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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Joseph Holbeach

Plaintiff

and

Chief Constable of the Police Service of Northern Ireland

Defendant

Master Bell

Introduction

[1] On 8 November 1987 a bomb exploded in Enniskillen. Eleven people were killed in the blast and over sixty were injured. Many people particularly remember the incident because of what was said during a television interview after the explosion by Gordon Wilson, who lost his daughter in the blast and who was himself injured. He said that he bore no grudges and called for forgiveness and reconciliation in our community.

[2] The plaintiff recognises in his skeleton argument that the bomb which caused his injuries was planted by the Provisional IRA and the explosion was not caused by the police. However, he considers that, nonetheless, he has a valid claim in negligence against the police. The essence of his argument is that police owed him a duty of care because they had assumed responsibility for his safety as an attendee at the Remembrance Day parade. However, they had acted negligently in the way in which they carried out the operation to protect those attending the parade by failing to search the Reading Rooms in Enniskillen where the bomb was apparently planted.

[3] The application before the court is the defendant's application by summons to strike out the plaintiff's Statement of Claim "on the grounds that it discloses no reasonable cause of action and is scandalous, frivolous and/or vexatious or is otherwise an abuse of the court." (The final expression is a typographical error which should have referred, as stated in the Rule, to "an abuse of the process of the court"). The defendant's application is therefore an application under Order 18 Rule 19(1)(a), (b) and (d).

[4] The plaintiff was represented by Mr Scott and the defendant was represented by Mr Reid. I am grateful to them both for their helpful written and oral submissions.

[5] In the light of the fact that the Court of Appeal for Northern Ireland had in recent times delivered its judgment in *Magill v Chief Constable* [2022] NICA 49 on the subject of when a duty of care might be owed by police to those harmed by the acts of third parties, I offered the plaintiff the opportunity to make an application to amend his Statement of Claim. In the light of the decision in *Magill*, it was inevitable that plaintiffs in cases such as these would have considered the terms in which their pleadings had been drafted and whether they required amendment so as to amount to more that an omissions case. Mr Scott was nevertheless content to proceed with the defendant's application on the basis of the Statement of Claim which had been served. He indicated that the plaintiff's case had been pleaded at its height. He recognised that this was an omissions case and that the only way in which the plaintiff could succeed was to fall within the exception of assumption of responsibility.

Strike Out Applications

[6] In the decision of the court in *Magill v Chief Constable*, McCloskey LJ summarised the principles to be applied in strike out applications:

> "[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 19 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:
>
> (i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
>
> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

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

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

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

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

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

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

[7] These are the principles which the court must therefore apply in deciding whether or not to strike out the plaintiff's Statement of Claim.

Duty of Care

[8] Before dealing with the central issue of assumption of responsibility, it is necessary to place it in the context of when the police owe a duty of care for injury caused by third parties. There is a long line of modern decisions on the issue of whether there is a duty of care owed by the police to citizens who are injured by third parties. The line is often traced through the series of decisions made by the House of Lords and the Supreme Court in *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495; *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11. In the light of this series of decisions, the circumstances in which an individual may successfully sue the police for negligence as a result of injury caused by third parties will be rare, given that a duty of care will be imposed upon the police only in very limited circumstances.

[9] In *Magill v Chief Constable* McCloskey LJ described the current legal position as follows:

> "[15] The Supreme Court revisited this legal territory in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. The distinguishing feature of the factual framework in this case is its "operational" dimension, involving as it did

one of two police officers inadvertently knocking the plaintiff, a frail lady aged 76, to the ground when attempting to arrest a suspected drugs dealer in a public place. Both at first instance and on appeal the plaintiff failed essentially on the ground of the espousal by both courts of an immunity from suit approach. On further appeal, the Supreme Court held that on the particular facts a duty of care was owed by the police officers to the claimant.

