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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KINGS BENCH DIVISION

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BETWEEN:

JOSEPH HOLBEACH

Plaintiff/Appellant:

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Respondent:

_____

Mr Hugh Southey KC and Mr Nicholas Scott (instructed by KRW Law LLP) for the Plaintiff/Appellant
Mr Tony McGleenan KC and Mr David Reid (instructed by the Crown Solicitors Office) for the Defendant/Respondent

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Before: McCloskey LJ, Horner LJ and Colton J

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McCLOSKEY LJ (*delivering the judgment of the court*)

INDEX

Introduction

[1] Joseph Holbeach, whom we shall describe as "the plaintiff", is a living victim of one of the most appalling terrorist atrocities which scarred the recent wretched history of Northern Ireland. It has become known as the "Enniskillen Bomb." The explosion which this entailed occurred on 8 November 1987, Remembrance Sunday. There were in excess of 70 innocent victims, 11 of whom were murdered. The bomb exploded in a building, popularly known as the Reading Rooms, overlooking the cenotaph.

[2] The plaintiff was a bystander. As a result of the explosion, he suffered both mental and physical injuries and possibly some financial loss. At the material time the relevant police organisation in this jurisdiction was the Royal Ulster Constabulary ("RUC"). The defendant in these proceedings is the Chief Constable of the Police Service of Northern Ireland ("PSNI"). The PSNI is the statutory successor of the RUC.

The Proceedings

[3] The plaintiff's claim is that his injuries and possible other losses were sustained by reason of the negligence of the RUC. He initiated these proceedings on 8 September 2021, some 34 years after the precipitating event. While there will foreseeably be a major limitation issue if his action survives, this is not a matter of concern to this court. By his judgment and order dated 13 April 2023 the Queen's Bench Master struck out the Statement of Claim on the ground that it disclosed no reasonable cause of action against the Chief Constable. The ensuing appeal was dismissed by the judgment and order of McAlinden J dated 23 October 2023.

The Amended Statement of Claim

[4] The application determined by the Queen's Bench Master was based on the Statement of Claim served on 1 January 2022. At para [5] of his decision the Master records that he offered an opportunity to amend the Statement of Claim, eliciting the following response:

> "[Counsel] was nevertheless content to proceed with the defendant's application on the basis of the Statement of Claim which had been served. He indicated that the plaintiff's case had been pleaded at its height. **He recognised that this was an omissions case and that the only way in which the plaintiff could succeed was to fall within the exception of assumption of responsibility.**"
> [Emphasis added.]

The plaintiff's first notice of appeal followed, being dated 17 April 2023. As already noted, the judgment and order of McAlinden J are dated 23 October 2023. An amended Statement of Claim materialised between the last two mentioned dates. In

passing, by virtue of RCC Order 20, Rule 3(1) the amendments did not require the leave of the court. Their advent seems surprising, having regard to what the Master recorded. Having regard to the governing principles (infra) it will be necessary to pay the closest attention to this pleading.

[5] The amended statement of claim begins with an averment that on 9 January 1987 a RUC officer was killed in a bomb attack at High Street, Enniskillen perpetrated by the Provisional IRA ("PIRA"). The next averment is that on 7 November 1987 an unknown member (or members) of PIRA placed a bomb in the Reading Rooms. The narrative continues:

> "On his way to the Cenotaph the plaintiff was stopped on the Queen Elizabeth Road by unknown members of the British Army …. [who] … made the plaintiff open his car boot and searched the plaintiff's car before allowing him to proceed up to the Cenotaph …
>
> The plaintiff saw that there were police at the Cenotaph and believed that the area was safe ….
>
> The plaintiff expected police to be present at the parade. This was because of their presence at the parade in previous years and the terrorist threat and security circumstances in Northern Ireland at the material time. When the plaintiff saw the army and police were present at the parade he felt safe. That influenced his decision to attend the parade because if there was no policing then it was unlikely he would have attended."

The pleading then returns to the RUC:

> "…. The RUC carried out searches of an unknown number of locations (the plaintiff does not know which locations) along the route of the parade …
>
> At an unknown time on an unknown date prior to the parade, unknown RUC officers responsible for implementing the RUC's plan to ensure the safety of those taking part in and observing the parade, which included the search operation along the route of the parade, took the decision not to search the Reading Rooms."

[6] The ensuing averment relates to the detonation of the bomb at around 10:45 hours on 8 November 1987. The next material averment is that the plaintiff was injured in consequence and such injuries were "caused" by the negligence of RUC officers. There are three Particulars of Negligence, as follows:

"(a) RUC officers took the decision not to search the Reading Rooms prior to the parade;

(b) RUC officers decided not to search the Reading Rooms despite the knowledge that [PIRA] had carried out a bomb attack in Enniskillen town centre in January 1987.

