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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **23/10/2023**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

JOSEPH HOLBEACH

Plaintiff/Appellant

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Respondent

McALINDEN J

Introduction

[1] This is an appeal against the decision of Master Bell handed down in a reserved written judgment on 13 April 2023 in which he struck out the plaintiff/appellant's statement of claim under Order 18 rule 19(1)(a) on the ground that it disclosed no reasonable cause of action.

[2] The facts giving rise to the plaintiff/appellant's claim are set out in Master Bell's detailed judgment and I do not intend to repeat them other than to state that the plaintiff/appellant was injured in the Remembrance Sunday bomb explosion in Enniskillen on 8 November 1987 and he is suing the police for what he alleges is a failure to search the "Reading Rooms" near the Cenotaph were the bomb was planted by the Provisional IRA.

[3] As is the usual way with appeals from the Master, the hearing before me was a fresh hearing of the matter and in any event the issues had evolved from the time when the Master addressed them as the plaintiff/appellant had amended his statement of claim on 14 September 2023 in order to specifically plead that:

> "On his way to the Cenotaph, the plaintiff was stopped on the Queen Elizabeth Road by unknown members of the British Army. Those soldiers had an antenna type

> equipment (specific type is not known to the plaintiff); made the plaintiff open his car boot and searched the plaintiff's car before allowing him to proceed to the Cenotaph. The plaintiff saw that there were police at the Cenotaph and believed that the area was safe. The plaintiff expected police to be present at the parade. This was because of their presence at the parade in previous years and the terrorist threat and security circumstances in Northern Ireland at the material time. When the plaintiff saw that the army and police were present at the parade, he felt safe. That influenced his decision to attend the parade because if there was no policing then it was unlikely that he would have attended."

These new matters were set out in paras 6A, 6B and 6C of the amended statement of claim.

[4] The principles that the court should adhere to when dealing with an application under Order 18 rule 19(1)(a) were clearly and helpfully set out by McCloskey LJ in the case of *Magill v Chief Constable of the Police Service of Northern Ireland* at para [7] of his judgment and the Master quoted this paragraph of McCloskey LJ's judgment verbatim at para [6] of the Master's judgment. I see absolutely no need to rehearse those principles. In considering this application, I have endeavoured to adhere faithfully to those principles.

[5] At the hearing of the matter before me, I had the benefit of skeleton arguments from the plaintiff/appellant and the defendant/respondent, and I had the benefit of oral submissions from Mr Southey KC who led Mr Scott for the plaintiff/appellant and Dr McGleenan KC who led Mr Reid for the defendant/respondent. I am grateful to counsel for the quality of their written and oral submissions from which I gained great assistance.

[6] The parties helpfully referred me to and provided me with a bundle of relevant authorities concerning the liability of public bodies exercising public functions for injuries suffered by claimants in a number of the cases as the result of actions of third parties, namely: *Michael v Chief Constable of South Wales* [2015] UKSC 2; *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25; *Magill v Chief Constable of the Police Service of Northern Ireland* [2022] NICA 49; *Chief Constable of Essex v Transport Arendonk BvBa* [2020] EWHC 212; *Sherratt v Chief Constable of Greater Manchester* [2018] EWHC 1746; *Airport Authority v Western Air Ltd* [2020] UKPC 29; *Al-Najar v Cumberland Hotel (London) Ltd* [2019] 1 WLR 5953; *N v Poole BC (AIRE Centre intervening)* [2019] UKSC 25; *HXA v Surrey CC* [2022] EWCA Civ 1196; *Slovin v Wise* [1996] AC 923; *Capital & Counties Plc v Hampshire CC* [1977] QB 1004; and *Gorringe v Calderdale Metropolitan Borough Council* UKHL 15.

[7] I do not mean to do any injustice to the parties or their carefully constructed submissions but I am satisfied that the relevant legal principles are more than tolerably clear, particularly when it comes to the performance by the police of the public function and duty to protect life and property, to preserve order, to prevent the commission of offences and where an offence has been committed to take measures to bring the offender to justice as presently set out in section 32 of the Police (Northern Ireland) Act 2000 ("the 2000 Act"). This provision replaced a similarly worded provision set out in section 18 of the Police (Northern Ireland) Act 1998 ("the 1998 Act"). Prior to the 1998 Act, it appears that this function/duty was one founded in common law and recognised in statute. See section 1(4) of the Constabulary Act (Northern Ireland) 1922, section 11 of the Constabulary (Ireland) Act 1836 and section 5 of the Constabulary Act 1822 ("the 1822 Act")(all repealed).

[8] This last provision contained the precise terms of the oath which constables in Ireland who were appointed under the 1822 Act had to swear. The language of the relevant portion of the oath is very similar to the wording of section 32 of the 2000 Act:

> "I A.B. do swear that I will well and truly serve our Sovereign Lord and King in the Office of Chief Constable [or Constable, or Sub-Constable, as the case may be] without favour or affection, malice or ill-will; that I will see and cause His Majesty's peace to be kept and preserved, and that I will prevent, to the best of my power, all offences against the same; and that while I shall continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof, in the execution of Warrants and otherwise, faithfully according to law. So help me God."