[16] One striking feature of this decision is the adoption of a starting point based not on immunity from suit, rather a principle expressed in positive terms: the police generally do owe a duty of care to members of society in the discharge of their duties and functions in accordance with the ordinary principles of the law of negligence unless otherwise provided by statute or the common law. Thus, there is no general rule that the police do not owe a duty of care in the discharge of their functions of preventing and investigating crime, no general rule of immunity from suit. Applying these principles, therefore, a duty of care to prevent a person from a danger of injury created by police officers could arise. There is a second important element of this decision. The Supreme Court, having formulated the foregoing principles, applying the prism of actual conduct of police officers then turned its gaze to the different scenario of omissions. In so doing it espoused the central theme of the decisions considered above. Thus, it held, the police are not normally under a duty of care to protect an individual from a danger of injury which they themselves did not create (including injury caused by the acts of third parties) in the absence of circumstances such as an assumption of responsibility by them.

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

through the performance of their public duties: see para [50]. The qualifying word "*generally*" in this passage is of self-evident importance; so too the final clause:

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

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

[19] Factual comparisons being unavoidable in the discrete jurisprudential sphere to which the present appeal belongs, *Tindall* was, in substance, a case of alleged police omissions in an operational situation where police had attended the scene of a traffic accident caused by black ice, had taken certain measures and then left the scene, following which a fatal collision at the same location. The Court of Appeal found in favour of the police. Their core reason for doing so was based upon the principle that the non-conferral of a benefit on a given person by a public authority in the exercise of a statutory power or function cannot render it liable in negligence: this is our somewhat more elaborate formulation of what is stated in para [69] of the judgment of Stuart-Smith LJ. We do not overlook the other ingredients in the court's reasoning and take into account in particular the code of principles formulated (inexhaustively, NB) in para [54]:

"(i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public

by reason of a failure to exercise that power. In general the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible: see East Suffolk, Stovin;

(ii) If follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently: see Capital & Counties, Gorringe, Robinson;

(iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see East Suffolk, Capital & Counties;

(iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger: see Stovin;

(v) Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger: see Capital & Counties, Sandhar;

(vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all): see Gorringe;

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

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

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

[10] As previously mentioned, Mr Scott acknowledged that this case was an omissions case (that is to say that the focus of the action is on alleged failures by the police and not on positive acts that they took which were detrimental to Mr Holbeach's safety) and that the only way that the plaintiff can succeed against the police is if the court can conclude that there was an assumption of responsibility by the police for the safely of Mr Holbeach. This was, in my view a correct approach for counsel to adopt. In the particulars of negligence the plaintiff states that police "took the decision not to search the Reading Rooms prior to the parade" and that police "decided not to search the Reading Rooms, despite the knowledge that the Provisional IRA had carried out a bomb attack in Enniskillen town centre in January 1987." This presents the action clearly as an omissions case even though the drafting of the Statement of Claim attempts to articulate it somewhat more positively. The question before the court therefore is, as Mr Scott readily concedes, solely whether the action should be struck out on the basis that it is unarguable that the defendant assumed responsibility for the plaintiff's safety while attending the parade.

Defendant's Submissions

[11] The defendant acknowledges that there are exceptions to the principle that, while generally liability in negligence is not imposed for omissions, special considerations, such as an assumption of responsibility, will create a duty of care. Counsel willingly conceded that as Lord Reed stated in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 11 at para [69]:

> "… the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm."

[12] In *N v Poole Borough Council* (2020) AC 780 Lord Reed analysed the concept of assumption of responsibility in the context of public authorities exercising their statutory duties and powers. At paras [80] to [82] he said:

"[80] As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), 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 re-housing 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*. 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. Reference is made to an email written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188, 196."

[13] The defendant argued that the relationship between Mr Holbeach and the Chief Constable was not a situation which could be described in the language used by Lord Reed in *Robinson* as "being close or akin to contract" or "such as being a parent or standing *in loco parentis*". Mr Reid submitted that, at the height of the plaintiff's pleaded case, the allegation was that the defendant had acted ineffectually in the searches which were carried out.

[14] Mr Reid argued that in determining whether police owed a private law duty to an individual, it was material to analyse the relationship between police and other members of the same class as the individual. This pointed, he submitted, to one of the most fundamental issues in the current action. There was no difference between Mr Holbeach and any other person in Enniskillen that day, or any other person attending the Remembrance Day parade. Police had not provided any assurance to the plaintiff personally. It had not been pleaded that they had spoken or communicated with him personally. Indeed, police were generally unaware of the identity of Mr Holbeach, or of his presence, on that day.

