Michaelmas Term
[2024] UKSC 33
On appeal from: [2022] EWCA Civ 25

JUDGMENT

Tindall and another (Appellants) *v* Chief Constable of Thames Valley Police (Respondent)

before

Lord Hodge, Deputy President
Lord Briggs
Lord Leggatt
Lord Burrows
Lady Simler

JUDGMENT GIVEN ON
23 October 2024

Heard on 26 and 27 June 2024

Appellants
Nicholas Bowen KC
Duncan Fairgrieve KC (Hon)
David Lemer
(Instructed by Howard Kennedy LLP)

Respondent
Andrew Warnock KC
Ella Davis
(Instructed by DAC Beachcroft Claims Ltd)

LORD LEGGATT AND LORD BURROWS (with whom Lord Hodge, Lord Briggs and Lady Simler agree):

1. Introduction

1. It has long been recognised that the tort of negligence draws a fundamental distinction between acts and omissions or, in the more illuminating language adopted in recent years, between making matters worse (or harming) and failing to confer a benefit (or to protect from harm). As a general rule, a person has no common law duty to protect another person from harm or to take care to do so: liability can generally arise only if a person acts in a way which makes another worse off as a result. In recent years this distinction has taken on added significance because it is now firmly established (or re-established) that the liability of public authorities in the tort of negligence to pay compensation is governed by the same principles that apply to private individuals. Many public authorities - notably, protective and rescue services such as the police force and fire brigade - have statutory powers and duties to protect the public from harm. But failure to do so, however blameworthy, does not make the authority liable in the tort of negligence to pay compensation to an injured person unless, applying the same principles, a private individual would have been so liable. That means that to recover such compensation a claimant generally needs to show that the public authority did not just fail to protect the claimant from harm but actually caused harm to the claimant.

2. Drawing this distinction is not always straightforward. In this case we are faced with a claim against a public authority, the police, which raises in acute form a question about precisely where the dividing line falls between failing to protect a person from harm and making matters worse. The claimant (and appellant), Valerie Tindall, sues as the widow and administratrix of the estate of her late husband, Malcolm Tindall, who died in a road traffic accident. The respondent is the Chief Constable of Thames Valley Police. The chief constable is one of two defendants sued (the other defendant, not involved in this appeal, is the relevant highway authority, Buckinghamshire County Council). The primary claim is that the response of the police to an earlier accident on the same stretch of road made matters worse. Alternatively, it is argued that the case falls within one of the exceptions to the general rule that no duty of care is owed to protect a person from harm.

3. The appeal arises on an application by the chief constable to strike out the claim on the ground that the facts agreed or alleged do not disclose a valid claim in law or, alternatively, for summary judgment on the ground that the claim has no real prospect of success. That application failed at first instance but succeeded on an appeal to the Court of Appeal. The claimant appeals from that decision.

4. We will first summarise the material facts which are either agreed or are alleged in the claimant's particulars of claim and witness evidence. For present purposes it is to be assumed that the facts alleged will be proved if the claim proceeds to a trial. After noting the decisions reached below, we will identify the central legal principles to be derived from the case law. We will then examine whether the facts agreed or alleged disclose a claim against the chief constable which is capable of succeeding as a matter of law.

2. The facts (agreed or alleged)

(1) The first accident

5. At approximately 04.30 on 4 March 2014 Martin Kendall lost control of his car on an area of black ice, while travelling southbound on the A413 in the direction of High Wycombe. Mr Kendall's car slid and rolled into a roadside ditch. Although he was in some pain, he was not seriously injured and was able to get out of his car. Having inspected the black ice, Mr Kendall, who had previously worked as a road-gritter for ten years, realised that this had been the cause of his accident and that it presented an imminent danger to other road users. Given the dangerous state of the road, Mr Kendall waved vigorously to a passing van and other traffic. He has said in a witness statement that he was trying to encourage them to stop, or at least to slow down, in order to avoid the risk of a further accident.

6. Mr Kendall then called 101 and spoke to the Thames Valley Police civilian call handler. He relayed the facts of the accident, that his back and chest were hurting and that he had tried to flag down a van, but the van had slowed but did not stop. During the call Mr Kendall told the call handler that there was ice all over the road, which had caused him to spin off. The call handler informed Mr Kendall that police officers were on their way to the scene and that they had been warned both about the ice and that the road was dark and fast. The call handler remarked that, if another car came off, the police could have a really big problem.

7. The call lasted 13 minutes. During that time Mr Kendall did not continue his attempts to flag down the traffic. The call handler allocated the incident to PCs Irwin, Flanagan and Stamp. As Mr Kendall finished his call, at 05.03, PCs Irwin and Flanagan arrived at the scene in a police van. Police protocols did not require the van to carry signage used by road traffic officers to slow down traffic and to warn of up-coming hazards. At 05.06 PC Stamp arrived in a panda car. This vehicle was required under internal police protocols to carry such signs but was not properly equipped as it was

only carrying one "police slow" sign instead of two. At or around the same time fire and ambulance crews arrived.

8. All three police officers understood that they were being called to an incident where there was a localised ice hazard on the carriageway. They were further alerted to the ice hazard by Mr Kendall and by a conversation with the attending fire crew, one of whom stated words to the effect that "I'm sure there will be another one joining it later".

9. On arrival, the police officers spoke to Mr Kendall and inspected his vehicle. Mr Kendall was asked how the accident had happened and he informed the officers about the ice. As Mr Kendall spoke to the officers, vehicles were slowing down because of the blue (emergency) lights. Mr Kendall was given a breathalyser test and was then placed in the care of the ambulance service by one of the police officers. Mr Kendall told the attending paramedic that he had pains in his back and neck. He was placed on a stretcher and left the scene in an ambulance.

10. While the police officers were at the scene, the "police slow" road sign which they had with them was placed by PC Irwin on the northbound carriageway. PC Flanagan swept the road and checked for, and removed, the debris from the accident. PC Stamp then called the Thames Valley Police control centre to request the attendance of a gritter, but he did not communicate the urgency of the request to the call handler.

11. At 05.26, after Mr Kendall had departed in the ambulance, the police officers left the scene and returned to Amersham police station. When they left, PC Irwin removed the single "police slow" sign that had earlier been placed on the northbound carriageway. The fire crew left the scene at around the same time, having satisfied themselves that Mr Kendall had been taken to hospital and that it was safe for his vehicle to remain where it was.

