IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 212 (QB)

No. QA-2019-000267

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 23 January 2020

Before:

MRS JUSTICE ELISABETH LAING

B E T W E E N :

THE CHIEF CONSTABLE OF ESSEX POLICE — Claimant/ Appellant

- and -

TRANSPORT ARENDONK BVBA — Defendant/ Respondent

MS L. JOHNSON (instructed by DAC Beachcroft) appeared on behalf of the Claimant/Appellant.

MR R. BARRACLOUGH QC (instructed by Smith Bowyer Clarke) appeared on behalf of the Defendant/Respondent.

J U D G M E N T

MRS JUSTICE ELISABETH LAING:

1 This is an appeal from a decision of Recorder Riza QC dismissing the appellant's application to strike out the respondent's claim. Leave to appeal was given by Jay J on the papers by an order stamped on 30 October 2019. Ms Johnson has represented the appellant on this appeal and Mr Barraclough QC has represented the respondent. I thank both counsel for their helpful oral and written submissions. I will refer to the parties as they are on this appeal rather than to them as they were below.

The pleaded claim

2 The respondent claimed damages for negligence and for breach of statutory duty against the appellant. The respondent was carrying a cargo of sportswear belonging to Neon. The respondent was liable to Neon for the consignment, which was to be carried from Belgium to Sheffield in a curtain-sided lorry. The sides of the lorry were made from heavy duty plastic reinforced by steel. The lorry was driven by a Romanian citizen, Mr Luca.

3 The lorry arrived in England on the evening of 8 September. The lorry was involved in a collision in the village of Coggeshall in Essex. The lorry did not stop. It drove on for about a quarter of a mile and then stopped in a layby which was surrounded by farmland. At about 10 in the evening, the police were called. According to para.12 of the particulars of claim, they did not arrive until about 22.43. When they arrived they gave Mr Luca a breath test. That test was positive. They then arrested and handcuffed him and took him to the police station.

4 When they were in the layby, according to para.13 of the particulars of claim, Mr Luca told the police that he was not allowed to leave the lorry. Paragraph 14 alleges that Mr Luca was not able to telephone his employers, because he was under arrest, on either of his two mobile phones. It is further pleaded that he had expressly asked "for this to be done and was refused." The appellant neither admits nor denies this allegation.

5 Either in the layby or at the police station, according to para.15 of the particulars of claim, the officers confiscated the keys of the lorry. According to para.16 of the particulars of claim, one of the officers noticed that the lorry's curtain had a slight rip in it. The officers recorded nonetheless that the lorry was "all secure" and that it could stay in the layby for the night (see para.17 of the particulars of claim).

6 The respondent then claims that the matters pleaded in paras.12 to 17 of the particulars of claim amounted to an assumption of responsibility by the appellant for securing the respondent's lorry and for the security of the consignment of sportswear owned by Neon, that the officers took possession and control of the lorry, and of the consignment, and were its custodians with a view to keeping the lorry and its contents safe.

7 It is also pleaded that, by reason of the matters alleged in paras.13 and 14 of the particulars of claim, the officers knew or reasonably ought to have known that Mr Luca was responsible for the security of the lorry and of the consignment, that Mr Luca's duty was to be with the lorry and that, if the lorry was left unattended, the lorry would be exposed to the risk of damage and theft, especially given the damage to the lorry which the officers had seen.

8 Knowing all that, it is said, the officers took Mr Luca to the police station without (1) having made sure that Mr Luca got in touch with his employers or having got in touch with them themselves to enable in each case the employer to make arrangements for the safety of the

lorry and of the consignment, (2) without having arranged for the police to go to the layby to deter thieves or to make regular patrols or (3) asking Mr Luca while they were in the layby whether he wanted to contact his employer to say what was going on so that the employer could take steps to make the lorry and the consignment secure or (4) asking him whether he wanted them to contact his employer or (5) allowing him to contact his employer.

9 For all those reasons, it is said, the appellant owed the respondent and Neon a duty of care to take all reasonable steps to ensure that the lorry was safe and secure from damage and attack and that the consignment was not exposed to a risk of theft by being unattended in the layby. Further or alternatively, it is pleaded that the appellant was negligent in failing to ensure that the lorry was safe and secure and that Neon's consignment was secure.

10 In para.23, 13 particulars of negligence are pleaded. Two of those are identical to one another. The appellant relies, among other things, on Mr Luca's responsibility for the safety and security of the lorry and its consignment, his duty to be present, the fact that the curtain of the lorry was vulnerable to entry, the fact that the layby was remote, unlit and insecure, that the lorry was exposed to a risk of theft, that Mr Luca had said he was not allowed to leave the lorry, that Mr Luca had not managed to make contact with his employers in the layby, and that there had been many thefts from unattended lorries which the police were currently investigating.

11 It is claimed that, while he was in the police station, Mr Luca was asked if he wanted anyone to be told of his arrest and that he replied "his boss," but that he did not have the number, which was in the truck. The custody officer is then said to have told Mr Luca that his colleague would go to the truck and get that.

