

The Police have a Duty to Protect the Public, but what about Protecting Me?

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01 February 2022

Summary

In *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25 the Court of Appeal issued guidance on the limited circumstances in which the police (and public authorities generally) assume a duty to exercise reasonable care to protect individuals from harm.

This guidance confirms that the police assume a duty in relation to 1) positive actions taken by the police that cause harm or 2) cases whereby the police assume responsibility over the situation or the claimant themselves. If neither of these conditions can be evidenced, it is highly unlikely that a duty can be said to have been assumed.

Facts

Early on a winter morning, Mr Kendall encountered black ice whilst driving down a fast stretch of country road. Mr Kendall's vehicle came off the road, but fortunately he only sustained non-life-threatening injuries. Mr Kendall was very concerned that further vehicles using the road would also encounter the black ice and suffer accidents. As such, he called the police and started to signal to other drivers to slow down whilst he awaited rescue.

During the rescue the police put out a warning sign. However, once they had cleared the road from any debris, they left taking the sign with them. The site, therefore, was effectively the same as it had been prior to Mr Kendall's accident; coated in black ice, with no means of warning drivers to the hazard.

Some 20 minutes after the police left the scene, Mr Tindall was driving along the same stretch of road when an oncoming driver lost control on the black ice and collided with Mr Tindall's vehicle head-on. Neither driver survived.

Proceedings in the High Court

At first instance, Mrs Tindall argued that the police had made matters worse by removing Mr Kendall and the sign, both of which had been alerting drivers to the danger. The Master refused the Chief Constable's application to strike out the claim or for summary judgment, finding that it was not fanciful that the police had made matters worse and assumed a duty of care.

The Chief Constable then appealed.

The Court of Appeal's Ruling

In granting the appeal the Court of Appeal derived the following principles from the authorities. These principles are to be applied when considering whether a public authority is 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 [54].

"i) Where a statutory authority (including the police) is entrusted with a mere power it cannot 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 (East Suffolk Rivers Catchment Board v Kent [1941] A.C. 74, [1940] 12 WLUK 4; Stovin v Wise [1996] A.C. 923, [1996] 7 WLUK 392)

ii) 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 (Capital & Counties Plc v Hampshire CC [1997] Q.B 1004, [1997] 3 WLUK 337; Gorringe v Calderdale MBC [2004] UKHL 14, [2004] W.L.R 1057; Robinson v Chief Constable of West Yorkshire [2018] UKSC 4, [2018] A.C. 736, [2018] 2 WLUK 189).

iii) *Principle ii applies where it may be said that a public authority's intervention involves it taking control of operations. (East Suffolk; Capital & Counties).*

iv) *Knowledge of a danger which the public authority has the power to address is not sufficient to give rise to a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger (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 (Capital & Counties; Sandhar v Department of Transport, Environment and the Regions [2004] EWCA Civ 1440, [2005] 1 W.L.R. 1632, [2004] 11 WLUK 168)*

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) (Gorringe)*

vii) *In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (Ansell & Ansell v McDermott [1993] 4 All E.R. 355, [1993] 1 WLUK 997; Alexandrou v Oxford [1993] 4 All E.R. 328, [1990] 2 WLUK 252) and making matters worse (Rigby v Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242, [1985] 2 WLUK 253; Knightley v Johns [1982] 1 W.L.R. 349, [1981] 3 WLUK 212; 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 (Ansell) or to an individual (Michael v Chief Constable of South Wales [2015] UKSC 2, [2015] A.C. 1732, [2015] 1 WLUK 622).*

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."*

In the case of *Tindall* the Court of Appeal found that the facts established a paradigm case of a public authority responding ineffectually and failing to confer a benefit that might have resulted if they had acted more competently; the police failed to take steps that might have prevented harm being suffered, but they did not make matters worse. Moreover, the relationship between Mr Tindall and the Police was indistinct from the relationship between the police and other road users such that there was no proximity of relationship between the parties upon which a duty of care could be founded.

Comment

The principles set out at paragraph 54 of Stuart-Smith LJ's judgment will assist those advising potential claimants and the police as to the merits of claims arising from an alleged breach of a duty to exercise reasonable care to protect an individual from harm.