(2) The fatal accident

12. At some point between 05.45 and 05.52 Carl Bird was driving northbound on the A413, in the direction of Wendover. He lost control of his car on the same area of black ice, some 184 metres from where Mr Kendall's car ended up. His vehicle crossed into the path of the car driven by Mr Tindall, which was travelling in the opposite direction. A head-on collision occurred, with both vehicles travelling at an estimated speed of 50 mph. Mr Tindall and Mr Bird died either on impact or shortly thereafter. Mr Bird's passenger, Melanie Parker, was airlifted to hospital and survived.

(3) IPCC investigation, disciplinary tribunal and inquest

13. The police officers' conduct was considered by the Independent Police Complaints Commission (IPCC), by a police disciplinary tribunal and at an inquest conducted in compliance with article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which concerns the right to life).

14. In a report dated 15 October 2016, the IPCC concluded that the officers had a case to answer for gross negligence manslaughter and misconduct in public office. The case was referred to the Crown Prosecution Service, which decided not to prosecute the officers. Their conduct was, however, the subject of disciplinary proceedings. The police disciplinary tribunal found that PCs Irwin and Flanagan were guilty of misconduct and PC Stamp of gross misconduct. In their evidence in the disciplinary proceedings, all the officers stated that they had not received training in dealing with accidents on a single carriageway, as distinct from a dual carriageway. The tribunal found, in particular, that there had been errors by the police officers in the discharge of their duty to carry out an investigation at the scene of an accident as trained; and that PC Stamp, without knowing whether a gritter was on its way, should have reevaluated the situation and done more.

15. On 16 November 2017, following a five-week inquest, the jury gave a narrative verdict which stated that the police officers "should" have done more. The jury found: that there was a localised patch of ice; that the cause of the road being in that condition was excess water which froze forming ice; that the highway authority responsible for the road (Buckinghamshire County Council) had failed to investigate the cause of the excess water and take appropriate action to stop the water reaching the A413; and that the highway authority and the police, on the basis of the verbal information received, should have carried out a detailed investigation prior to, and at the scene of, Mr Kendall's accident to identify the root cause. The jury also found that the following actions should have been carried out after Mr Kendall's accident: appropriate signs should have been placed; gritters should have been requested and the police should have stayed at the scene until the gritters arrived; the road should have been closed; and appropriate support should have been requested.

(4) Mr Kendall's evidence

16. Mr Kendall has made a witness statement dated 7 November 2018 for the purposes of these proceedings in which he states what he would have done had the police not arrived at the scene at all. He says that:

(i) He would have done his very best to warn other motorists of the sheet ice.

(ii) He would have continued to wave his arms and would have attempted to stop each car that passed by.

(iii) He was optimistic that his continued efforts would have persuaded other motorists to stop and to assist him in slowing or stopping the traffic.

(iv) He would have tried to get the red triangle from the boot of his vehicle, although he acknowledged that this may have been difficult given that his car was in the ditch and the doors were partially jammed.

(v) In the absence of the police, he would have asked the fire service to do what they could to make the road safe; most obviously by closing the road, leaving an emergency vehicle with flashing lights, or erecting warning signs.

17. For the purposes of this appeal, the chief constable accepts that the court should assume that, but for the arrival of the police, Mr Kendall would have continued his attempts to alert other road users. The claimant accepts that the police did not say or do anything (either directly to Mr Kendall or generally) to encourage him to stop his attempts or to go in the ambulance, still less did they direct, or in any way coerce, him to stop what he was doing and leave.

3. The decisions below

(1) The High Court

18. In the High Court, Master McCloud held that the claim should not be struck out and that summary judgment should not be given: [2020] EWHC 837(QB); [2021] RTR 6. Her central reasoning was that whether, on the facts, the actions of the police amounted to an intervention that made matters worse is a very fact dependent exercise which cannot fairly be undertaken without a full consideration of the evidence at a trial. The same, in her view, applied to the alternative argument that the police, by their actions, had taken control and assumed responsibility in a way that gave rise to a duty of care to protect Mr Tindall from harm.

(2) The Court of Appeal

19. The chief constable appealed to the Court of Appeal, which allowed the appeal (Stuart-Smith LJ giving the judgment, with which Thirlwall and Nicola Davies LJJ agreed): [2022] EWCA Civ 25; [2022] 4 WLR 104. Stuart-Smith LJ's central reasoning was as follows:

> (i) After reviewing in some detail the main relevant authorities, Stuart-Smith LJ set out, at para 54, a summary of principles that he derived from them, including the central principle that "[i]n cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually … and making matters worse."
>
> (ii) Looking first at making matters worse, the claimant's case at its highest was 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 in the ambulance. This was not sufficient to give rise to a duty of care. The allegation that negligence of the police caused Mr Kendall to cease his own attempts to warn other motorists was also unsupportable. "By the time that Mr Kendall decided to leave in the ambulance the police had not done anything that could reasonably be described as negligent which may have contributed to his decision" (para 66). Nor had they made matters worse by putting out a warning sign and sweeping debris from the road, and then taking down the sign and leaving: this 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" (para 67).
>
> (iii) Turning to failure to confer a benefit, there was nothing in the claimant's argument that a duty of care to protect Mr Tindall from harm arose from physical control, or the power to exercise such control, over the accident scene. There was no analogy between the facts of this case and that of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (see para 79 below), where prison officers had control over young offenders in their custody. Further, there was nothing in the pleaded facts that could justify a finding that the police assumed responsibility to Mr Tindall or other road users to protect them from harm caused by a danger for the existence of which the police were not responsible. All that occurred was an ineffectual response by police officers in the exercise of a power, which on authority is insufficient (paras 71-74).

(iv) Finally, Master McCloud had erred in concluding that the point of law in this appeal could only be decided after trial. Stuart-Smith LJ said, at para 75:

> "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."

4. Legal principles

20. There can be no doubt on these facts 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. But as noted at the start of this judgment, it does not follow that they were in breach of a duty of care in the tort of negligence owed to particular individuals. As explained by Lord Toulson in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732, para 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."

21. This basic principle is not in dispute on this appeal. Nor are the "ordinary principles of the common law" referred to by Lord Toulson in *Michael* and, in particular, the fundamental distinction between making matters worse and failing to confer a benefit. To see how this distinction is drawn in cases of the present kind, and the recognition of exceptions to the general rule that there is no duty of care to confer a benefit, it is helpful to set out, in outline, the facts and the essential reasoning in six past cases. Three of these concerned whether the police owed a duty of care in the tort of negligence and the other three raised that question in relation to other public authorities.

(1) East Suffolk

22. In *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 the respondents' land was flooded when a very high tide made a breach in a sea wall. A public authority with power to repair the sea wall carried out the work so inefficiently that the flooding continued for 178 days, causing further damage, though the judge found that with the exercise of reasonable skill and care the wall could have been repaired in 14 days. The House of Lords held that the public authority was under no liability in the tort of negligence to the respondents.