[9] The common law foundation for this function/duty was recently discussed by Humphreys J at paras [10] to [18] of *Graham* [2022] NIKB 25 in which he referred to the judgment of Parker LCJ in *Rice v Connolly* [1966] 2 QB 414. He also quoted from a passage of the judgment of Lord Reed in *Robinson* which I will also set out as it is central to the determination of the present appeal:

> "[43] Turning to consider specifically the position of the police, Lord Toulson JSC explained in *Michael's* case [2015] AC 1732, paras [29]–[35] that the police owe a duty to the public at large for the prevention of violence and disorder. That public law duty has a number of legal consequences. For example, the police cannot lawfully charge members of the public for performing their duty (*Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270), and a police officer who wilfully fails to perform his duty may be guilty of a criminal offence (*R v Dytham*

> [1979] QB 722). Some members of the public may have standing to enforce the duty, for example in proceedings for judicial review (*R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118), but in doing so they are not enforcing a duty owed to them as individuals."

[10] Humphreys J having set out the above passage went on to state at para [15] of *Graham* that:

> "The case referred to in *Robinson*, *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, is authority for the established principle that the duty of the police is owed to the public at large and does not, of itself, give rise to a private law duty of care."

[11] This precise point was reiterated by McCloskey LJ in *Magill v Chief Constable of the Police Service of Northern Ireland* [2022] NICA 49 and by Stewart-Smith LJ in *Tindall v Chief Constable of Thames Valley Police and another* [2022] EWCA Civ 25. I do not consider it profitable or necessary to set out *in extenso* the passages of these two judgments which set out the key principles at play in cases such as the present one. I would simply refer to para [54] of *Tindall* and para [19] of *Magill* and I would (hopefully correctly) summarise the law as follows. When one is dealing with the performance by the police of the public function and duty of protecting life and property and preventing the commission of offences (in the absence of any Convention based duty, which issue doesn't arise in relation to the events of 1987) the liability of the police for harm inflicted upon a claimant by a third party is limited to situations where the police, through their actions have negligently created or materially increased the risk of such harm being caused to the claimant by that third party, or, alternatively, the police have acted in such a manner as to be deemed to have assumed responsibility for the claimant's safety, the claimant having relied upon this assumption of responsibility, the police having negligently failed to fulfil this responsibility and the claimant having suffered harm at the hands of a third party as a result.

[12] In my exchanges with Mr Southey KC, I was careful to tease out the precise nature of the case being made out by the plaintiff/appellant in his amended statement of claim. He unequivocally stated that the plaintiff/appellant's case did not rely upon the first limb of the test set out in the preceding paragraph. It was not being alleged that the police, through their <u>actions</u> had negligently created or materially increased the risk of harm being caused to the claimant by a third party. Mr Southey KC specifically confirmed that the amendment to the statement of claim solely focused on the assumption of responsibility for the safety of the plaintiff/appellant by the police and the reliance by the plaintiff/appellant on that assumption of responsibility. The issue of reliance is now clearly pleaded in the amended statement of claim and for the purposes of this application this plea must

be taken at face value. The outcome of this application depends on whether the plaintiff/appellant in his amended statement of claim has set out the case that the police through their actions had assumed responsibility for his safety.

[13] During my exchanges with Mr Southey KC, I posed the following question to him. Assuming, as the court must do at this stage, that the facts and circumstances as set out in the amended statement of claim were true, what was it in relation to those facts and circumstances that gave rise to an assumption of responsibility by the police for the safety of the plaintiff/appellant? His responses led me to conclude that the plaintiff/appellant's case boiled down to the following proposition. There was an ongoing police operation relating to the Remembrance Sunday events taking place in the vicinity of the Cenotaph in Enniskillen. This police operation was an open and visible manifestation of the exercise by the police of their policing functions/duties. The plaintiff was aware of the ongoing police operation and, placing reliance upon this police operation, he decided to attend the Remembrance Sunday events at the Cenotaph and he was injured when a bomb planted in the "Reading Rooms" near the Cenotaph exploded, the police having failed to search that particular location. Relying on the cases of *N v Poole BC (AIRE Centre intervening)* [2019] UKSC 25 and *HXA v Surrey CC* [2022] EWCA Civ 1196, Mr Southey KC submitted that foreseeable reliance upon the discharge of a public function/duty was sufficient to give rise in law to an assumption of responsibility and, in this case, it was reasonably foreseeable that the plaintiff would place reliance upon the existence of a police operation.

