General Update on Civil Law and Inquests

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Introduction

1 Until ***Tindall and another v Chief Constable of Thames Valley Police*** [2024] UKSC 33 and ***Afriyie v Commissioner of Police for the City of London*** [2024] EWCA Civ 1269 (judgments handed down on 23 October 2024 and 25 October 2024 respectively) it had been a relatively quiet year for significant judicial pronouncements of the highest authority in civil and coronial law cases directly involving the police service.

Civil claims

Duty of care: making matters worse and the principle of interference

2 In ***Tindall*** the Supreme Court was concerned with where the dividing line falls between "*failing to protect a person from harm*" and "*making matters worse*". The Court acknowledged that drawing this distinction is "*not always straightforward*" (at [2]).

3 The claimant sued as the widow and administratrix of the estate of her late husband Malcolm, who died in a road traffic accident. No police officers or vehicles were actually involved in the fatal accident itself. The claimant's primary claim was that the response of the police to an *earlier* accident on the same stretch of road made matters worse such that the Chief Constable was liable in negligence. Alternatively, it was argued that the case fell within one of the exceptions to the general rule that no duty of care is owed to protect a person from harm (assumption of responsibility/control/status).

4 The Chief Constable applied to strike out the claim. The application failed at first instance but was successful on appeal to the Court of Appeal. The claimant appealed to the Supreme Court.

5 The facts were as follows. At approximately 04.30 on 4 March 2014 a Mr Kendall lost control of his car on an area of black ice travelling south on the A413 towards High Wycombe. His car slid off the road into a ditch. He was not seriously injured and able to call police. In his witness statement Mr Kendall said that given the dangerous state of the road he waved at a passing van and other traffic to encourage them to stop or slow down. A police van was allocated and arrived but was not carrying signs to slow down traffic or warn of hazard. A police car was also allocated which should have been equipped with two 'police slow' warning signs but had only one instead of two. Fire and ambulance crews also arrived. Mr Kendall did not continue to try to warn other road users. Nor did his witness statements include any evidence that he had told police he had already tried to warn other road users or would continue to do so if left at the scene. He was conveyed from the scene by ambulance at 05.25. The police officers cleared the area of debris, called for a gritter to attend and then left the scene, removing their 'police slow' sign. The fire crew also left having satisfied themselves that Mr Kendall had been taken to hospital and his car was not itself a hazard.

6 Approximately 20 minutes later a car lost control on the same area of black ice and had a head on collision with a vehicle being driven by Mr Tindall. Both drivers died.

7 There were disciplinary proceedings against the 3 officers. There was also an Inquest at which the Jury returned a narrative conclusion which stated that the police officers 'should' have done more: appropriate signs should have been requested, police should have stayed at the scene until gritters arrived, and the road should have been closed. These findings may have emboldened the claimant in terms of prospects of success in a civil action.

8 Master McCloud held that the claim should not be struck out and summary judgment should not be given, her central reasoning being that whether the action of the police amounted to an intervention that 'made matters worse' was very fact dependent.

9 Reversing the Master's decision, Stuart-Smith LJ in the Court of Appeal reasoned that the case was a "*paradigm example of a public authority responding ineffectually and failing to confer a benefit that may have resulted if they had acted more competently*" (at [19(ii)]), which did not give rise to a duty of care. Further, there was nothing on the facts that could justify a finding that the police 'assumed responsibility' to Mr Tindall or road users generally to protect them from harm caused by a danger the police had not themselves created and were not responsible for. He reasoned that all that occurred was an ineffectual response by police officers in the exercise of a power, which on authority is insufficient to give rise to a duty of care.

10 The Supreme Court noted that on the facts of this particular case "*there can be no doubt that the failure of the police officers to take steps to protect road users from the danger posed by the ice hazard to which the officers had been alerted was a serious dereliction of their public duty owed to society at large*" (at [20]). However, it went on to observe that "*it does not follow that they were in breach of a duty of care in the tort of negligence owed to particular individuals*". The Court quoted with approval Lord Toulson in ***Michael v Chief Constable of South Wales Police*** [2015] UKSC 2 (at [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.*"

11 Neither that basic principle nor the ordinary principles of the common law referred to were actually in dispute, in particular, the fundamental distinction between making matters worse and failing to confer a benefit. The Court helpfully set out the facts and reasoning of six past cases to see how the distinction can be drawn, as well as the recognition of well-known exceptions to the general rule that there is no duty of care to confer a benefit.