12 A claim for breach of statutory is based on an alleged breach of s.56(1) of the Police and Criminal Evidence Act 1984 ("PACE"). It is pleaded that Mr Luca was trying to exercise his statutory right to inform somebody of his arrest and that the appellant breached a statutory duty by not getting the employer's contact details from the lorry so that Mr Luca or the police could tell Mr Luca's employer what had happened. The final allegation is that the officer was in breach of a duty of care of negligent or in breach of statutory duty by not returning to the lorry until 7.50am the next day.

13 The respondent's case, in short, is that the police created an avoidable situation in which the respondent's property was left vulnerable to attack (see, for example, the skeleton argument for the hearing below, para.6) (see also para.8 of that document). It is said that the layby was not chosen by Mr Luca knowing that the lorry would be there all night. The police log notes suggest that the police thought that the layby was secure and that the lorry could safely stay there all night.

The pleaded defence

14 The appellant denied that it owed the respondent a duty of care in respect of the lorry when it was left by the roadside after the driver's arrest. The appellant's case was that, first, it was immune from a suit in negligence arising from the investigation or suppression of crime, second, that it owed no duty of care to protect potential victims of crime, third, it owed no duty to prevent a third party from causing damage to the respondent, fourth, it owed no duty of care to take steps to prevent criminal acts of third parties and/or, fifth, that the damage was too remote.

15 The appellant's case in more detail included the following points. First, the sole cause of the lorry being unattended was the driver leaving the scene of an accident and then being found in a condition which gave rise to a reasonable suspicion that he had been driving under the influence of alcohol. Second, the sole and proximate cause of loss was the criminal act of a third party. Third, the lorry was broken into because it was an insecure curtain-sided lorry, not a secure container. Fourth, the only person who can be criticised for not telling the respondent that the lorry was being left unattended was the driver, who had had an ample opportunity to tell the respondent while he was waiting for the police to arrive. On the respondent's own pleaded case, once the driver was in custody, the reason the driver could not tell the respondent was because the driver did not have the respondent's contact details.

16 Other points are made on the facts. The appellant's case was that the police were called because the driver of the lorry would not provide his contact details at the scene. It is further suggested that the driver was seen on his phone for 20 minutes calling someone in a foreign language while he was waiting for the police to arrive. The respondent was required to prove that that was not a call to the respondent or to an agent of Mr Luca's employer. If it was not a call to the respondent, then it was for the respondent to explain why the appellant should be held responsible for the driver not calling his employer when he had an opportunity to do so.

17 The appellant accepts that the driver repeatedly said he could not leave the lorry and avers that he said that he should be left in the lorry to sleep it off. The driver did not ask to contact his employer when he was in the police car, it is suggested. It is further said that he was lawfully under arrest at that point. The appellant makes the point that it was not foreseeable that valuable goods would be carried in a curtain-sided lorry. The appellant further argues that it cannot be proved when the lorry was broken into. In any event, the respondent sent two employees from Belgium and the respondent cannot show that, if they had been sent sooner, the theft would have been prevented. The appellant also relies on a plea of contributory negligence

<u>The decision of the Recorder</u>

18 The Recorder said that he had to decide whether the respondent had a real prospect of success and, if not, whether there was a compelling reason why the case should be tried. His approach was to assume that the facts pleaded by the respondent were true. He said that the pleadings were to be incorporated into the judgment as if he had set them out (para.3). From the pleadings, he deduced that the main question of law was whether police officers in the execution of their function owe a duty of care in tort to secure a vehicle and its contents from dangers reasonably foreseeable on account of the arrest and separation of the driver from the vehicle.

19 In para.5, he listed some of the risks to a vehicle and to its contents if it is left unattended. He said that the relevant law was stated by Lord Reed SCJ in *Robinson v Chief Constable of Yorkshire Police* [2018] UKSC 4 at para.70. I will return to the authorities later in the judgment, but will quote this passage from the Recorder's judgment, as it enables his judgment better to be understood:

> "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..."

20 The Recorder summarised the appellant's submission that there was no real prospect that the respondent would show that, first, the police created the danger of theft from the lorry, second, the police assumed responsibility for the security of the lorry and its contents and, third, the facts would prove that a breach of the duty of care caused the loss.

21 The Recorder did not accept that it was clear-cut that the police did not create a danger of theft from the vehicle. The fact that the arrest was lawful did not necessarily mean that the police did not create the danger. It was a factor in causation, but not conclusive. It was for the trial process to decide whether:

> "The chain of causation created by the driver came to an end once he was arrested and removed by the police. Whether the police created a danger as a result of the driver's removal will depend on the facts proved at trial and their interpretation by the trial judge."