23. Although not using this precise terminology, a critical distinction was drawn between making matters worse than they would have been without the intervention of the authority and failing to make things better. There was a duty of care not to do anything to make matters worse, but that was all. Thus, Viscount Simon said, at pp 84-85:

> "If, for example, the appellants, by their unskilful proceedings had caused a further area of the respondents' land to be flooded, or had prolonged the period of flooding beyond what it would have been if they had never interfered, they would be liable. But … nothing of this sort happened. The respondents would have gained if the flooding had been stopped sooner; their complaint against the appellants is that they did not act with sufficient skill to stop it more promptly; but the respondents cannot point to any injury inflicted upon them by the appellant Board …"

Lord Porter said, at p 105:

> "[W]here, as here, the damage was not caused by any positive act on the part of the appellants but was caused and would have occurred to the like extent if they had taken no steps at all, I cannot see that the loss which the respondents suffered was due to any breach of a duty owed by the appellants. Their duty was to avoid causing damage, not either to prevent future damage due to causes for which they were not responsible or to shorten its incidence."

(2) Ancell

24. We mention *Ancell v McDermott* [1993] 4 All ER 355 primarily because of the similarity with the facts here. The fuel tank of a car had become ruptured, causing diesel fuel to leak from the car onto the road surface for some distance until the car ran out of fuel. A police patrol car noticed diesel fuel on the road and followed the trail to the car which they found stationary and out of fuel. They stopped to assist the driver and sent a radio message that diesel fuel had been spilt on the road but left the scene. Another police officer drove past the scene of the spillage and reported the matter to the relevant highway authority but also did nothing to warn road users of the danger posed by the presence of the diesel fuel on the road surface. Shortly afterwards, a car skidded on the diesel and collided head-on with a lorry. The driver died and her two passengers were injured. They brought claims against the police in the tort of negligence.

25. An application to have the claims struck out failed at first instance but succeeded on appeal. Although some of the reasoning of the Court of Appeal was based on policy considerations which would not now form part of the analysis, the essential point is that the police were held to owe no duty of care to protect road users from hazards or dangers on the road which they had not created.

(3) Capital & Counties

26. In *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 the Court of Appeal decided three appeals involving claims in negligence against fire brigades. The facts of the three cases are instructive.

27. In the first case, against Hampshire County Council, the fire brigade attended the scene of a fire at the claimants' premises which had triggered the operation of a heat-activated sprinkler system. On arrival the fire brigade turned off the sprinkler system. This led to the fire rapidly spreading out of control and destroying the premises. It was found as a fact at the trial that, if the sprinkler system had been left on and the fire brigade had otherwise acted as it did to combat the fire, the premises would not have been destroyed.

28. In the second case, against the London fire brigade, some small fires on waste land abutting the claimants' premises had already been extinguished when the fire brigade arrived. The fire brigade left without inspecting the claimants' premises, where a fire later broke out. The claimants sued the fire authority alleging negligence in failing

to ensure that all fires and risk of further fires in the area had been eliminated before leaving.

29. In the third case, against the West Yorkshire fire authority, the claimant's chapel was destroyed by a fire which the fire brigade failed to extinguish because of a lack of water. Some of the nearby fire hydrants failed to work and others were not found, or were found so late to be of little use. The claimant sued the fire authority alleging negligence in failing previously to inspect the hydrants and ensure that they were in working order and in failing to locate some of the hydrants sooner.

30. In the first (Hampshire) case the Court of Appeal upheld the judge's decision that the fire brigade was liable in negligence. But there was held to be no duty of care in the other two cases. The difference was that in the Hampshire case the fire brigade, by turning off the sprinkler system, had made matters worse, whereas in the London and West Yorkshire cases the failures of the fire brigade made things no worse than if they had not intervened at all.

31. Stuart-Smith LJ, who gave the judgment of the court, began by considering whether there is a common law duty upon the fire brigade to answer calls to fires or to take reasonable care to do so. While accepting that the public may hope that the fire brigade will attend and extinguish the fire, he concluded, at p 1030, that:

> "the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable."

Given that a fire brigade or other rescue service will not be in breach of a common law duty of care if it makes no attempt at rescue at all, it would be illogical if liability could arise from making an attempt which is ineffectual. As Stuart-Smith LJ said, at p 1037:

> "It is not clear why a rescuer who is not under an obligation to attempt a rescue should assume a duty to be careful in effecting the rescue merely by undertaking the attempt. It would be strange if such a person were liable to the dependants of a drowning man who but for his carelessness he would have saved, but without the attempt would have

> drowned anyway. … This is consistent with the *East Suffolk* case."

32. Stuart-Smith LJ observed, at p 1031, that:

> "The peculiarity of fire brigades, together with other rescue services … and protective services such as the police, is that they do not as a rule create the danger which causes injury to the plaintiff or loss to his property. For the most part they act in the context of a danger already created and damage already caused, whether by the forces of nature, or the acts of some third party or even of the plaintiff himself, and whether those acts are criminal, negligent or non-culpable. But where the rescue/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment the plaintiff can recover."

Stuart-Smith LJ commented, at p 1032, that it can make no difference in principle whether the rescue/protective service creates an entirely new kind of danger or exacerbates an existing one. The Hampshire case was an example of the latter. By turning the sprinklers off, the fire brigade created a fresh danger, albeit of the same kind and of the same nature, namely fire.

33. Stuart-Smith LJ drew an analogy, at p 1034, between the Hampshire case and the following hypothetical variant of the facts in *East Suffolk*:

> "Suppose that after the main sea wall had been breached the plaintiff had constructed a temporary wall which contained the flood water to a relatively small area, and that the defendants then came upon the land to repair the main wall and negligently destroyed the plaintiff's temporary wall so that the area of the flooding increased before the repairs were completed. In such circumstances the defendants would at least prima facie be liable for the extra damage unless they could show - and the burden would be upon them - that the damage would have occurred in any event, even if they had never come upon the scene. If they were unable to discharge that burden, then they would be liable."

Applying that reasoning, the defendants' inability in the Hampshire case to show that the building would still have burned down if the fire brigade had not turned up at all and the sprinklers had been left on, rendered them liable.

34. Stuart-Smith LJ also made clear that taking control of the fire-fighting operation did not carry with it a duty of care to put out the fire. He said, at p 1036:

> "By taking such control that officer is not to be seen as undertaking a voluntary assumption of responsibility to the owner of the premises on fire, whether or not the latter is in fact reliant upon it."

