Insight 218

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

In this week's edition of Insight, we consider the Court of Appeal decision of *Tindall v Chief Constable of Thames Valley Police [2022] EWCA*.

In this case, the Court of Appeal considered the duty of a public authority to take action to prevent harm to individual members of the public.

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Tindall v Chief Constable of Thames Valley Police

Background

The claimant's claim arose out of a fatal road traffic accident which occurred on 4 March 2014. The claimant's husband Mr Malcolm Tindall was killed whilst driving on the A413 road between Wendover and Amersham. A car driven in the opposite direction by a Mr Carl Bird went out of control on black ice and collided head on with Mr Tindall's car. Mr Bird was also killed.

There had been an earlier accident on the same stretch of road about an hour earlier involving another driver Mr Kendall, also caused by black ice. Police officers had attended the scene of the earlier accident. They were at the scene for approximately 20 minutes. While they cleared debris from the road, they put up a "Police Slow" sign by the carriageway. Once they had completed clearing the debris the police left taking the "Police Slow" sign with them.

The claimant alleged the police officers conduct at and on leaving the site was negligent.

The Chief Constable applied to strike out the claimant's claim as disclosing no reasonable cause of action or alternatively for summary judgment. The application was heard by Master McCloud who refused both applications.

The Chief Constable appealed that decision.

The hearing before Master McCloud

Master McCloud summarised the facts as follows:

- Mr Kendall had an accident on a fairly fast stretch of country road when a portion of the road had frozen over causing black ice. Mr Kendall's vehicle came off the road, but he did not suffer life threatening injuries. Whilst waiting for rescue Mr Kendall warned other road users to slow down. When the police attended Mr Kendall advised the police the situation was dangerous.
- During the rescue the police put up a warning sign. Once the scene was cleared the police left but black ice remained. Nobody remained to warn traffic, no signs were left, and no steps were taken to ensure further traffic knew of the hazard.
- Not long afterwards the accident involving Mr Tindall and Mr Bird occurred.

Having considered the facts, the Master considered that the orthodox legal position is that absent specific provision creating civil liability, public authorities are in the same position as other individuals and there is no positive duty to protect individuals from harm. If, however a public authority takes steps which create or make worse a source of danger they may be held to come under a duty of care towards those foreseeably affected.

After considering case law the Master concluded:

"What amounts to intervention which makes things worse is a very fact dependant exercise. In this case, we have police who actively attended, placed a warning sign, arranged removal of a person who was engaged in warning traffic, then removing the warning sign after having taken only minimal steps to render the road safe. This may very well on the facts amount to sufficient intervention that they made matters worse, both in relation to how the position was at the time Mr Kendall was warning traffic and at the time they erected the warning sign. I cannot say that the case as pleaded discloses no good legal grounds or stands only a fanciful chance of success."

The Master dismissed the applications made by the Chief Constable.

The Chief Constable appealed the decision.

The grounds of appeal

1. The Master erred in concluding that it was arguable the Chief Constable owed a duty to the claimant because his officers had made things worse by attending at the accident and leaving again, even though they did nothing which created or increased the hazard posed by ice on the road.
2. The Master erred in concluding it was arguable that police officers owed a duty because they had taken control and assumed responsibility for the accident scene.
3. The Master erred in concluding that the point of law in the appeal could only be determined after a trial of the facts.

The Chief Constable's submissions

- In respect of ground 1, it was submitted that nothing done by the police (other than their arrival at the scene) influenced Mr Kendall to leave the scene in the ambulance. Therefore, if Mr Kendall's departure removed one potential source of warnings to approaching traffic it was not caused by the police. Further the removal of their sign by the police was not a negligent act that "made matters worse". It restored the road to the condition in which they found it save only that they had swept up debris.
- In respect of ground 2, the Master's decision was inconsistent with the principle that a public authority does not owe a duty of care merely because it has statutory or other public law powers or duties to improve safety.
- In respect of ground 3, all relevant facts had been pleaded and there was no advantage letting the issue go forward to trial.

The claimant's submissions

- In respect of ground 1, the police came to a situation where the alternative rescuer Mr Kendall was already in situ and their attendance made matters worse. Removing the means of warning which had previously

been undertaken by Mr Kendall was clearly part of the overall positive actions of the police which made the situation worse than if they had not intervened at all.

- In respect of ground 2, the police took control of the scene and the dangerous road. They had the ability to control the risk posed by the black ice or at least to influence the outcome.
- In respect of ground 3, the Master was justified in concluding the issue should be determined at trial due to the fact sensitive nature of any decision on the existence or otherwise of a duty of care.

The Court of Appeal decision

"The claimant's case at its highest is that the arrival and presence of the police caused Mr Kendall to assume (privately) that they would act in a certain way, which influenced him to decide for himself to go to hospital. That is not a proper basis for holding that the police came under a private law duty to prevent road users from suffering harm. The allegation that negligence on the part of the police caused Mr Kendall to cease his own attempts to warn other motorists is equally unsupportable.

By the time that Mr Kendall decided to leave in the ambulance, the police had done nothing that could reasonably be described as negligent. I reject the submission that the police made matters worse by reference to the departure of Mr Kendall. They failed to take steps that might have prevented harm being suffered

but they did not make matters worse: they merely left the road as they found it."

In relation to ground 2, the Court of Appeal stated:

"I cannot accept the claimant's submission that a duty can arise in circumstances "where a defendant had the power to exercise physical control, or at least influence, over a third party, including a physical scene (such as the accident scene in the present case) and, absent their negligence ought to have exercised such physical control". This submission is far to wide. If correct it would mean that wherever a public authority has the power to prevent harm and, if acting competently, ought to have prevented it, then a duty to prevent the harm arises. This is directly contrary to the authorities"

"What occurred was a transient and ineffectual response by officers in the exercise of power. It did not involve any assumption of responsibility to other road users in general or to Mr Tindall for the prevention of harm caused by a danger for the existence of which the police were not responsible".

In respect of ground 3 the Court of Appeal stated

"I can see no reason why the point of law in this appeal can only be decided after a trial. There is no reason to think further examination of the facts could lead to a different outcome".

The appeal by the Chief Constable was allowed.

Conclusion

The Court of Appeal summarised the state of the law as follows:

- A public authority will not generally be held liable where it has intervened but has done so ineffectually. In this case, the police could have done more such as waiting for a gritter to arrive but there was no duty on them to do so. The police did not take any active steps to prevent harm to others but that in itself did not make the situation worse.
- Knowledge of the danger which a public authority has the power to deal with is not sufficient to give rise to a duty of care to address it effectually or to prevent harm from arising from that danger.
- The mere arrival of a public authority at a scene of potential danger is not sufficient to find a duty of care.
- The circumstances in which the police or a public authority will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited.

The decision of the Court of Appeal confirms that as long as the actions by a public authority have not made the situation worse then subject to certain exceptions the claim against the public authority is unlikely to succeed.

The Court of Appeal stated that "transient and ineffective" intervention was insufficient to involve liability attaching to a public authority. Whilst it is considered claims against, public authorities will concentrate on trying to prove the actions of their employees have made a situation worse, the Court of Appeal's comments make this approach more difficult.

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