12 The Court summarised the central principles as follows (at [44]):

> "*(i) There is a fundamental distinction, drawn in all the above cases, between making matters worse, where the finding of a duty of care is commonplace and straightforward, and failing to confer a benefit (including failing to protect a person from harm), where there is generally no duty of care owed.*
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> *(ii) An example of the former (making matters worse), where there was held to be a duty of care owed by the police, is Robinson. As regards other emergency services, a more difficult example is the Hampshire case in Capital & Counties (turning off the sprinkler system). All the other cases mentioned fell on the other side of the line.*
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> *(iii) A difficulty in drawing the distinction (between making matters worse and failing to protect from harm) is how to identify the baseline relative to which one judges whether the defendant has made matters worse: see Sandy Steel, "Rationalising omissions liability in negligence" (2019) 135 LQR 484, 487. The cases show that the relevant comparison is with what would have happened if the defendant had done nothing at all and had never embarked on the activity which has given rise to the claim. The starting point is that the defendant generally owes no common law duty of care to undertake an activity which may result in benefit to another person. So it is only if carrying out the activity makes another person worse off than if the activity had not been undertaken that liability can arise.*

> *(iv) Another way of stating the general rule is to say that a person owes a duty to take care not to expose others to unreasonable and reasonably foreseeable risks of physical harm created by that person's own conduct. By contrast, no duty of care is in general owed to protect others from risks of physical harm which arise independently of the defendant's conduct - whether from natural causes (as in East Suffolk) or third parties (as in Michael and Ancell).*
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> *(v) Although not made out in any of the above six cases, there are exceptions to the general rule that there is no duty of care to protect a person from harm, for example, where the defendant has assumed a responsibility to do so or has control of a third party."*

13 Not surprisingly given the state of the law, the primary way in which the claim against the Chief Constable in this case was put involved an argument that the police simply 'made matters worse'. The argument was founded on the allegation that, but for the arrival of the police, Mr Kendall would have continued making attempts to warn other road users. In short, the police made matters worse (at [46]) by *"displacing Mr Kendall's efforts"* without making comparable efforts of their own. Once they left, road users were exposed to a risk of injury greater than if the police had never attended at all (because Mr Kendall would have persisted in his warning attempts).

14 In the alternative, the claimant argued that, applying one of the exceptions to the general rule, the police were under a duty of care because the police 'took control of the scene' and then relinquished control without taking steps to remove or reduce the hazard.

15 In advancing the submission that the police 'made matters worse' the claimant relied upon what had been previously described by commentators as 'the interference principle':

> *"If A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help she needs."*

16 It was submitted that the substitution of the police officers for 'A', drivers using the road for 'B' and Mr Kendall as 'someone else' should sound in liability. Although there had been no previous English case clearly accepting and applying this 'interference' principle, the Court accepted it was a correct statement of English law (at [56]). The Court observed that it followed from first principles and was simply a particular illustration or manifestation of the duty of care not to make matters worse by acting in a way that creates an unreasonable and reasonably foreseeable risk of physical injury to the claimant.

17 The Court observed that Counsel for the claimant righty accepted that to succeed the claimant would have to establish that the police knew or ought reasonably to have known (i.e. it was reasonably foreseeable) that their conduct had or might have had the effect of putting off or preventing Mr Kendall from warning other motorists of the ice hazard. The Court observed however that *"at this stage in the analysis, the claimant runs into a major factual difficulty"* (at [59]).

18 After analysing the pleaded case, agreed or alleged facts, and the witness statements, the Court concluded there was a "*fatal factual lacuna*" in the claimant's case (at [68]) – there was no evidence that the officers knew or ought to have known that Mr Kendall would have taken steps to prevent road users from suffering harm. The crucial question was whether the police could reasonably have foreseen that their attendance would 'displace' attempts that Mr Kendall would otherwise have made to prevent harm to others. The absence of any affirmative evidence of this was fatal. The Court dismissed a submission of the need for caution on this strike out application as it concluded the law was clear, and "*not in a state of flux*" (at [68]). The Court likewise

dismissed a plea that further evidence of what officers knew or ought to have known "*might emerge at trial*". It was now ten years on and the Court concluded it was "*fanciful*" to suppose any new evidence might emerge.

19 As a consequence, on the pleaded facts and evidence relied upon, there was no reasonable basis for imposing a duty of care on the basis that the police 'made matters worse'.