[14] The question which must be addressed is whether the open and visible manifestation of the exercise by the police of their policing functions/duties by conducting a police operation in Enniskillen which was focused on the Remembrance Sunday events was sufficient to be deemed in law to constitute an assumption of responsibility by the police for the safety of the plaintiff/appellant on the basis that it was reasonably foreseeable that the plaintiff would rely on the existence of that police operation. The cases of *Magill* and *Tindall* would strongly point to answering this question in the negative when it comes to the exercise of public functions/duties by the police. Different considerations may apply in the context of the performance of public functions/duties by social services, public health bodies and public education authorities where the public bodies in question offer services to the public and an individual avails of one or more of the specific services offered.

[15] In *Magill,* in the appeal from the Master, I was prepared to allow the plaintiff's claim to proceed to hearing on the basis of there being a policing operation in relation to the parade. Although the Court of Appeal upheld my decision, it was made clear that but for the subsequent amendments to the statement of claim, my decision would have been overturned and the Master's decision would have been reinstated. The mere existence of a policing operation was insufficient to enable a case based on the assumption of responsibility to be made out.

[16] In the *Magill* case, the amendments made to the statement of claim that were considered by the Court of Appeal were to the effect that the police brought the

Orange Order parade to a halt in what was effectively hostile territory, and the police kept the parade stationary at this location for some time. The claimant, a participant in the parade, was then struck by a missile thrown at the parade by a person who was opposed to the Orange Order parade passing through that area. The case became an example of the police, through their actions, negligently creating or materially increasing the risk of harm being caused to the claimant by a third party.

[17] In *Tindall*, a driver of a motor vehicle was killed when a car which was coming in the opposite direction went out of control on black ice and collided head on with Mr Tindall's car. The driver of the vehicle that went out of control also died. There had been another accident on the same stretch of road about an hour earlier, also caused by black ice. In the first accident, a driver had lost control of his car, which rolled over and ended up in the ditch, causing him to suffer injuries for which he was taken to hospital. Police officers attended the scene of the first accident. They arrived about 20 minutes after it had happened and were there for about 20 minutes. While there, they cleared debris from the road and put up a "Police Slow" sign by the carriageway. Having done that, they left the scene about 20 minutes or so before the fatal accident, taking their "Police Slow" sign with them. It is alleged that their conduct at and on leaving the scene was negligent.

[18] Following a detailed analysis of the pleaded case and the relevant caselaw, Stuart-Smith LJ struck out the claimant's pleaded case as disclosing no reasonable cause of action. In the court's view, having regard to the principles gleaned from the authorities which are set out in para [54] of his judgment, the facts of the case fell squarely within the principles that apply when a public authority acting in pursuit of a power conferred by statute fails to confer a benefit. See para [69]. There was nothing in the pleaded facts that could justify a finding that the police assumed responsibility to Mr Tindall or other road users. There was 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. See para [73]. What had 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. See para [74].

[19] The issue of reasonable foreseeability of reliance giving rise to deemed assumption of responsibility was dealt with by Lord Reed at paras [80] to [83] of *N v Poole BC.* At para [80], Lord Reed stated:

> "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."

[20] Lord Reed went on to explain that on the basis of the case alleged in *N v Poole BC* "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." On the basis of the pleaded case, it could not be said that "the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility." It was not alleged that the council had taken the claimants into its care, and had thereby assumed responsibility for their welfare. "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." See para [81].

[21] Lord Reed made the following important point at para [82] of his judgment:

> "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."

[22] In the more recent case of *HXA* again relating to the involvement of social services with a child, Baker LJ in the English Court of Appeal refused to strike out a claim on the basis that the issue of an assumption of responsibility in such cases was:

> "still an evolving area of the law in which it will only be through careful and incremental development of

> principles through decisions reached after full trials on the evidence that it will become clear where precisely the line is to be drawn between those cases where there has been an assumption of responsibility and those where there has not. If the assumption of responsibility were to be confined to cases where a local authority had acquired parental responsibility under a care order, the line would be clear. But in my view that is not the effect of the decision in *Poole*. The responsibility for a child required to give rise to a duty of care can be assumed in wider circumstances. Whether a duty arises will always depend on the specific facts of the case. As the reports from the family courts demonstrate, there is a very wide range of circumstances in which the social services department of a local authority may become involved in the lives of children in its area who are or are at risk of being abused or neglected. In many such cases, it may not be possible without a full examination of the facts to establish whether or not a duty of care arose or, if it did, whether it was breached. In those circumstances, it is plainly wrong to strike out the claims."

[23] In this case, there is no question of the plaintiff/appellant using a service which the police have offered to the public so the issue of reasonable foreseeability of reliance does not arise. Further, there is no question of the police behaving in a particular manner towards the plaintiff/appellant from which the assumption of responsibility might be inferred. Finally, there is no question of the police becoming involved in the life of a vulnerable plaintiff/appellant who is at risk of being harmed or neglected. The mere performance by the police of their public functions cannot give rise to a finding that the police has assumed a responsibility for the safely of the plaintiff/appellant. The pleaded case, when properly examined does not go beyond that. In the circumstances, the Master's decision is affirmed, and the statement of claim is struck out because it does not disclose a reasonable cause of action.