[15] The limit of the police's responsibility on that day was their general duty under section 32 of the Police (Northern Ireland) Act 2000 to prevent and investigate crime and to protect life and property. For this to ground a duty of care, via an alleged assumption of responsibility, would blur the lines between the police's public law duty and a private law duty of care.

[16] As indicated, the defendant conceded that the law is such that public authorities such as the police can be held negligent for a pure omission if there has been an assumption of responsibility. 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, the principles derived from the previous caselaw as outlined by Stuart-Smith LJ in para [54] of *Tindall* have to be applied. The nine principles were described as a "Code of Principles" by McCloskey LJ in *Magill*, albeit recognised as an inexhaustive one.

[17] Mr Reid argued that there was nothing in the facts pleaded by Mr Holbeach which could justify a finding that the police had assumed responsibility for him. There was no feature differentiating the relationship of the police with Mr Holbeach from their relationship with any other person present in Enniskillen on that day. There was no pre-existing relationship between the police and Mr Holbeach. Mr Reid argued that, were a duty of care to be imposed in this case, through a conclusion that responsibility had been assumed by the police for Mr Holbeach, it would mean that all those injured in the Enniskillen bombing would be able to bring claims. It would also mean that, in any instance where the police performed searches prior to a gathering of people and those persons were subsequently injured by the criminal acts of third persons, then there would have been an assumption of responsibility by the police for the injured in circumstances where there was no relationship between the police and the injured other than the injured were simply members of the public. Essentially Mr Reid's argument was, therefore, that assessing what had been pleaded as an assumption of responsibility by the police for Mr Holbeach's safety would drive a coach and horses through the general principle that there is no duty of care by the police in omissions cases save for the exceptions.

Plaintiff's Submissions

[18] Mr Scott began by emphasising the need for caution in strike-out applications. In relation to the principles to be applied on a strike-out application, (and in addition to the dicta of McCloskey LJ in *Magill v Chief Constable*), Mr Scott also referred me to two paras of Laing J 's decision in *Chief Constable of Essex Police v Transport Arendonk BVBA* [2020] EWHC 212 (QB) where she adopted a cautious approach to strike out applications, saying:

> "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."
>
> and
>
> "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*."

[19] A further submission made by Mr Scott on this point was that a fundamental difficulty to the court striking out the claim at this stage was that the entire facts of the case were not known. The plaintiff's Statement of Claim asserts:

> "8. In advance of the parade the RUC had put in place a plan to ensure the safety of those taking part in and observing the parade. The specific details of that plan are not known to the plaintiff.
>
> 9. As part of that plan, the RUC carried out searches of an unknown number of locations (the Plaintiff does not know which locations) along the route of the parade."

The implication of this argument was that, because cases involving assumption of responsibility were very fact-sensitive, the court should therefore not strike out the action given that it does not know the facts.

[20] In relation to the legal principle of the assumption of responsibility, Mr Scott emphasised that he was not asking me to develop the Common Law. He was, rather, inviting me to apply the principles of the Common Law which the courts had previously developed. Nevertheless, in relation to this concept, Mr Scott stressed that, in *Magill v Chief Constable*, the Court of Appeal had said:

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

[21] In the action which Mr Holbeach has brought, it is not that he alleges that the police did nothing at all to protect those present at the parade. Rather he alleges that the police positively engaged in a security operation to protect the attendees. However police took a decision not to search the Reading Rooms and therefore did not find the bomb which had been left there. It was the decision not to search the Reading Rooms that gives rise to his allegation of negligence. This is a crucial plank in the plaintiff's argument. Mr Scott makes a clear distinction between those involved in rescuing others from danger and those who are engaged in pre-planned operations to lessen the possibility of danger.

[22] Mr Scott drew my attention to *Poole Borough Council v GN and Another* [2020] AC 780 where Lord Reed said (at para [67]):

"Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne* in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale* (1793) 1 Esp 75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-529 and 530:

> "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would

> be a contract. ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. … Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility." "

[23] Mr Scott submitted that the plaintiff relied upon the specific skill exercised by the police, namely protection of those attending the event. He drew comparisons with the situations in *Al-Najar v Cumberland Hotel (London) Ltd* [2019] 1 WLR 5953 where a hotel was found negligent for failing to protect an attack by a third party on someone staying at the hotel and *Airport Authority v Western Air Ltd (The Bahamas)* [2020] UKPC 29 where an airport provider was held liable for damage suffered to a plane at the airport which arose due to security lapses.