20 The claimant's arguments that one or more of the exceptions to the general rule were all also dismissed. First, the Court found it "*impossible to see*" how an assumption of responsibility to Mr Tindall could arise on the facts of this case. The police officers did not say or do anything of which Mr Tindall or others were aware or could rely upon (at [76]).

21 Second, the claimant's argument on control – namely, even if the police did nothing to make matters worse, they came under a duty of care to protect motorists from the danger posed by the ice by taking control of the accident scene (based on a ***Dorset Yacht*** analysis) – also failed. On the facts the police had not taken control of the "*patch of ice*" (at [83]); indeed, it was a major criticism that the police were negligent in failing to inspect the ice or take other necessary measures, clearly contrary to having taken control.

22 Third, the suggestion that the mere 'status' of the police as a body gives rise to a duty of care (which was unsurprisingly not developed in argument) was irreconcilable with ***Michael*** and was also dismissed.

23 The Court ultimately concluded that, applying the interference principle, the police could not be held liable for making matters worse and that none of the possible exceptions to the general rule that there is no duty of care to protect a person from harm could be made out. The appeal was dismissed.

24 The decision will of course be welcomed by the police and potentially other responders/public authorities. It serves as a helpful reminder that regardless of the outcome of an Inquest, in particular the at times damning conclusions of a Jury narrative as to police failings, they do not determine civil liability. The application of principles from the law of tort must be applied. This judgment is most helpful in that regard.

25 It also serves to underscore the need to scrupulously analyse the pleaded basis of the statement of case advanced against you as a public authority and the content of the factual basis and evidence relied upon by a claimant upon which an assertion is made that a duty is owed. Given the Court's view that the law in this area is not in a 'state of flux' it may mean that Masters or District Judges will be more willing to strike out or enter summary judgment than has historically been the case.

Use of Taser amounting to unreasonable use of force

26 In ***Afriyie v Commissioner of Police for the City of London*** [2024] EWCA Civ 1269 the Court of Appeal were concerned with an officer's use of Taser following a traffic stop. The Judge at first instance, Mrs Justice Hill, found that the use of a taser was lawful and objectively reasonable in all the circumstances and so dismissed the claimant's claim for damages for assault and battery.

27 The Court of Appeal (William-Davis LJ with whom Baroness Carr CJ and Dingemans LJ agreed) allowed the claimant's appeal against her decision. There was no challenge to the Judge's finding that the officer held an honest belief that it was necessary to use force. The challenge to the Judge's conclusion that the officer's honest belief that it was necessary to use force was objectively reasonably held, whilst the source of some critical comment by the Court of Appeal, was dismissed.

28 The appeal succeeded however on the basis that the Judge had failed to consider *"the proportionality of using a taser in the circumstances as she found them to be"* (at [43]). William-Davis LJ observed *"she did not stand back and ask whether the use of a weapon which carried the risk of serious injury to the appellant was a reasonable response to the situation"*.

29 This judgment reinforces the need for those defending civil claims based on use of force to ensure they consider not just whether use of force per se can be defended, but the objective reasonableness of the actual use of force tactic deployed (including the type of force, degree and duration of force).

Witness evidence: to call or not to call, that is the question

30 In ***Bell v Commissioner of Police of the Metropolis*** [2024] EWHC 379 (KB) the claimant brought proceedings against the Met under section 6 of the Human Rights Act 1998 for a breach of his Article 8 right to respect for his family life, as well as a claim in negligence. His claim arose out of the abduction of his 3-year-old son by his former partner who took their child to Brazil in September 2013 and has never returned. The claimant's case was that not only did the Met's officers fail to prevent the abduction, but they also positively enabled and assisted it by giving the child's passport (which they had initially secured) back to the claimant's former partner, failing to put into place 'port alerts' and not telling the claimant so he could try and obtain appropriate court orders to prevent the abduction.

31 The Met broadly accepted that the officers acted as alleged and chose not to call any of the officers to give evidence at trial. There were accounts recorded during a complaint that had been made. No hearsay notices had been served but there was no objection taken to the admissibility of those officer accounts per se.

32 ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR P324 was a clinical negligence case in which Brooke LJ summarised a number of principles touching upon the absence of a witness at trial (at P340):

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
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> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
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> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
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> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

33 At [135]-[144] of her judgment in Bell Mrs Justice Hill considered the application of the Wisniewski principles. She rejected the Met's contention that officers had not been called to give evidence because their recollection of events from as long ago as 2013 would 'probably be impaired' such that it 'would add nothing' and be 'meaningless'. Hill J stated (at [140]):

> *"Experience dictates that witnesses can, in some cases, have a good recollection of past events, especially perhaps when, as here, the facts are rather unusual and where detailed contemporaneous documents as to what happened do exist…"*

34 The Court also affirmed (at [141]) what Leggatt J (as he then was) said in ***Gestmin v Credit Suisse*** [2020] 1 CLC 428 : oral evidence serves another important purpose, namely *"the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness"*.