22 The Recorder said that the police often have to do dangerous things in the lawful course of their operations. An example is driving at speed, as in *Robinson*. In that case, it was held 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." *Robinson* is authority that police officers owe a duty of care to other road users not to cause harm when driving at speed by taking precautions. If they fail to and cause an accident, the Recorder would have been "very surprised if such a failure were not in breach of the duty of care, even if done in the lawful execution of police work."

23 The Recorder could see no difference in principle between that sort of duty and being required to take routine precautions when separating a driver from a lorry in an area known to be vulnerable to thieves (para.14). He did not think that the police conferred a benefit if they told hauliers of an arrest of one of their drivers "although they would make a state of affairs created [it is possible that the word 'by' is missing] an arrest and removal of a lorry driver worse if they fail to do so" (para.15).

24 In para.16, he said that it would be for the judge at the trial to decide whether, in all the circumstances, the danger to the load from thieves was created by the driver's removal by the police without the hauliers having been told about that. If the trial judge decided that the police did not create the danger of theft from the lorry, he would have to decide whether the police assumed responsibility for the security of the lorry and the contents because they took the keys from the driver. They thought that they had secured the lorry, but that is not the same thing as accepting the legal consequences of leaving it unattended (para.17).

25 The Recorder said that it was not fair to shut the respondent out at this stage on the basis that the police did not assume at least temporary responsibility, given that the lorry could not be moved to a secure location within a reasonable time without their involvement and given that there was evidence that they thought that they had to secure it (para.19). The Recorder set out the respondent's submission that the police did not tell the hauliers of the state of affairs that posed a risk of theft from the lorry. It was a question of fact for the trial whether, if the police had told the respondent, the respondent would have secured the lorry.

26 The Recorder accepted that the police had to take the driver to the police station, but that did not necessarily absolve them from at least enabling the driver to tell the hauliers where the lorry was, that he was going to be separated from it and for how long, that the police had the keys and that the lorry was parked in an area known to be vulnerable to thieves (para.21). That, it seems to me, is a key paragraph in the Recorder's reasoning.

27 It would be for the trial judge to evaluate what steps the haulier would have taken if the haulier had been told (para.22). The Recorder did not think that the police breached any duty of care in failing to guard the lorry, but he must leave it to the trial judge as he had concluded that the appellant had not shown that the claim had no real prospect of success in relation to their failure to inform the haulier of the arrest of the driver (para.23).

28 If he was wrong about that prospect of success, the Recorder was "firmly of the view" that there was a compelling reason to allow the case to go ahead. It was not in the public interest for the application of the decision in *Robinson* to cases "where, in the lawful execution of their duty, the police separate those reasonably suspected of drink/drive offences from their vehicle to be determined without a trial of the issues" (para.25). That should be done after a full trial in public. An important precedent-setting point could then be decided on the basis of actual proven facts. That was the approach of the Supreme Court in *Robinson*. That approach would clarify the law and make it more accessible to road users and the public.

The law

29 In her full and helpful submissions on the law, Ms Johnson referred me to several authorities. In general, the law of tort does not impose liability on A for injury or loss suffered by B as a result of an act of C. There are two exceptions.

30 The first exception is established by the decision of the House of Lords in *The Home Office v The Dorset Yacht Company* [1970] AC 1004. In that case, borstal officers took some borstal trainees to an island. Instead of supervising them during the night, they went to sleep. The trainees escaped from the island and damaged the plaintiff's yacht, which was moored offshore. The trainees all had criminal records. Five had previously escaped. If they tried to escape, they would try and take a yacht and would probably damage it. Damage to the yacht was a likely consequence if the officers did not supervise the trainees (per Lord Reid at p.1026C to D).

31 On appeal, the Home Office argued that there was "virtually no authority" for imposing a duty of care for a wrong done by an adult third party. The House of Lords held that there was a duty to take reasonable care to prevent the trainees under the control of the officers from escaping and damaging the plaintiff's property if that was a manifest risk if the trainees escaped. Lord Diplock said, at p.1070, that the risk of crime is generally a risk shared by the public at large. It did not give rise to a cause of action at common law against anyone but the criminal himself. A custodian from whom a criminal escaped would only be liable if there was:

> "… some relationship between the custodian and the person to whom the duty is owed, which exposes that person to a particular risk of damage in consequence of the escape, which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public."

32 The distinctive added risk from a failure to exercise due care in preventing the escape of the trainees was the likelihood that, in order to escape, the trainees might steal or appropriate and damage property close to their place of detention. The courts would go too far if they were to recognise a duty of care to prevent escape which is owed to anyone other than those whose property is exposed by that escape to an exceptional added risk.

33 At p.1071D, Diplock L said that the proximity of the yacht to the place of detention meant that there was material fit for consideration at trial for holding that the plaintiff was in as class of people to whom a duty of care might be owed.

34 I accept Ms Johnson's submission that there are two preconditions for the application of this exception to the third party rule, in so far as it is founded on the *Dorset Yacht* case. A may be liable to B for loss suffered as a result of action by C if (1) A is responsible for controlling C's actions and (2) B is in a limited class of people who are exposed to a risk of particular damage which is different in its incidence from the risk of damage to the general public.