(4) Gorringe

35. In *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057 the claimant was seriously injured in a road accident which occurred where there was a sharp crest in the road. Some years earlier the word "slow" had been painted on the road before the crest, but the sign had subsequently disappeared. The claimant sued the highway authority, contending that the accident had been caused by the authority's negligence in failing to give her proper warning of the danger posed by the crest in the road and, in particular, to provide a "slow" sign. The House of Lords held that the highway authority owed her no duty. Lord Hoffmann said, at para 17:

> "Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it."

36. The House of Lords rejected an argument that because the highway authority had once painted the "slow" sign on the road they were under a duty to repaint the sign when it became obliterated. In the words of Lord Rodger of Earlsferry, at para 88:

> "When that happened, the situation returned to what it had been before the defendants decided to exercise their statutory powers by painting it in the first place. They were not under

> any common law duty to exercise their power to repaint it and are not liable because, for whatever reason, they did not do so."

(5) Michael

37. In *Michael*, the victim made an emergency 999 call to the police from her home saying that she was in danger from her former partner and that he had said he would be returning to kill her. Instead of being logged as a call requiring an immediate response envisaging attendance within around five minutes, the call was incorrectly logged as having a lower priority. Some 15 minutes later, before the police had responded to the call, the victim called 999 again and was heard to scream. This time the police responded immediately but, on arrival, found that the victim had been stabbed to death. The victim's estate and dependants brought claims, including a claim in negligence, against the police. The Supreme Court, sitting as a panel of seven Justices, by a majority of five to two upheld the decision of the Court of Appeal giving summary judgment dismissing the negligence claim.

38. Lord Toulson, who gave the majority judgment, affirmed the general rule that there is no duty of care to prevent harm caused by others. He said, at para 97:

> "The fundamental reason … is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else."

He went on to clarify that the rule is not absolute and referred, at paras 98-100, to what he described as two well recognised exceptions. The first, as exemplified by *Dorset Yacht* (see para 19(iii) above and para 79 below), is a situation where the defendant is in a position of control over the third party who has directly caused the damage. The second is where there is an assumption of responsibility by the defendant to the claimant to safeguard the claimant. Neither exception applied on the facts of the case. In particular, the Supreme Court rejected an argument that there had been an assumption of responsibility by the police call handler. The only assurance given was that the call would be passed on to the South Wales Police. The call handler gave no promise as to how quickly the police would respond.

(6) Robinson

39. In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736 the Supreme Court reaffirmed the principles stated in *Michael* but distinguished that decision on the facts. Two police officers had attempted to arrest a suspected drug dealer in a shopping street in the centre of Huddersfield. In the ensuing struggle, they knocked into the claimant, who was a relatively frail lady aged 76, and all fell to the ground with the claimant underneath. She brought a claim in negligence against the chief constable for her injuries. The trial judge held that the police had acted negligently but that the police had immunity against claims in negligence. The Court of Appeal upheld the judge's decision. The Supreme Court reversed it.

40. Lord Reed, giving the leading judgment, emphasised the fundamental distinction between duties not to cause harm to other people or their property and duties to provide them with benefits (including the prevention of harm caused by other agencies). The law of negligence generally imposes only duties not to cause harm; duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by law, as, for example, where there has been an assumption of responsibility by the defendant to the claimant to take care to confer the benefit: see para 69(4). Lord Reed also stressed that the same principles apply to private individuals and public authorities alike: paras 32-34.

41. The facts of *Robinson*, however, did not concern a failure to confer a benefit. The complaint was not that the police officers had negligently failed to protect the claimant against the risk of being injured. The case fell on the other side of the line where the actions of the police had resulted in her being injured. It was reasonably foreseeable that in attempting to arrest the suspect at a time when he was close to pedestrians - especially physically vulnerable pedestrians such as the claimant - they might be knocked into and injured in the course of his attempting to avoid arrest. This reasonably foreseeable risk of injury gave rise to a duty of care to the claimant: see paras 73-74.

42. At para 34, Lord Reed cited, as a helpful summary of the exceptions to the general rule that there is no duty of care to protect a person from harm, the opening sentence of an article by Stelios Tofaris and Sandy Steel, "Negligence liability for omissions and the police" (2016) 75 CLJ 128:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done

> something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

43. This summary has since been cited again by this court in *N v Poole Borough Council* [2019] UKSC 25; [2020] AC 780, para 76, and *HXA v Surrey County Council* [2023] UKSC 52; [2024] 1 WLR 335, para 88, and by the Privy Council in *Great Lakes Reinsurance (UK) plc v RAV Bahamas Ltd* [2024] UKPC 11, para 21. Although this summary should clearly not be read as if it were a statute (any more than should any judicial statements), it is a useful starting-point for analysis.

(7) Summary of principles from the above cases

44. Having examined some of the main cases, we can summarise the central principles to be derived from them as follows:

> (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.
>
> (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.
>
> (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*).

(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.

45. A further point may usefully be made about the need to view the defendant's activity as a whole. This dispels the objection that it can be difficult or even arbitrary to distinguish between acts and omissions. Take, for example, what Lord Nicholls of Birkenhead in *Stovin v Wise* [1996] AC 923, 930, described as the classic illustration of failing to apply the handbrake when parking a car, with the result that the car rolls down a hill and causes damage to another vehicle. On one view the damage in this example results from a mere omission. Any difficulty in explaining the common sense conclusion that the driver owes a duty of care disappears, however, when the focus is directed at the whole activity (of driving) and the question is asked whether the damage would have occurred if the defendant had not engaged in that activity. Plainly the answer is "no". So viewed, it can readily be seen that the case is one of making matters worse.

5. The claimant's case

46. The primary way in which the claim against the chief constable in this case is put involves an argument that the police made matters worse. The argument is founded on the allegation - accepted as a fact for the purposes of this appeal (see para 17 above) - that, but for the arrival of the police at the scene of Mr Kendall's accident, Mr Kendall would have continued making attempts to warn other motorists of the ice on the road. The claimant contends that the police made matters worse by displacing Mr Kendall's efforts without taking any comparable steps of their own to warn motorists of the hazard. While the police were at the scene, the blue lights and the "police slow" sign placed on the northbound carriageway provided some warning. But once the police left, taking the sign with them, road users were exposed to a risk of injury from skidding on the ice greater than if the police had never attended at all (because in that event Mr Kendall would have persisted in his warning efforts). On these facts, applying the reasoning in *Capital & Counties* (see para 33 above), the burden would be on the police

to show that the accident in which Mr Tindall died would not have been averted by Mr Kendall's efforts.

47. Alternatively, the claimant argues that, applying one of the exceptions to the general rule, the police came under a duty of care to protect from harm road users travelling on the icy stretch of road. In particular, such a duty is said to arise from the fact that the police took control of the scene upon their arrival and then relinquished control without having taken any steps to remove or reduce the hazard to which road users were then again exposed.