35 The Judge ultimately concluded that there was a *"deafening silence"* in the case put forward by the Met and she accordingly drew a Wisniewski inference that the reason why no evidence had been called was because it *"had no answer to the criticism made"*.

36 This is a salutary warning to us all to ensure that very careful consideration is given to a number of evidential features when deciding what evidence to call at trial. If there are good reasons for not calling witnesses, those reasons should be evidenced to fill, or attempt to fill, what might otherwise be described as the 'deafening silence'. It is also a warning to ensure that there is the proper use of hearsay notices for documents where the creators or deponents are not to be relied upon as witnesses.

37 The Court also outlined the circumstances in which positive obligations may arise under Article 8 ECHR (at [183]-[185]). It applied the need for a 'clear causative link' (at [243]-[245]) between the Article 8 violation and the claimant's losses and ultimately assessed the award for 'just satisfaction' on this particular Article 8 claim in the sum of £28,000. It may be a helpful comparator in other Article 8 violation cases.

Other cases of note

Strike out where breach is clear but no causative effect

38 ***Lukes v Kent and Medway NHS and Social Care Partnership Trust*** [2024] PIQR P14 is a helpful case on the ability to strike out a claim where breach of duty may be clear (failings in custody), but it can be said factual causation cannot be made out (failings subsequently corrected/intervening acts by others).

Section 329 Criminal Justice Act 2003: police dog Jerry

39 ***Ward v Chief Constable of Greater Manchester*** [2024] EWHC 1297 (KB) is a reminder of the application of section 329 of the Criminal Justice Act 2003 which provides that where a person is injured by a trespass to the person whilst committing a crime for which they are later imprisoned, they can only bring a claim with the permission of the court. It also reminds us that when determining whether force used was grossly disproportionate, undue emphasis is not to be placed on the result of the force, namely the injury and its severity (applying McDonnell v Commissioner of Police of the Metropolis [2015] EWCA Civ 573); and, that a person acting for a legitimate purpose may not be 'able to weigh to a nicety' the exact measure of any necessary action (applying Minio-Paluello v Commissioner of Police of the Metropolis [2011] EWHC 3411).

Inquests

'*Galbraith Plus*' and *Palmer* revisited

40 In ***R (Officer B50) v HM Coroner for the East Riding of Yorkshire and Kingston Upon Hull*** [2023] EWHC 81 (Admin) the claimant firearms officer (under the cipher B50) challenged a coroner's decision to leave to the Jury at Inquest the issue of unlawful killing of Mr Skelton on the basis that the coroner had failed to correctly apply the so-called 'Galbraith plus' test. He also advanced what was described as a 'root and branch' attack upon the structure and content of the coroner's summing up (at [7(i)]). Both challenges failed.

41 The Divisional Court revisited the decisions in Galbraith and R v HM Coroner for Exeter and East Devon ex p Palmer [2000] Inquest Law Reports 78 and observed (at [38]):

> *"…it is not obvious that Lord Woolf was seeking to add some additional test in [46] or [49]. To say that the evidence is so inherently weak, vague or inconsistent (a clear reference back to the language of Galbraith category 2) that it would not be "safe" for a jury to come to that verdict seems to us to be indistinguishable in context from saying that the evidence is so weak, vague or inconsistent that (without usurping the function of the jury) no jury properly directed could properly convict the defendant."*

42 The Court cited with approval the judgment of Pepperall J in ***R (Chidlow) v HM Senior Coroner for Blackpool and Fylde*** [2019] EWHC 581 that in many cases there may be little difference between ***Galbraith*** and '***Galbraith plus***' and that: *"where there is evidence upon which a jury properly directed could properly reach a particular conclusion or finding then it is likely to follow that the jury could safely reach such conclusion or finding"*. As they observed: *"likely but not inevitable; and, on present authority, it appears that the categories of consideration that could (at least in theory) render it unsafe to leave a suitably evidenced conclusion to the jury are not closed"* (at [65]). This Divisional Court seems sceptical the 'plus' gloss should endure.

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