35 The second exception to the third party rule is where the defendant assumes responsibility either by providing a service in a relationship akin to a contract, or the defendant makes a representation and, in either case, the claimant relies on that assumption of responsibility.

36 *Alexandrou v Oxford* [1993] 4 All ER 328 is a decision of the Court of Appeal after a trial. The plaintiff's shop was burgled on a Sunday evening. This activated the burglar alarm and sent a message to the police station. Two police officers came promptly. The judge at trial found that they did not look at the back of the shop through which the burglars had broken in. Some hours later, goods were stolen from the shop.

37 The plaintiff claimed that the police had been negligent in not doing enough to find out why the alarm had gone off and in assuming that it had been a false alarm. At trial, the judge found that the burglary would have been prevented if the police had looked properly at the back of the shop. The Chief Constable appealed.

38 The Court of Appeal held that the plaintiff had to prove, not only that it was foreseeable that he would suffer loss if the defendant did not act with reasonable care, but that he stood in a special relationship with the defendant. There was no such special relationship in that case because the emergency call was like any other and, if a duty was owed to the plaintiff, then a duty would be owed to every other member of the public who called the police about a crime or an apprehended crime. It was not in the public interest to impose such a duty on the police.

39 The first difficulty in the way of establishing a duty of care was that the plaintiff's loss was caused, not by the police, but by the burglars. Glidewell LJ said that it was not enough for the plaintiff to prove that, if the defendant did not exercise reasonable care, it was reasonably foreseeable that the plaintiff would suffer loss. He said that the plaintiff also had to show that he was in a special relationship with the defendant.

40 He cited the *Dorset Yacht* decision. He also referred to *Hill v The Chief Constable of Yorkshire Police* [1989] AC 53. That claim essentially was that, if the police in that case had not been negligent, they would have caught the Yorkshire Ripper sooner and he would not have murdered the plaintiff's daughter. The House of Lords in that case held that the police owed no duty of care to the general class of potential victims of an unidentified criminal.

41 The Court of Appeal in *Alexandrou* rejected the plaintiff's submission that the owners of shops with burglar alarms were in a special relationship of proximity with the police. The

police could assume a contractual liability, but had not done so here. If the police were under a duty of care because of the burglar alarm call, they would be under a duty of care to anyone who made a 999 call. There was no special relationship, as in the *Dorset Yacht* case. In any event, the Court of Appeal held that such as duty should not be imposed as a matter of public policy.

42 In *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732, a woman called the police from her home on her mobile phone. The call was taken by a call handler from a neighbouring force. She said that her ex-partner had come to her home, found her with someone else, bitten her ear really hard, taken the other person away in his car, and said he would come back and hit her. Later in the call, she said that her ex-partner had said that he would come back and kill her. The call handler apparently did not hear that part of the call.

43 That call was automatically graded as one that should be responded to within five minutes. The call handler then reported to the emergency control room of the appropriate police force that the ex-partner had threatened to return to the house, but did not report any threat to kill the occupant of the house. The police then graded the call as one which should be responded to within 60 minutes. 15 minutes later, and before the police responded, she called again. She was heard screaming. The police then responded immediately. When they arrived, they found that she had been stabbed to death. Her ex-partner later pleaded guilty to murdering her. The police had records showing a history of domestic abuse.

44 Her estate made claims against the two police forces in negligence and pursuant to the Human Rights Act 1998 (" the HRA"). The judge dismissed applications by the police to strike out the claims (apart from one claim which was dismissed by consent). The police appealed. The Court of Appeal allowed the appeal on the negligence claim, but, by a majority, allowed the HRA claim to go to trial. The Supreme Court dismissed the appeal by a majority and unanimously dismissed the cross-appeal.

45 The judgment of the majority was given by Lord Toulson. He listed the issues in paragraph 18. Three are relevant here:

> "(1) If the police know of a risk to the life of an identifiable person or member of a small group, do they owe a duty under the law of negligence to take reasonable care for their safety?
>
> (2) Alternatively, if a member of the public (A) gives a police officer (B) apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life, does B owe to A a duty to take reasonable steps to assess such threat and, if appropriate, to prevent it [from materialising]?
>
> (3) Should the police be held on the facts to have assumed responsibility for the victim's safety?"

46 Lord Toulson summarised the main principles in paras.29 to 81 of his judgment. The police have a duty to keep the Queen's peace. It is a duty owed to the public at large for the prevention of violence and disorder (para.33). The general law of tort applies to the police just as much as to anyone else (para.37). Foreseeability of harm is not enough. "Some further ingredient was needed to establish the requisite proximity of relationship between the

claimant and the defendant, and all the circumstances of the case had to be considered" to see if the ingredient was present.

47 If there was no duty of care owed to the general public to catch known escaped criminals (as in the *Dorset Yacht* case), the police could not be under a duty to find and catch an unknown criminal (*Hill v The Chief Constable of West Yorkshire*). The obiter holding in *Hill* that the police are immune from suit in respect of mistakes in their efforts to investigate and suppress crime went too far.