6. Did the police owe a duty of care by making matters worse?

48. On this appeal counsel for the claimant have argued that, in rejecting the claimant's case that the police made matters worse, the Court of Appeal put the test too high. It was wrong, they submit, to require the claimant to identify a specific positive act done by a police officer which encouraged or coerced Mr Kendall to stop his attempts to warn other motorists and leave in the ambulance. It is enough that the attendance of the police at the scene by itself had this effect. The fact that Mr Kendall chose to leave (because of his private expectation about what the police would do) is not an answer to the claim. What is critical is that Mr Tindall and other motorists driving along the relevant stretch of road afterwards were exposed to a greater risk of physical injury than they would have been if the police had never attended the scene of Mr Kendall's accident at all.

49. In advancing this argument, the claimant's counsel relied both on the submission that the police made matters worse by creating an additional danger and on the second "exception" suggested by Tofaris and Steel (see para 42 above). We see no substantive difference between these contentions. The "exception" relied on - that A has done something which prevents another from protecting B from a source of danger - is, on analysis, an instance of the general rule: a particular way of making matters worse by creating an additional danger. Indeed, Tofaris and Steel themselves recognised this when they returned to this category of case later in their article in analysing when a duty of care is owed by the police. In that context they described the category as one "where the police's involvement prevents alternative means of rescue, *thus making the situation worse*" (our emphasis): see "Negligence liability for omissions and the police" (2016) 75 CLJ 128, 149. This is not to deny that this particular form of making B worse off merits particular attention when one is considering "liability for omissions" because of its close factual connection to protecting a person from harm.

50. No case is cited by Tofaris and Steel as an example of this "exception" (whether involving the police or any other actor). The only references given are to earlier academic commentary: namely, Roderick Bagshaw, "The duties of care of emergency service providers" [1999] LMCLQ 71 and Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (2006), pp 161-163. This category of case is, however, considered in more detail by Nicholas McBride and Roderick Bagshaw in their book on *Tort Law*, 6th ed (2018), pp 213-217, under the heading "interference". As they express the principle:

> "[I]f 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."

Duncan Fairgrieve KC (Hon), who presented this part of the claimant's case, relied on this statement of the "interference principle" and submitted that it applies here, substituting the police officers for "A" and drivers using the road for "B", with Mr Kendall as the "someone else".

51. Like Tofaris and Steel, McBride and Bagshaw do not cite any case as direct support for the interference principle. But they suggest that the results of several cases could be explained by it, even if it did not actually form part of the reasoning in those cases. Counsel for the claimant adopted this argument and placed particular reliance on the decision of the Court of Appeal in *Kent v Griffiths* [2001] QB 36.

52. The claimant in that case suffered an asthma attack at her home. Her doctor attended and, at 4.25 pm, telephoned 999 and asked for an ambulance to take her to hospital immediately. When the ambulance failed to arrive, two further telephone calls were made and on each occasion the call handler said that the ambulance would be arriving within a few minutes. The ambulance did not arrive until 5.05 pm. The delay resulted in the claimant suffering a respiratory arrest, which caused brain damage. The Court of Appeal decided that the ambulance service owed a duty of care to the claimant on the basis of an assumption of responsibility arising from the emergency call. Lord Woolf MR also accepted that, if wrong information had not been given about the arrival of the ambulance, the claimant would have been driven to the hospital and arrived before her respiratory arrest: see paras 17 and 49.

53. In *Michael*, para 138, Lord Toulson explained and distinguished *Kent v Griffiths* on the ground that "the call handler gave misleading assurances that an ambulance

would be arriving shortly". In *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50; [2019] AC 831, para 18, Lord Lloyd Jones, with whose judgment the rest of the Supreme Court agreed, also treated this as an alternative basis on which liability was founded in *Kent v Griffiths*. In *Darnley* the claimant had gone to the Accident and Emergency department of the defendant's hospital after sustaining a head injury. He was told by the receptionist that it would be four to five hours before he would be seen. That was inaccurate, as he would have been examined within 30 minutes by a triage nurse, who would have decided how soon he needed to see a doctor. As a result of the inaccurate information given to him, the claimant went home without telling anyone and without being seen by a clinician. At home he collapsed and was returned to hospital by ambulance. Although he underwent neurosurgery, he suffered permanent brain damage which, on the facts found at trial, would have been avoided by prompt intervention if his deterioration had occurred at the hospital. The Supreme Court analysed the case as falling squarely within the general principle that there is a duty of care not to act in such a way as foreseeably to cause physical injury. Providing misleading information which might foreseeably cause physical injury is an example of this: see paras 16-19. In support of this conclusion Lord Lloyd Jones noted "the close analogy between the present case and the alternative basis of decision in *Kent v Griffiths*" (para 20).

54. In the latest edition of their book, published since the hearing of this appeal, McBride and Bagshaw have expressed some reservations about the interference principle. They now say that it is "more controversial than we acknowledged in previous editions of this textbook" and that "there are elements in the case law that place in doubt whether the proposition … is actually correct": see McBride and Bagshaw, *Tort Law*, 7th ed (2024), p 101. One element which has prompted this doubt is the decision of the Court of Appeal in this case, which the authors suggest appears inconsistent with the interference principle.

55. They also refer to *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897, where the coastguard, among other alleged failings, misdirected a Royal Navy helicopter to the wrong area in searching for a canoeing party which had got into severe difficulties at sea. Although the party was eventually rescued, four children later died from hypothermia. A claim in negligence was brought against the coastguard alleging that, if it had acted competently, the rescue would have taken place sooner and the lives saved. The claim was struck out on the ground that the coastguard did not owe the canoeists a duty of care. An argument was made that negligently misdirecting another rescuer, the Royal Navy, was analogous to negligently turning off the sprinkler system in *Capital & Counties* and made the situation worse. May J rejected this argument on the ground that to distinguish between the coastguard misdirecting their own rescuers (which would clearly not give rise to liability) and misdirecting another rescue service would be "quite artificial". He added, at pp 907-908:

> "If there were two helicopters, one belonging to the coastguard and the other to the Royal Navy, it would be nonsensical if the coastguard were liable for misdirections given to one but not the other."

56. Despite the authors' recent misgivings, we consider that the "interference principle" articulated by McBride and Bagshaw is a correct statement of English law. Although there has been no previous English case clearly accepting and applying this principle, it is an alternative way of rationalising the result in *Kent v Griffiths* and one which this court has endorsed in *Darnley*. It follows in any case from first principles. It is 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. There is no reason in principle why the conduct which creates this risk should not consist in acts which are foreseeably likely to have the effect of putting off or preventing someone else from taking steps to protect the claimant from harm. Although it did not involve putting off another person's intervention, the interference by the fire officer in turning off the sprinklers in *Capital & Counties* is analogous. The sprinklers would otherwise have contained the fire and, by turning them off, the fire service prevented that containment and so made matters worse. There is no material distinction between diverting or displacing an object from protecting the claimant from harm and diverting or displacing a person from doing so.