[24] Mr Scott asserted that a decision by this court to dismiss the defendant's application would not have the effect of opening the floodgates in terms of increasing the number of those persons to whom the police owe a duty of care. He reassured the court that the circumstances are not such as where the next potential victim of cime is unknown and the responsibility is to the world at large. In the circumstances which are being considered, an assumption of responsibility would require the police to have identified the specific location which they are protecting those likely to be present and then taken proactive steps to protect those present at the site.

Discussion

Assumption of Responsibility : Examples

[25] Before considering the principles involved in the issue of assumption of responsibility, I shall examine examples of where the courts have previously accepted or rejected the existence of an assumption of responsibility. The following cases demonstrate how the courts have dealt with the issue of whether there was an assumption of responsibility by the police.

[26] In *Sherratt (for and on behalf of the members of the family of the late Beevers) v Chief Constable of Greater Manchester Police* [2018] EWHC 1746 (QB) King J held that where a woman had committed suicide in circumstances where her mother had telephoned the police and had been told that police officers were going to be dispatched to the woman's house; that they were going to be dispatched promptly; and that the mother should leave matters to the police, including any calling of an ambulance, there had been an assumption of responsibility for the woman's safety.

[27] In *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550 the plaintiff was a woman police constable who was attacked and injured by a woman prisoner in a police cell at a police station. A nearby police inspector did not come to her aid when she was attacked. The Court of Appeal for England and Wales held that there was an assumption of responsibility by the inspector for the police constable's safety.

[28] In *Magee and another v Chief Constable of The Police Service of Northern Ireland*, [2019] NIQB 83 Mr Magee, who had mental health issues, was arrested by police and taken to hospital where he was de-arrested and left by police. He exited the hospital before he could be seen by a doctor. The next day he committed suicide. Maguire J was of the view that such actions could arguably amount to an assumption of responsibility and declined to strike out the Statement of Claim.

[29] In *Chief Constable of Essex Police v Transport Arendonk BVBA* [2020] EWHC 212 (QB) police stopped a lorry one night and breathalysed the driver who was found to be over the limit. As they arrested him, the driver told police he was not allowed by his employers to leave his lorry. Police nonetheless proceeded with the arrest and took him to a police station and the driver was not able to phone his employers. The police confiscated the lorry keys and took the view that the lorry was secure and could stay parked in the layby for the night. During the night, however, the lorry was broken into and the cargo was stolen. The police applied to have the action struck out, submitting that they owed no duty of care to prevent the commission of crimes by third parties and that it was not arguable that they had assumed responsibility for the lorry or its cargo. The court did not accept that it was clear-cut that the police either had not created a danger of theft from the vehicle by removing the driver without informing his employers, or had not assumed responsibility for the lorry by taking the keys. The court therefore decided that it was arguable that a duty of care had been owed and that there should be a trial of the full facts. The High Court dismissed the appeal against the refusal to strike out.

[30] In *An Informer v A Chief Constable* [2012] EWCA Civ 197 the plaintiff was a Covert Human Intelligence Source (or, in the vernacular, a police informer) who alleged in his particulars of claim that his handlers had assured him that his and his family's personal safety, welfare and livelihood were the police's first priorities. The plaintiff was later arrested by other police officers (who had not been told he was an informer) on suspicion of money laundering and a restraint order was made in respect of his assets. He was not prosecuted and the restraint order was subsequently discharged. He sued the police for economic loss and psychological injury. The Court of Appeal for England and Wales held that there had been a clear assumption of responsibility by virtue of the plaintiff's status as an informer. Nevertheless, on the facts of this particular case, the assumption of responsibility had been displaced by the duty to investigate crime.

[31] In *Michael and others v Chief Constable of South Wales Police and another [2015]* AC 1732 the victim made an emergency call to police and told police that her former partner had said he was coming to kill her. The emergency call was graded as requiring an immediate response. It was then re-graded as requiring a response within sixty minutes. The victim was found stabbed to death by police when they arrived. The strike out of the negligence claim was allowed by the Court of Appeal for England and Wales and upheld by the Supreme Court. Lord Toulson held that the assumption of responsibility argument was "not tenable".