48 The question is whether, on the facts, there is a duty of care, but a general duty of care to victims and witnessed asserted by the claimant could not be imposed on the police for public policy reasons (*Brooks v The Commissioner of The Police for the Metropolis* [2015] UKHL 24; [2005] 1 WLR 1495, paras.27 and 30). Liability under the "extended" principle in *Hedley Byrne & Company Limited v Heller & Partners Limited* [1996] AC 465 was not excluded.

49 In *Smith v The Chief Constable of Sussex Police* (heard with *Van Colle v The Chief Constable for Hertfordshire Police* [2008] UKHL 50; [2009] AC 225), the House of Lords had endorsed the view that the police do not have a general immunity from suit.

50 In *Elguzouli-Daf v The Commissioner of Police of the Metropolis* [1995] QB 335, the Court of Appeal upheld decision striking out actions for negligence brought by suspects who had been arrested in the context of investigations which were then discontinued. The Court of Appeal recognised that there might be cases in which the Crime Prosecution Service assumes by its conduct responsibility to a particular defendant under the *Hedley Byrne* principle.

51 In para.97, Lord Toulson said that English law does not generally impose a liability on B for injury or damage to property suffered by A at the hands of C, fundamentally because common law does not generally impose liability for pure omissions. It is one thing to require B to take care if he does an act which might harm others, but another to make B liable for something which C has done.

52 In paras.98 to 100, he went on to say that there are two well-recognised exceptions to that rule. First, where B is in a position to control C and should have foreseen that it was likely that C would cause damage to someone in close proximity if B failed to take reasonable care in the exercise of that control. In this type of case, there are two types of special relationships, between B and C and between B and A. (2) B assumes a positive responsibility to safeguard A under the principles in *Hedley Byrne*. The list of such relationships, which includes contract, fiduciary relationships, employment, school and pupil, health professional and patient, is not exhaustive. It should not be expanded artificially.

53 It would be open to the court to create a new category of exception to the rule about omissions (para.102). Lord Toulson considered some of the cases about the liability of public authorities for failures to provide benefits which authorities have the power to provide in paras.108 to 113. In para.114, he said that it did not follow from the fact that a public authority with a protective function had been set up that the public at large should be liable to compensate A if B fails in some way in the exercise of its functions and if C, for whom the state is not responsible, inflicts harm on A.

54 The police owe a duty to preserve the peace to members of the public at large. That does not involve a close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care (para.120). It was for Parliament to decide whether

there should be public compensation for victims of crime in cases of "pure omission by the police to perform their duty for the prevention of violence" (para.130).

55 In para.138, Lord Toulson considered whether the police had assumed responsibility to take care for the victim's safety. The assurance by the call handler that the call would be passed to South Wales Police was not arguably enough. She gave no assurance about how quickly they would respond. She told the victim that they would call her back and to keep her phone free. As the victim was using her mobile phone, that was not an instruction to stay at home; nor was a question whether she could lock the door.

56 In *Robinson v The Chief Constable of West Yorkshire Police* [2018] UKSC 736; [2018] AC 736, two police officers tried to arrest a suspect in daylight in a shopping street. There was a struggle. The three men knocked into the claimant. She was a relatively frail woman of 76. They all fell over. She was underneath them. She was injured and sued the defendant. The judge held that the police had been negligent, but dismissed the claim on the grounds that the police had an immunity from suit. The Court of Appeal dismissed an appeal from the judge's decision.

57 The Supreme Court allowed a further appeal. According to the headnote, it held that the police generally owe a duty of care in accordance with the ordinary principles of the law of negligence unless statute or common law provided otherwise. There was no general rule that they had no such duty of care when they were preventing or investigating crime. The police might be under a duty to protect a person from a risk of injury which they themselves had created. But, unless there was, for example, an assumption of responsibility, they were not normally under such a duty where they had not created the danger of injury, including injury caused by the acts of third parties.

58 This case, however, concerned a positive act, not an omission. A risk of injury was foreseeable, and the police owed a duty of care. The chain of causation was not broken by the decision of the suspect to resist arrest. His act was the very act which the police were under a duty to guard against.

59 Lord Reed gave the judgment. He said (para.2) that most of the issues could be decided by applying long-established principles. The fact that the issues had reached the Supreme Court reflected the erosion of those principles by uncertainty and confusion. He listed the issues at para.20. There are four relevant issues or sub-issues. (1) Does the existence of a duty of care always depend on applying the test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617 to 618? (2) Is there a general rule that the police owe no duty of care when they are investigating and preventing crime, or are they under a general duty to avoid causing reasonably foreseeable personal injuries, when such a duty would arise in accordance with ordinary principles of the law of negligence? Does the law distinguish between acts and omissions (in particular, between causing injury, and protecting people from injuries caused by others?) (3) If so, was this an act or omissions case? (4) Did the officers owe a duty of care to the claimant?