57. We do not agree with the judge in *OLL* that it is artificial or nonsensical to treat different public rescue services for this purpose as independent actors. The relevant question to ask in that case was whether the coastguard and the Royal Navy were distinct legal persons with distinct legal duties and liabilities. Undoubtedly, they were. Thus, the Royal Navy was just as much an external agency as a private rescuer would have been. The reasoning and result in *OLL* have been criticised by commentators on this basis: see Donal Nolan, "The Liability of public authorities for failing to confer benefits" (2001) 127 LQR 260, 274; Sandy Steel, "Rationalising omissions liability in negligence" (2019) 135 LQR 484, 488-489. We agree with those criticisms and consider that, because the misdirections given to the Royal Navy helicopter did arguably make the victims worse off, the case was wrongly decided. It should have been held that the facts alleged fell within the interference principle.

58. We also agree with the claimant that the detailed formulation of the interference principle by McBride and Bagshaw is correct. In particular, it is not enough to show that the defendant has acted in a way which had the effect of putting off or preventing someone else from helping the claimant. Rather, in line with the well-established approach to establishing any duty of care, for a duty of care to arise it is necessary to

show that the defendant knew or ought to have known (ie that it was reasonably foreseeable) that its conduct would have this effect.

59. When questioned by the court, Nicholas Bowen KC for the claimant rightly accepted the consequence that, to succeed in this case, the claimant would need to show that the police knew or ought reasonably to have known 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. At this stage in the analysis, however, the claimant runs into a major factual difficulty.

60. We accept that, on the agreed and alleged facts, the attendance of the police at the scene of Mr Kendall's accident caused Mr Kendall to desist from attempts he would otherwise have made to alert other motorists to the ice on the road. It is not fatal to the claimant's case on causation that nothing was specifically said or done by a police officer to encourage or direct Mr Kendall to stop his attempts to warn other motorists and leave in the ambulance. It is enough, to establish causation, that the attendance of the police at the scene had this effect. Nor was there anything untoward in Mr Kendall's decision to leave. Someone in his position would naturally expect that, once the police had arrived and he had told them about the ice, they would take charge of the situation and alert other road users to the danger.

61. It is also not an answer to the claimant's case to emphasise, as counsel for the defendant did, that nothing done by the police before Mr Kendall left in the ambulance, or which may have contributed to his decision to leave, could reasonably have been described as negligent. To give rise to a duty of care, it would be sufficient that the activity of the police as a whole created a danger, ie that the activity of the police as a whole created an unreasonable and reasonably foreseeable risk of physical harm to the victim. Breach of such a duty (ie negligence) would be established by failure to take reasonable steps to remove this risk.

62. Where the claimant's case breaks down, however, is in relation to what the police knew or ought to have known about Mr Kendall's warning efforts. There is no pleaded allegation that the police were aware that, before calling 101, Mr Kendall had been attempting to warn other motorists of the ice hazard. Nor is it alleged that Mr Kendall said anything to the call handler or to any of the police officers who attended the scene of his accident to suggest that he had any intention of making such attempts. Nor are any other facts alleged from which such an intention could reasonably have been inferred. Close examination of all the available evidence also reveals no basis for such an inference. The focus of the claimant's case has been on Mr Kendall's evidence about what he says he would have done had the police not arrived at the scene. But that is only part of the necessary inquiry. What is also critical is what the police knew or ought to

have known about the role of Mr Kendall and what he would have done but for their arrival. As far as the police were concerned, Mr Kendall was someone who had been injured in an accident and no more than that. He was a victim, not a rescuer.

63. The evidence before the court comprises: two witness statements given by Mr Kendall to the police and a further statement made by him some 4 ½ years after the accident for the purposes of these proceedings; witness statements taken by the police from a member of the ambulance crew and one of the fire officers who attended the scene; a copy of the computerised police log detailing Mr Kendall's call to the police control room and the actions taken in response to it as they occurred; and a transcript of a voice recording of his call to the control room which was prepared for the inquest into Mr Tindall's death. There is nothing in any of this evidence which provides any support for a contention that the police knew or ought to have known that Mr Kendall had made or was intending to make attempts to alert other motorists to the ice hazard on the road.

64. The most favourable evidence to which the claimant can point on this crucial issue is Mr Kendall's evidence that, after he had managed to get out of his car and was standing by the side of the road, he saw a van approaching and waved his arms to try to get it to stop, despite being in pain. He said in his witness statement made for these proceedings that, as soon as the van had passed by without stopping, he decided to ring the police. He said that a few more vehicles passed by while he was on the call, but he did not try to stop them as he was engaged on the phone. The call handler asked him to stay on the phone, and he did so, until the police arrived at the scene.

65. Neither the transcript of the telephone call nor any of Mr Kendall's witness statements record him telling the call handler that he had tried to flag down a vehicle. The only reference in the transcript to any vehicle other than Mr Kendall's own car (and the police vehicle arriving) is a statement by the call handler that he could hear other vehicles - to which Mr Kendall replied:

> "They're just driving past, they're not stopping. It's 4 o'clock in the morning, innit. They're not going to stop."

66. Despite the absence of any supporting evidence, it is alleged in the particulars of claim - and must be assumed for the purpose of this appeal - that Mr Kendall told the call handler "that he had tried to flag down a van but that the van had slowed but failed to stop". That information was, however, entirely consistent with his seeking assistance for himself. The main subject of the call was Mr Kendall's injuries and safety. He said that he needed an ambulance, that he had pain in his chest and back and that he was finding it hard to stand. He also said that a lot of smoke was coming from his car and

was advised to move away from it. Nothing said or allegedly said by Mr Kendall to the call handler gave any reason to think that Mr Kendall had attempted to warn, or would attempt to warn, other motorists of the ice on the road.

67. Stuart-Smith LJ came very close to making this point (see the quotation from para 66 of his judgment set out in para 19(ii) above). However, his focus appears to have been on whether the police had caused Mr Kendall to leave the scene - he concluded that they had not - whereas the crucial question is whether the police could reasonably have foreseen that their attendance would displace attempts that Mr Kendall would otherwise have made to prevent road users from suffering harm. The critical importance of the fact that any such intention on his part was purely private, and was not disclosed to the police, relates to this latter question. Even if the police officers had encouraged or coerced Mr Kendall to leave the scene to go to the hospital, that could not have given rise to any duty to protect road users from harm when the police officers neither knew nor ought to have known that Mr Kendall would otherwise have taken steps to do so.