[32] In *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 All ER 215 the police decided to interview Fred West about a number of murders committed in particularly harrowing and traumatic circumstances. In accordance with the requirements of the Code of Practice under PACE, they asked the plaintiff, a voluntary worker, to attend the police station and act as an appropriate adult during the interview. The plaintiff attended as requested and acted as an appropriate adult. She sat in on interviews, accompanied West to scenes of the murders and, on numerous occasions, was locked and left alone in a cell with him. Subsequently the plaintiff claimed that she had suffered post-traumatic stress, psychological injury, and a stroke by reason of her involvement in the matter. The judge struck out her claim for damages, on the basis that it was not just and reasonable in the public interest to impose a duty of care on the police when they were acting at all times within the Codes of Practice and where the plaintiff was performing her role voluntarily. The Court of Appeal upheld that decision, concluding that the police did not assume responsibility towards her in relation to her duties.

[33] In *Tindall v Chief Constable of Thames Valley Police* [2022] 4 WLR 104 there had been an accident on a road caused by black ice. After the accident, police attended the scene 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 taking their sign with them about 20 minutes or so before a second accident occurred, in which Mr Tindall died. It was alleged that their conduct at, and on leaving, the scene was negligent and that the Chief Constable was liable to the plaintiff. The Chief Constable applied to strike out the plaintiff's claim against him as disclosing no reasonable cause of action, Master McCloud refused the application. The Chief Constable appealed to the Court of Appeal which allowed the appeal, holding that there was nothing in the pleaded facts which could justify a finding that the police assumed responsibility for Mr Tindall.

[34] Although McCloskey LJ said in *Magill v Chief Constable* that the concept of assumption of responsibility could not characterised by either exhaustive definition or rigid boundaries and would always be intensely fact-sensitive, it is reasonable to imagine that certain features will usually be present in cases where the court determines that police have assumed responsibility for an individual's safely. It is clear from previous decisions of the courts that where responsibility for a person's safety, or the safety of their property, has been assumed, three elements will usually be involved. Firstly, there will usually have been some form of engagement or

relationship between the police and the plaintiff. Secondly, there will usually have been communication between the police and the plaintiff. Thirdly, some form of assurance will usually have been given by the police to the plaintiff (either expressly or implied).

Assumption of Responsibility: Principles

[35] In *Michael and Others v Chief Constable of South Wales Police and Another* [2015] UKSC 2 the Supreme Court held that the duty of the police for preservation of the peace was owed to members of the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private duty of care. In the majority judgment Lord Toulson stated:

> "114. It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.
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> 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. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood District Council* (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* and *Gorringe v Calderdale Metropolitan Borough Council* (no duty of care owed by a highway authority to take action to prevent accidents from known hazards)."

and later observed:

> "119. If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not?
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> 120. It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly, if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners' liability principle. These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care."

[36] Arguably the factual position in Mr Holbeach's action is much weaker than that in *Michael*. In *Michael* the victim contacted the police seeking help and was provided with a certain level of assurance. In the current case, on the facts pleaded by the plaintiff, there was no contact between Mr Holbeach and the police and he was provided with no assurance by them.

[37] Mr Scott drew a distinction between situations where a police officer responded as a "rescuer" to a breach of the peace (of whatever severity) and situations where the police had engaged in a pre-planned operation to protect the safety of those attending an event. In the latter case, he argued there was an assumption of responsibility. Mr Reid disagreed with this distinction. He noted that Mr Scott was unable to provide any authority for such a distinction being made and argued that the distinction was inconsistent with the principles set out in *Tindall* and *Magill*. He submitted that those conducting a pre-planned operation to attempt to reduce the danger should not, as a matter of logic, be placed in a worse position than those simply

reacting to danger, unless the pre-planned operation has actively made matters worse than they would have been.