60 In para.21, Lord Reed said that the belief that a court will only impose a duty of care where that is fair, just and reasonable is mistaken. The decision in *Michael* shows that there is no single test for imposing a duty of care. The approach is based on precedent and on the incremental development of the law by analogy with established authorities. Where the existence or nonexistence of a duty of care has been established, the court should follow that (subject to the ability of the Supreme Court to depart from its previous decisions) (para.26).

61 It is normally only in a novel type of case where established principles do not provide an answer that courts need to go beyond those principles in order to decide if a duty of care should be recognised:

> "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 judgment when deciding whether a duty of care should be recognised in a novel type of case. … 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" (see para.27 and para.29).

62 The current case involved no extension of the law of negligence, but the application of established principles. Public authorities are generally subject to the same liabilities in tort as private individuals unless common law or statute provides otherwise (paras.32 and 33). Neither is generally under a duty to avoid harm. They are not liable for pure omissions (para.34).

63 Lord Reed then quoted from an article by Tofaris and Steel entitled "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."

64 That article, he said, made it clear that public authorities could in some circumstances be under a duty to prevent harm happening. In the absence of such circumstances, public authorities owe no duty to people to confer a benefit on them by protecting them from harm any more than a private person would, even if the public authority might have powers which would enable or require it to prevent the harm, unless statute imposed a duty which was enforceable in private law. A related principle, he said, is that public authorities and private individuals do not generally owe a duty of care to prevent others being harmed by the conduct of third parties.

65 Such a duty may sometimes be owed, as the article by Tofaris and Steel shows (para.37). They include circumstances in which the public authority has created a danger of harm which would not otherwise have existed or has assumed responsibility for a person's safety and the person has relied on that:

> "Where established principles do not provide a clear answer to the question whether a duty of care should be recognised in a novel situation, the court will have to consider whether its recognition would be just and reasonable."

66 The *Hill* case showed that the police could be liable in negligence like anyone else (para.45). It was not authority that the police have a general immunity of suit in respect of anything they do when they are investigating or suppressing crime (para.55). The distinction between acts and omissions is fundamental, although it can be difficult to draw in borderline cases.

67 The police may be under a duty of care to protect a person from a danger of injury which they have created, including a danger from human agency (see the *Dorset Yacht* case), but they are not normally under a duty to protect people from a danger of injury which they have not

themselves created, including conduct by third parties. In the absence of special circumstances, such as an assumption of responsibility (para.70).

68 This was not a case in which the defendant played no active part in the critical events (para.72). Nor was it sought to make the defendant liable for the act of a third party. As in the *Dorset Yacht* case, the ground of action was the damage caused by the carelessness of police officers in circumstances in which it was reasonably foreseeable that their carelessness would lead to the claimant being injured. She did not complain that they failed to protect her from the risk of injury, but that their actions led to her being injured (para.73).

69 The final case on which Ms Johnson relied was *N v Poole Borough Council* [2019] UKSC 25; [2019] 1 WLR 1478. This case concerned a mother and her two children, who were placed by the defendant, in the discharge of its statutory functions, in a property owned by a third party. A neighbouring family subjected them to harassment and abuse. The defendant knew that that family were persistently antisocial. The claimant claimed damages from the defendant for breach of its common law duty of care to protect the claimant and her children from abuse and harassment.

70 They appealed from a decision of the Court of Appeal reinstating a decision of the Master to strike out their claim. The Supreme Court dismissed their appeal. Lord Reed gave the judgment. He said that the issue was whether the defendant was liable for a breach of duty of care at common law in relation to the exercise of its statutory functions (para.25).

71 Lord Reed summarised the effect of his judgment in *Robinson* in para.26. In para.28, he said that public authorities do not generally owe as duty of care to confer benefits on people, for example, by protecting them from harm. He drew a distinction between causing harm ("making things worse") and failing to confer a benefit ("making things better"), rather than the more traditional distinction between acts and omissions, because it better conveyed the rationale for the distinction drawn in the authorities and because the traditional distinction is difficult to apply.

72 The duty to protect from harm or to confer some other benefit might arise in particular circumstances, for example, where the public authority created the source of danger or had assumed responsibility to protect the claimant from harm (para.28). He then referred to cases which illustrated that distinction. He said in para.34 that some of the reasoning in the earlier cases has to be approached with caution because of recent developments (in *Michael* and in *Robinson*) in understanding in the law of negligence as respects the liability of public authorities. He summarised the reasoning in *Michael* and in *Robinson* in paras.61 to 65.

73 He considered the concept of assumption of responsibility in paras.66 to 73. He said that the principle had been applied when a defendant has given advice to a claimant with an undertaking to take reasonable care (such an understanding can be implied usually from "the reasonable foreseeability of the claimant's reliance on the exercise of such care") or did a task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken (para.68).