68. There is therefore a fatal factual lacuna in the claimant's case. When confronted with it, Mr Bowen cited the many judicial statements urging caution before striking out a claim in an area of law which is uncertain and developing, and emphasising the desirability that any further development of the law should be on the basis of actual and not hypothetical facts: see eg *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 740-741; *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557; *Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607, 1613-1614. In the last of these passages Lord Slynn of Hadley described the law of negligence in relation to public authorities as such a developing area. That was a fair description when these cases were decided. But it is not true now. The law has since been settled by successive decisions of this court, particularly the seminal decisions in *Michael* and *Robinson* outlined earlier in this judgment. We agree with the Court of Appeal that the applicable law is clear and not in a state of flux. When it is clear, as it is here, that on the facts alleged taken at their highest no duty of care was owed, it would be unjust and a waste of resources to allow the claim to proceed to a trial.

69. As regards the facts, Mr Bowen was driven to contend that, even if evidence to suggest that the police knew or ought to have known of Mr Kendall's private intentions is currently lacking, such evidence might emerge at a trial. This suggestion is unrealistic. The attitude of Mr Micawber is never a good reason to avoid summary disposal of a claim. But here the hope that something will turn up is particularly unrealistic. Ten years have now elapsed since the events of 4 March 2014. Those events have been investigated in detail by the IPCC, by a police disciplinary tribunal, at an inquest, and for the purposes of bringing these proceedings. It is fanciful to suppose that

any new evidence might emerge that has not yet come to light to support the claimant's case on this point.

70. For this reason, the pleaded facts and evidence relied on by the claimant disclose no reasonable basis for the argument that a duty of care was owed by the police to Mr Tindall because the police made matters worse by displacing Mr Kendall as a rescuer.

7. A footnote on the fire service

71. Although this point does not appear to have been relied on in the courts below, as there is no mention of it in the judgments either of the Master or the Court of Appeal, the particulars of claim include an allegation, at para 58(b), that:

> "but for the attendance of the police, the fire service would in all probability have taken control and remained at the scene and ensured the safety of road users until the ice hazard was cleared."

This argument did not form part of the claimant's opening oral submissions on this appeal. But it was briefly mentioned in the claimant's written case; and, in his reply submissions, Mr Bowen fell back on it as an alternative basis for suggesting that the attendance of the police made matters worse by displacing another source of help. He submitted that, even if the claim based on displacing Mr Kendall cannot succeed, the claimant can rely on a similar argument in relation to the fire brigade.

72. This argument is not sustainable. There are no pleaded facts and there is no evidential basis for the counterfactual allegation made in the particulars of claim about what the fire service would "in all probability" have done. Mr Bowen drew attention to two witness statements dated 20 August and 16 September 2014 made by Mr Pete Tomes, the fire officer who led the crew which attended the scene of Mr Kendall's accident. In those statements Mr Tomes described the role played by the fire service. In short, the fire officers checked that the driver (Mr Kendall) had been able to get out of his vehicle and that the vehicle was not in a position dangerous to other road users. They were not required to carry out any actions in relation to the vehicle and left. There is nothing in this evidence to suggest that the fire crew regarded their role as including responsibility to protect other road users from the hazard of ice or that they would have taken steps to do so but for the presence of the police. Indeed, the evidence is inconsistent with that suggestion. So is the averment in para 40 of the particulars of claim that:

> "At or around the same time [as the police left the scene], the fire crew also left the scene, happy that Mr Kendall had been taken to hospital and believing it safe to leave his car where it had come to rest."

This makes it plain that, as one would expect, the reason for the attendance of the fire crew was limited to securing Mr Kendall and his vehicle and that their departure was not caused by a belief that the police were or would be remaining at the scene to deal with an ice hazard.

73. This alternative attempt to argue that the police owed a duty of care by making matters worse also suffers from the same flaw as the allegation based on what Mr Kendall would allegedly have done but for their attendance. Again, there is no pleading or evidence that the police knew or ought to have known (ie that it was reasonably foreseeable) that they were displacing an activity which the fire service would otherwise have undertaken. For this reason too, this way of putting the claimant's case must fail.

8. Did the police owe a duty of care to protect Mr Tindall from harm?

74. In the alternative to her case based on the allegation that the police made matters worse, the claimant has argued that one (or more) of the exceptions to the general rule applies here. In the claimant's written argument for this appeal all the potential exceptions identified by Tofaris and Steel (see para 42 above) are relied on. Omitting the interference principle, the others are: (i) that A has assumed a responsibility to protect B from a source of danger (not created by A); (ii) that A has a special level of control over that source of danger; and (iii) that A's status creates an obligation to protect B from that danger. In oral submissions David Lemer, who addressed the court on this part of the claimant's case, refined the argument and concentrated almost exclusively on the issue of control.

(1) Assumption of responsibility

75. While somewhat elusive - and possibly having different requirements in different contexts (eg pure economic loss and misrepresentations) - for present purposes an assumption of responsibility involves the idea that a person may, by words or conduct, expressly or impliedly promise (or undertake or give an assurance) to take care to protect another person from harm. In some situations, but not all (for an exception, see *HXA v Surrey County Council*, para 108), it is also a necessary element that the claimant has relied on this promise. An example is provided by *Kent v Griffiths*, where the call

handler for the London Ambulance Service gave assurances that an ambulance would attend with reasonable speed. By contrast, in *Michael* it was found that the police call handler had made no such promise. The principle of assumption of responsibility can also be invoked to explain the duty of care that arises when a person voluntarily accepts a specific role or enters into a specific relationship with another person which carries with it recognised responsibilities to protect the other person's welfare. A classic example is the relationship between a professional person and his or her client or patient.

76. The basic stumbling-block for any argument based on assumption of responsibility in this case is the complete absence of any communication or interaction between the police officers who attended the scene of Mr Kendall's accident and Mr Tindall. The police officers did not say or do anything of which Mr Tindall (or other motorists who drove along the relevant section of road after the police had left) were aware, or on which they could have relied. We find it impossible to see in these circumstances how an assumption of responsibility could be said to arise.

77. It is unnecessary to consider this question any further, however, because Mr Lemer made it clear that the claimant does not before this court seek to advance any argument based on assumption of responsibility except in so far as it can be said to overlap with the claimant's argument based on control.

(2) Control

78. That argument is that, even if the police did nothing to make things 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.