[38] The plaintiff's view of the purpose of the pre-planned operation was to "ensure the safety" of those taking part in and those observing the parade. The defendant's view of the purpose of the pre-planned operation was to "reduce the danger" to those taking part in and those observing the parade. In my view the defendant's view on this issue is correct. Police cannot ensure the safety of an individual unless they take that individual into custody or have control or influence over a person's movements. It is in my view clear that there is nothing pleaded to support the allegation that the police had assumed responsibility for the safety of Mr Holbeach or any other attendee at the parade. They were simply performing their general duty under section 32 of the Police (Northern Ireland) Act 2000 to prevent crime. No assurance was given to Mr Holbeach that his safety was protected. Police had not, for example, purported to set up "a safe-zone" for members of the public.

[39] Notably, the plaintiff's argument does not in any way distinguish him from any other members of the public who were killed or injured by the Enniskillen bomb. The consequence of the plaintiff's argument, if correct, is that each and every person who was injured by the bomb would also have a valid claim in negligence against the police.

[40] In *Tindall* the Court of Appeal for England and Wales allowed the Chief Constable's appeal against the Master's decision not to strike out the plaintiff's claim, concluding:

> "[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*.
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> [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."

The facts of Mr Holbeach's action are not dissimilar to the factual position in *Tindall*, namely (at best) police omissions in an operational situation.

[41] In *Michael v Chief Constable of South Wales Police*, Lord Toulson, delivering the judgment of the Court observed, at para [100] of the Court's judgment, that there had sometimes been a tendency for the courts to use the expression "assumption of responsibility" when in truth the responsibility had been imposed by the court rather than assumed by the defendant. Lord Toulson warned that the concept "should not be expanded artificially."

[42] The decision in respect of this application must be made on the facts which the plaintiff has pleaded. The court offered the plaintiff an opportunity to amend his Statement of Claim and counsel submitted that the case had been pleaded at its height.

[43] The basis for the application is that the pleadings do not disclose a reasonable cause of action since they do not disclose a relationship between the plaintiff and the defendant with such ingredients and characteristics to create a duty of care. In particular, there was no duty of care to protect the plaintiff from the malicious actions of third parties. When one examines the application of the concept of assumption of responsibility in other actions, Mr Holbeach's action lacks those features which have caused courts to recognise the existence of a duty of care.

[44] There are a number of matters crucially absent from the facts pleaded in the Statement of Claim. Firstly, there is nothing pleaded to state that Mr Holbeach knew that police had carried out a security operation whereby they had made searches for explosives. Secondly, there is nothing pleaded to suggest that Mr Holbeach had had any communication with police to discuss any potential danger to those attending the parade. Thirdly, there is nothing pleaded to suggest that any form of assurance or undertaking was offered to him by the police. Fourthly, there is nothing pleaded to suggest that Mr Holbeach relied on the skills of the police to search for explosives as an important factor in maintaining his safety from terrorist acts. Fifthly, there is nothing to suggest that there was any kind of special relationship between the police and Mr Holbeach (in the sense of a relationship akin to a contract). Therefore, although Lord Reed said in para [82] of his speech in *N v Poole Borough Council* that an inference as to an assumption of responsibility can be drawn from the manner in which the public authority has behaved towards a claimant in a particular case, there is, in my view, no factual basis from which any court could reasonably draw such an inference in Mr Holbeach's case. Such facts are starkly absent.

[45] I am not persuaded by Mr Scott's argument that, because there was a pre-planned search of certain buildings in Enniskillen prior to the Remembrance Day parade, this means there was an assumption by the police of responsibility for the safely of everyone attending. As Lord Toulson observed in *Michael v Chief Constable of South Wales Police*, the duty of the police for the preservation of the peace is owed to members of the public at large and does not involve the kind of close or special relationship necessary for the imposition of a private law duty of care.

[46] To echo the final observations of Stuart-Smith LJ in *Tindall v Chief Constable of Thames Valley Police*, I see no reason why the point at issue in this application could only be decided after a trial. The facts 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. Given the paucity of what has been pleaded in the Statement of Claim, and Mr Scott's indication that the pleadings were drafted at the height of what was possible, then this is not the type of case where a detailed factual analysis needs to be carried out at trial. In the light of the consideration of the law on assumption of responsibility and the facts that have been pleaded, I therefore conclude that it is unarguable and incontestably bad, on the case pleaded in his Statement of Claim, that the police had assumed responsibility for the safety of Mr Holbeach at the Remembrance Day parade in Enniskillen. I must therefore strike out the Statement of Claim.