74 He quoted in para.68 from a passage in the judgment of Lord Goff in *Spring v Guardian Assurance Plc* [1995] 2 AC 296. At p.318 of his judgment, Lord Goff described the principles in the *Hedley Byrne* case. He said this:

> "Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to

> the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

75 Lord Reed rejected the submission that a local authority could never be held to have assumed responsibility for performing its statutory functions. It could be held to have if what it did satisfied the criteria in *Hedley Byrne* (para.73). He observed in para.82 that, even where no such assumption could be inferred from the nature of the function itself, it could nevertheless be inferred from the way in which a public authority had behaved to a claimant on the facts:

> "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."

Submissions

76 Ms Johnson submits that the cause of harm in this case was the criminal act of a third party. The starting point, therefore, was that the appellant had no duty of care to prevent that act. The respondent had to show that there was an arguable case either that there were two special relationships of the type which existed in the *Dorset Yacht* case or that the appellant had assumed responsibility for keeping the respondent's lorry safe.

77 She submitted that this was not a *Dorset Yacht* case. There was no special relationship between the appellant and the respondent. The appellant had no control over the thieves. The discharge by the appellant of its duty to arrest the driver, Mr Luca, could not create a special relationship with the appellant or with the appellant's employee. There was no such relationship, it was held, in *Alexandrou* or in *Michael*. Both those cases were stronger cases for the existence of such a relationship. In *Alexandrou*, there was a potential victim of crime and, in *Michael*, the soon to be victim told the police that there was a risk to her life.

78 The appellant's knowledge from Operation Blade of a risk of thefts from unattended lorries was not enough, as foreseeability of loss did not itself found a duty of care. She submitted that whether or not a telephone call had been made made no difference. The appellant was not obliged to prevent harm. Once Mr Luca was arrested, his rights were governed by PACE. His right to tell someone of his arrest could not give the respondent a right of action.

79 It is clear, she submitted, that an assumption of responsibility requires more than the mere performance or non-performance of statutory functions. Something more, which made the relationship akin to a contract was needed. Real and relevant reliance were also needed (see the *Poole* case). The facts should fit into one of the situations that has already been recognised by the law.

80 Mr Barraclough accepted that the claim for breach of statutory duty was hopeless. He submitted that this case involves more than a loss incurred in the course of the exercise by the police of their functions to investigate and supress crime. There had been "positive engagement" by the police. The officers knew that the lorry was insecure. They refused to let the driver tell the operator. They took the keys and, therefore, had control of the lorry. They told the driver that officers would receive the operator's contact details from the vehicle. They knew that the lorry was in an unlit, remote layby. They knew about the risks of thefts from unattended lorries. The officers exposed the load to a serious risk of theft. They created that situation by their conduct. They were aware of the situation and of the risk. They took positive action to undermine the safety of the lorry by stopping the driver from contacting the operator.

81 He submitted that this was not a case like *Michael* or *Alexandrou*. Unlike *Alexandrou*, this is not just a case in which there was no extra ingredient beyond being really the victim of a crime. He submitted that the police had played an active part in the events. Indeed, they had created the risk of harm. The police assumed responsibility for the safety of the lorry by implication because of several factors. They knew that Mr Luca wanted to contact the operator, and they promised to get the contact details. They took the keys. They left the lorry in the layby all night. They had a special level of control over the danger from their status as officers. They also had a duty to protect the respondent from harm, and they knew because of Operation Blade of the risk of theft.

82 In the circumstances, however, he submitted that there was no need for a special relationship. The appellant was liable under the ordinary principles of negligence (see para.34 of *Robinson*). He submitted that, if this was an omission case, it could fit into any of the four categories described in the article by Tofaris and Steel referred to in para.34 of Lord Reed's judgment in *Robinson* (and elsewhere). This was not a case in which the police had simply exercised their functions and no more.

Discussion

83 The issue on this appeal is whether the respondent has reasonable prospects of establishing its case that the appellant owed it a duty of care. The circumstances are that the appellant arrested Mr Luca, took him into custody, stopped him from using two of his mobile phones, took the keys of the lorry, left it in a remote layby, and did not speedily fulfil a promise made by officers to get the operator's contact details from the lorry when it was known to the respondent that there was a risk of thefts from unattended lorries in the area.

84 I do not consider that I have been referred to any case which decides that issue. This case shares some general features with the decisions to which I have been referred, but it is not the same as, or similar to, any of them. As Lord Reed pointed out in *Robinson*, the common law proceeds incrementally, by analogy. A court which proceeds by analogy has to understand the underlying basis of the principles which are stated by the courts when they apply the law of negligence to different facts. However, previous decisions of the courts are not statutes, and the principles enunciated in the cases and the language which is used are not to be read as if they were a statute.

85 Unless it is very clear that the existence of a duty of care is precluded by authority or by the certain applications of the principles which can be deduced from authority, the possibility that as court may by that incremental process decide that the appellant did owe the respondent a duty of care cannot be excluded. But there is a more basic point, which is Mr Barraclough's submission that this case involves nothing more than the application of the normal principles of negligence.