When analysing such a case, the relevant questions are:

- 1) Did the police take a positive action that caused the loss to the claimant?
- 2) Did the police assume responsibility of the situation, or to the claimant, so as to give rise to a duty of care?

Alleged Actions

By placing the focus on the positive actions taken, the Court of Appeal has reaffirmed the fundamental principle of the law of negligence: not to cause harm to other people or their property. This is distinguished from imposing a duty to provide others with benefits due to the requirement of negligence that loss must flow from danger created by the respondent. In relation to the police, there are good public policy reasons for maintaining this distinction as public authorities generally do not create the danger that they are asked to intervene in.

For example, if the police are called to respond to an armed robbery at a shop, that armed robbery will already be underway by the time that the police arrive. If the robber shoots the shopkeeper before the Police apprehend him, the cause of injury to the shopkeeper is still the armed robber. This is true, notwithstanding the fact that the police failed to confer the benefit of protection that the shopkeeper might have hoped for.

As such, liability can only be established against the police where a Claimant can point to specific action taken by the police that caused them to suffer loss.

Returning to the example of the armed robber, if the robber flees into crowded street and the police knock an innocent bystander to the ground whilst in pursuit, the cause of any harm suffered by the bystander is the police. In this scenario, the police created a new danger that cannot be attributed to the presence of the armed robber.

Subject to the individual circumstances, the bystander in this scenario is likely to have a valid claim against the police in negligence as:

- 1) it is reasonably foreseeable that a suspect might resist arrest,
- 2) it is likely that the police will have foreseen that as a risk, and
- 3) there is a the reasonably foreseeable risk of causing injury to bystanders flowing from the risk that is sufficient to create a duty of care.

These were the facts in *Robinson*.

As such, if the actions taken by the police can only be described in failures to prevent harm caused by pre-existing dangers, rather than by descriptions of positive conduct that have caused harm in and of themselves, the police will not be deemed to have assumed a duty to exercise reasonable care to protect the claimant from harm.

Assumption of Responsibility

The courts have deemed that the police's knowledge of a danger that they have the power to address (*Stovin*), the arrival of the police on the scene of the potential danger (*Capital & Counties; Sandhar*), and / or a history of the public authority intervening in similar situations (*Gorringe*) are all insufficient to give rise to a duty of care. As such, a duty of care cannot be founded upon a reasonable expectation for the public authority to exercise their powers in specific circumstances.

In cases where it cannot be established that the actions of a police caused a potential claimant to suffer harm, that claimant must be able to demonstrate that the police either assumed responsibility for either the claimant themselves or for the situation that created the danger. This is a high hurdle, and there will only be a limited number of cases that meet this test.

In *Tindall*, Mrs Tindall was unable to establish that the police assumed responsibility for Mr Tindall or for the scene of the accident, and so her claim had to fail. However, there have been cases where responsibility has been deemed by the Courts to have been assumed by the police. For example, in *Alcock v Chief Constable of South Yorkshire* [1991] 3 W.L.R. 1057 the police assumed responsibility for control of the crowds at Hillsborough stadium. As such the police were liable for the harm suffered by those who were crushed in the Leppings Lane end. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 prison officers assumed responsibility for trainees whom they knew (or ought to have known) would try and escape by vessel. As such, the prison officers were liable for the damage to the vessels that was caused by the trainees.

In the future, those advising claimants or the police should pay close attention to any features of the case that may suggest that the police have assumed responsibility. Given the Court's analysis in *Tindall*, assumption of responsibility by the police is likely to be established in cases such as the following:

- Where a person is injured at a protest as a result of the police 'kettling' an unreasonable number of protestors in insufficient space.
- Where property is unreasonably damaged in the execution of a search warrant.
- Where a person is injured / harassed and / or threatened with harm as a result of the police erroneously disclosing their identity to alleged perpetrators of crime without consent.
- Where a person who the police know to be a risk of self-harm commits suicide in police detention.

Conclusions

The judgment in *Tindall* has clarified the relevant features of valid claims against public authorities for breach of duty to exercise reasonable care to protect individuals from harm. In the event that the claimant can neither prove that the public authority caused their loss nor assumed responsibility, the claimant is unlikely to have a cause of action in negligence. That is not to say, however, that the claimant is left without a legal remedy as there is no statutory power that is inherently immune from challenge via judicial review.



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