent with Lord Reed's authoritative statements of principle in *Robinson* set out above. Had the officers been private citizens who had temporarily stopped and illuminated the scene with their lights (or even, as suggested in argument before us, had they also put out a warning triangle) and then chosen to leave, it would not have been reasonably arguable that they would have come under a duty of care as now suggested either on the basis of an assumption of responsibility or otherwise. A senior officer of the fire-brigade taking control of firefighting does not assume responsibility so as to come under a duty of care to prevent harm. I see no basis upon which properly to distinguish the temporary actions of a police officer attending a scene of potential danger. Nor do I consider that any difference of approach is called for because the police were on traffic duties and not attempting to prevent crime: see [49] above. Finally, I do not accept that there was any "pre-existing relationship" between the police and pursuer, who knew nothing of each other's existence or involvement before the accident.

Discussion and conclusion

66. The claimant's submissions attach a significance to the departure of Mr Kendall that, in my judgment, it cannot bear. It is plain that, notwithstanding the pleading, the Claimant's case at its highest is that the arrival and presence of the police caused Mr Kendall to assume (privately) that they would act in a certain way, which influenced him to decide for himself to go to hospital in the ambulance: see [8]-[9] above. That, as I have explained, is not a proper basis for holding that the police came under a private law duty to prevent road-users from suffering harm: see [29] above. The allegation in [58] of the Particulars of Claim that negligence on the part of the police caused Mr Kendall to cease his own attempts to warn other motorists is equally unsupportable. By the time that Mr Kendall decided to leave in the ambulance the police had not done anything that could reasonably be described as negligent which may have contributed to his decision. I therefore reject the submission that the police made matters worse by reference to the departure of Mr Kendall.

67. The second aspect of the police's conduct that the Master considered raised an arguable case on making matters worse was their transient intervention by putting out their "Police Slow" warning sign, sweeping debris from the road, taking down the sign and leaving. This is a paradigm example of a public authority responding ineffectually and failing to confer a benefit that may have resulted if they had acted more competently. In the present case the police were confronted by a dangerous stretch of road which (it is to be assumed) they had power to render less dangerous by a competent response. They failed to take steps that might have prevented harm being suffered but they did not make matters worse: they merely left the road as they found it. There is, in my judgment, no material distinction to be drawn between the facts of this case and a case where the fire brigade attends, makes ineffectual attempts to control or extinguish the

fire and then leaves. *Capital & Counties* establishes that, in such circumstances, no duty of care is owed, breach of which could give rise to a claim for damages.

68. I do not accept that by taking down the "Police Slow" sign the police made matters worse within the meaning of the principles that are now to be applied. In my judgment the present case is closely analogous to the facts in *Gorringe*, albeit with a compressed timescale. The police officers' failure to keep the sign in position was, in my judgment, a failure to confer a benefit and not a case of making matters worse. Furthermore, an appreciation by the police that the road was dangerous because of ice (which is to be assumed for present purposes) did not impose on them a duty to act to prevent the danger, as is shown by the facts and result in both *Stovin* and *Sandhar*.

69. For these reasons, I consider that the facts of this case fall squarely within the principles that apply when a public authority acting in pursuit of a power conferred by statute fails to confer a benefit. There is no scope for reinventing the tortious wheel by the application of *Caparo*-type analysis, for the reasons I have already given.

70. Turning to Ground 2, the Master did not explain why she considered it to be arguable that the police had assumed responsibility so as to give rise to a duty of care to prevent harm. In respectful disagreement with her decision, I consider the proposition to be unarguable.

71. I cannot accept the Claimant's submission that a duty can arise in circumstances "where a defendant had the power to exercise physical control, or at least influence, over a third party, including a physical scene (such as the accident scene in the present case) and, absent their negligence, ought to have exercised such physical control." The submission is far too wide. If correct, it would mean that whenever a public authority has the power to prevent harm and, if acting competently, ought to have prevented it, then a duty of care to prevent the harm arises. This is directly contrary to the firmly established principles that are set out in and derived from the authorities to which I have referred

72. The Claimant cites a passage from the judgment of Lord Toulson in *Michael* that I have set out at [45] above in support of what she calls the "control exception". Comparison with what Lord Toulson described as the "classic example" demonstrates how far removed it is from the present case. In *Dorset Yacht* the prison officers had created the danger by bringing the borstal trainees who were in their custody and under their control onto the island and into close proximity with the boats to which damage was caused. The officers knew or ought to have known that the trainees were likely to try to escape and to take a vessel in attempting to make good their escape; but they went to bed leaving them unsupervised. It was therefore a case where the officers' control over the trainees was (or should have been) complete, the trainees were a known source of danger, and the officers introduced the danger into close physical proximity to the claimants' boats. In the present case, the officers came across a potential danger for the existence of which they had not in any way been responsible. This is not to be equated with a case where a public authority has been responsible for the creation of the danger by the manner in which it has exercised control over a third party or failed to exercise the power to control which it had. We were referred by the Claimant to *Couch v Attorney General (No 1)* [2008] 3 NZLR 725, which concerned the liability of the New Zealand Department of Correctios to the victims of a robbery committed by a convicted offender who had been released on licence from prison. I accept that the

decision in *Couch* is consistent with the principles established by *Dorset Yacht*, but there is no relevant analogy with the facts of the present case. Equally, for the reasons set out at above, the Claimant's reliance upon *Gibson v Orr* is misplaced.

73. There is nothing in the pleaded facts that could justify a finding that the police assumed responsibility to Mr Tindall or other road users. There is no feature differentiating the relationship of the police with Mr Tindall from their relationship with any other road user. There was no arguable pre-existing relationship between the police and Mr Tindall for the same reasons as would apply in *Gibson v* Orr.

74. What occurred was a transient and ineffectual response by officers in the exercise of a power. It did not involve any assumption of responsibility to other road users in general or to Mr Tindall in particular for the prevention of harm caused by a danger for the existence of which the police were not responsible. To hold otherwise would, in my judgment, be inconsistent with the decisions and principles set out in *East Suffolk*, *Stovin*, *Capital & Counties* and *Gorringe*.

75. Turning to Ground 3, I can see no reason why the point of law in this appeal can only be decided after a trial. The facts as pleaded are clear. There is no reason to think that further examination of the facts that are now assumed to be true could lead to a different outcome. The law is not in a state of flux. On the contrary, the law is settled by successive decisions that are binding upon this court.

76. For these reasons, I would allow this appeal.

Lady Justice Nicola Davies

77. I agree.

Lady Justice Thirlwall

78. I also agree.