86 I do not consider that this is a case in which it is clear beyond argument, as Ms Johnson submits, that a duty of care is excluded by the certain application of the principles stated in the decided cases to the facts. Leaving aside Mr Barraclough's fundamental submission that the case simply involves the application of the general principles of negligence to the facts of this case, the first ambiguity, which I consider can only be resolved after a trial on the basis of findings of fact, is whether this case fits into the analytic structure on which Ms Johnson relies or not.

87 Is it an act or omission case (or, in Lord Reed's words in *Poole*, at para.28) a case in which the appellant caused harm (made things worse) or one in which the appellant failed to confer a benefit (did not make things better)? I note that the relevant decisions recognise that it can be difficult on the facts to decide whether or not a case is an act or omissions case. See, for example, para.81 of the decision in *Poole*. See also the fact that one of the issues in *Robinson*, which went to the Supreme Court, was whether or not that case was to be classified as an act or omissions case, and see the statement by Lord Reed in para.69.4 of *Robinson* that, while the distinction between acts and omissions is fundamental, it can be difficult to draw in borderline cases.

88 In my judgment, this is not clearly a case in which the respondent relies solely on an omission by the appellant or completely, on the other hand, a case in which the respondent relies on a positive act by the appellant. This case shares features with both types of case. If it is not purely an omission case, I do not consider it is unarguable that the police in the circumstances of this case might owe the respondent a duty of care.

89 Moreover, like the Recorder, I consider there is a wider public interest in a decision after evidence and argument about whether the police owe any duty of care to a property owner in respect of property which they encounter in the course of an arrest and which, in consequence of the arrest, is separated from its custodian. I do not consider that such a duty is clearly precluded by the reasoning in the cases about the victims of violent crime.

90 It follows, in my judgment, that this is not clearly a case which can be analysed as a case in which the appellant failed to act or to provide a service. The appellant did fail to keep the lorry safe, but it is arguable that it also took steps which prevented others from keeping the lorry safe.

91 In any event, if that is wrong and, in accordance with Ms Johnson's submissions, this case does fit fairly and squarely into her analytical framework as an omission case, the next question is whether it is unarguably clear that the respondent cannot bring itself within one of the exceptions to the principle that a person is not generally liable for the acts of third parties.

92 Much time was spent in submissions about the concept of assumption of responsibility. There is, I recognise, some force in Ms Johnson's submissions on this aspect of the case. I accept that this is not clearly a case in which the appellant assumed responsibility for keeping the lorry safe in accordance with the principles enunciated in the cases precisely because the respondent did not know until it was too late what the appellant had done or failed to do. The respondent arguably did not rely on what the appellant did because the respondent did not know what the appellant had done. The respondent had no choice about any part of the transaction between the appellant and its driver, Mr Luca. Nevertheless, it seems from the cases to which I was referred that the concept of assumption of responsibility is somewhat elastic and has, in the words of Lord Toulson in para.101 of *Michael*, been "imposed by the court rather than assumed by the defendant."

93 I note that, in para.82 of the *Poole* case (albeit in a different context) Lord Reed cautioned that inferences of an assumption of responsibility depend on the facts of a particular case, and that there may well be cases in which it cannot be decided on a strike-out application that there was no assumption of responsibility. I do not consider that, if this is the right area of the analytical framework, it would be right to strike out this claim without findings of fact. Moreover, I do not consider that it is unarguable that this case might be found to fit into one of the other exceptions listed in para.34 of Lord Reed's judgment in *Robinson*.

94 Finally, as Lord Toulson made clear in para.102 of his judgment in *Michael*, the list of exceptions to this rule is not closed. I consider that the Recorder was right to hold that the issues of causation were for trial, and that it was not appropriate to decide them on an application to strike out the claim. I consider that the same reasoning applies to the question, if it arises, of whether any duty, if owed, was discharged on the facts.

95 The Recorder made no decision about the claim for breach of statutory duty. Ms Johnson told me, and Mr Barraclough did not demur, that she submitted at the hearing that that part of the claim had no reasonable prospect of success. The Recorder's failure to accede to her argument is not one of the grounds of appeal against his decision, however.

96 For what it is worth, I consider that the breach of statutory claim is hopeless. The duty relied on was owed to Mr Luca, not to the respondent. The respondent, therefore, cannot base a private law cause of action on it. But the fact that this part of the claim is hopeless does not, in my judgment, arguably exclude the existence of a duty on the appropriate facts to tell an owner that his driver has been arrested and that his lorry has been left in a layby, or alternatively a duty to permit the driver to tell his employer that, both of those, of course, being duties owed in private law rather than as a result of any provision of PACE. Section 56 of PACE is not an appropriate foundation for such a duty, for several obvious reasons.

97 For those reasons, I do not consider that the decision of the Recorder was wrong. I,therefore dismiss this appeal.

CERTIFICATE

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