79. The leading authority relied on for the proposition that a position of control may give rise to a duty of care in the exercise of such control is *Dorset Yacht* (although that case has sometimes been alternatively explained as one where the defendants created the danger). Some young offenders were taken on a training exercise under the supervision and control of prison officers to a small island in Poole Harbour. During the night seven boys escaped. In trying to leave the island, they boarded and caused damage to the claimant's yacht. The House of Lords held that the Home Office as the prison authority owed a duty of care to the claimant to prevent the boys under its control from causing damage to the claimant's property.

80. There have been other cases that may be regarded as illustrating this exception. For example, in *Carmarthenshire County Council v Lewis* [1955] AC 549 a three year old boy ran out into the road from the defendant's nursery school. The driver of a lorry swerved to avoid the boy, struck a telegraph post and was killed. His widow successfully brought a claim in negligence against the defendant. Although this was not the main focus of the reasoning in the case, the House of Lords had no difficulty in deciding that a duty of care was owed by the defendant to the deceased, and this can be explained on the basis that the defendant was in a position of control over the child.

81. The claimant contends that the principle of liability based on control is not confined to situations involving an assumption of parental or quasi-parental responsibility but extends to any situation where the defendant has control over a particular source of danger, whether it be a human being (as in the *Carmarthenshire* and *Dorset Yacht* cases) or an artificial or natural hazard, and the claimant is at special risk of suffering harm if such control is lost or relinquished. Mr Lemer submitted that the decision of the Privy Council in *Goldman v Hargrave* [1967] 1 AC 645 can be seen as an example of this broad principle. The defendant in that case was held to be under a duty to take care to prevent a fire which began when a tree on his land was struck by lightning from spreading to his neighbour's land. The claimant argues that this broad principle of liability based on control encompasses the facts of this case.

82. There is no clear authority supporting the broad principle for which the claimant contends. The actual decision in *Goldman v Hargrave* was limited to the duty of an occupier of land to protect a neighbouring landowner from a danger arising on the occupied land. It would be a significant step to extrapolate from this to a danger occurring on land to which all members of the public have a right of access. We do not need to explore this question, however, because, even if such a principle were to be accepted (which we do not need to decide), it plainly cannot apply here. The source of the danger in this case was a patch of black ice which is said in the particulars of claim to have extended for 50-100 yards. This patch of ice, which caused first Mr Kendall and later Mr Bird to lose control of their vehicles, was at some distance from the scene where Mr Kendall's car ended up in a ditch. On the claimant's pleaded case, agreed to be correct for the purpose of this appeal, the distance from that spot to the spot where the fatal accident occurred was 184 metres (see para 12 above).

83. The claimant's allegation that the police took control of the "accident scene" glosses over this point. In so far as the police can be said to have taken control of the "scene" of the accident, the scene in question was where Mr Kendall's car was located. It is not alleged that the police did anything which could on any view be characterised as taking control of the patch of ice which represented the source of danger. On the contrary, one of the criticisms made of the police is precisely that they did nothing at all

about that source of danger. They did not cordon off or close the road. There is no suggestion that they even went to inspect the ice. Indeed, a major complaint is that the police were negligent in failing to inspect the ice or take other necessary measures. That cannot be turned around to say that there was a duty of care consequent on their having taken control of the patch of ice.

84. Counsel for the claimant rightly eschewed reliance on any argument that the existence of a power of control, without an actual exercise of control, is capable of giving rise to a duty of care. At times, however, they appeared to suggest that a duty of care could arise from the fact that the police took steps - attending the scene with blue emergency lights flashing and putting up a sign to encourage motorists to slow down - which temporarily reduced the risk of another accident but which were then terminated when the police left (taking the sign with them). Any such argument is untenable. As illustrated by cases such as *East Suffolk*, *Ancell*, *Capital & Counties* (in particular, the London case) and *Gorringe*, taking steps which are ineffectual, whether because they are inadequate to begin with or because the defendant does not persist in them, cannot give rise to a duty of care.

(3) Status

85. The last head of liability suggested by Tofaris and Steel is that "A's status creates an obligation to protect B from … danger". In their article Tofaris and Steel developed an argument that the police have a special status derived from the fact that they are the primary body legally entitled to intervene and use force to protect citizens from criminal activity. They argued that this status, and the corresponding dependence of members of public on the police for their safety, are enhanced by the fact that a victim cannot generally protect or reasonably be expected to protect herself against a threat of violence. They proposed that the police should be held to owe a duty of care to a person who (as the police know or ought to know) is at a special risk of personal harm: see "Negligence liability for omissions and the police" (2016) 75 CLJ 128, 145-146, 150-151.

86. Whatever merit this argument might otherwise have had, it is irreconcilable with the decision of this court in *Michael*. Tofaris and Steel acknowledged this in their article and expressed the view that *Michael* should be overturned. We have not been invited on this appeal to consider departing from *Michael* and, given the weight of that authority and the further body of authority since founded on it, this would not have been a realistic argument to advance.

87. In their written case, counsel for the claimant made a submission that, given the position of the police as professional emergency responders, the "status exception", although "not an operative exception capable of supporting the existence of a duty of care on its own, … works in tandem with the other exceptions (which are individually capable of supporting a duty of care)". This submission was not developed in either written or oral argument and we cannot make coherent sense of it. It appears, however, to recognise correctly that if, as we have concluded, no other principle supports the existence of a duty of care in this case, the status of the police cannot do so.

10. Conclusion

88. For these reasons, on the facts agreed or alleged in this case, none of the grounds alleged for there being a duty of care owed by the police to Mr Tindall stands up to scrutiny. Applying the interference principle, the police could not be held liable for making matters worse; and none of the possible exceptions to the general rule that there is no duty of care to protect a person from harm can be made out. We would therefore dismiss the appeal.

Postscript

89. On 13 August 2024, more than six weeks after the hearing of the appeal, the claimant applied for permission to lodge a "post-hearing note" containing further submissions on the question whether there are reasonable grounds for alleging that Mr Kendall's warning efforts were reasonably foreseeable by the police. The note asserted that, for a combination of reasons, this issue "was not covered by the [claimant] as fully during the hearing as it should have been". The court refused the application. We do not accept that the issue was insufficiently covered. It was squarely raised with leading counsel for the claimant during his opening submissions and its importance was clearly appreciated by the claimant's team of three counsel as Mr Bowen spent the whole of his reply submissions on the second day of the hearing addressing it. In any case if, in the aftermath of the hearing, counsel believe that they failed to make a crucial point (which is not the position here), they should contact the court immediately. No explanation was given for the claimant's delay. No court could function fairly and efficiently if it were to adopt a practice of accepting unsolicited further submissions in writing after (in this case many weeks after) an appeal has been heard. Such a course could only be justified in exceptional circumstances which do not exist here.