(c) RUC officers did not search the Reading Rooms prior to the parade."

On its face and taking into account that there has been no discovery of documents to date, it appeared surprising that the plaintiff could plausibly make these specific allegations. In response to our enquiry, the court was provided with a government document which appeared to have been declassified in 2005 having content providing some support for the allegations made.

RCJ Order 18, Rule 19: Governing Principles

[7] The strike out application which succeeded at both first instance and upon initial appeal was made under RCJ Order 18, Rule 19. The principles by which such applications are determined were rehearsed in the decision of this court in *Magill v Chief Constable of PSNI* [2022] NICA 49, at para [7]:

"[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable* of the RUC [1997] NI 403 the following principles apply:

(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.

(ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

(iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State

policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> 'In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim.'

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated at p--:

> 'This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that

> no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.'
>
> We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

This approach is not contentious as between the parties.

Legal Framework

[8] The legal framework to which this appeal belongs is composed of an assortment of decisions at the highest judicial level. These were considered by this court in *Magill* (*supra*) at paras [15]–[19]:

> "[15] The Supreme Court revisited this legal territory in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. The distinguishing feature of the factual framework in this case is its "operational" dimension, involving as it did one of two police officers inadvertently knocking the plaintiff, a frail lady aged 76, to the ground when attempting to arrest a suspected drugs dealer in a public place. Both at first instance and on appeal the plaintiff failed essentially on the ground of the espousal by both courts of an immunity from suit approach. On further appeal, the Supreme Court held that on the particular facts a duty of care was owed by the police officers to the claimant.
>
> [16] One striking feature of this decision is the adoption of a starting point based not on immunity from suit, rather a principle expressed in positive terms: the police generally do owe a duty of care to members of society in the discharge of their duties and functions in accordance with the ordinary principles of the law of negligence unless otherwise provided by statute or the common law. Thus, there is no general rule that the police do not owe a duty of care in the discharge of their functions of preventing and investigating crime, no general rule of immunity from suit. Applying these principles, therefore, a duty of care to prevent a person from a danger of injury created by police officers could arise. There is a second important element of this decision. The Supreme

Court, having formulated the foregoing principles, applying the prism of actual conduct of police officers then turned its gaze to the different scenario of omissions. In so doing it espoused the central theme of the decisions considered above. Thus, it held, the police are not normally under a duty of care to protect an individual from a danger of injury which they themselves did not create (including injury caused by the acts of third parties) in the absence of circumstances such as an assumption of responsibility by them.

[17] The formulation of the starting point in *Robinson*, noted above, is discernible in paras [31] ff and paras [45]-[46] in particular. However, the proposition that police officers are subject to liability for causing personal injury in accordance with the general law of tort - *Robinson*, para [45] - leads to a second stage of the analysis. It is at this stage that the limited nature of this liability emerges clearly. Fundamentally, the common law generally does not impose liability for omissions and, more particularly, for a failure to prevent harm caused by the conduct of third parties. It follows that public authorities are not generally under a duty of care to provide a benefit to individuals through the performance of their public duties: see para [50]. The qualifying word "generally" in this passage is of self-evident importance; so too the final clause:

> '… The common law does not **normally** impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, **generally** under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility.'
> [emphasis added]

[18] In our review of the jurisprudence belonging to this sphere, we have taken into account also *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550, the key feature whereof is that of assumption of responsibility coupled with the express acknowledgement in evidence at trial by the defaulting police officer of a professional duty to provide assistance in the relevant circumstance. We have also considered *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25.

[19] Factual comparisons being unavoidable in the discrete jurisprudential sphere to which the present appeal belongs, *Tindall* was, in substance, a case of alleged police omissions in an operational situation where police had attended the scene of a traffic accident caused by black ice, had taken certain measures and then left the scene, following which a fatal collision at the same location. The Court of Appeal found in favour of the police. Their core reason for doing so was based upon the principle that the non-conferral of a benefit on a given person by a public authority in the exercise of a statutory power or function cannot render it liable in negligence: this is our somewhat more elaborate formulation of what is stated in para [69] of the judgment of Stuart-Smith LJ. We do not overlook the other ingredients in the court's reasoning and take into account in particular the code of principles formulated (inexhaustively, NB) in para [54]:

> '(i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally 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: see East Suffolk, Stovin;
>
> (ii) If follows that 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: see Capital & Counties, Gorringe, Robinson;
>
> (iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see East Suffolk, Capital & Counties;
>
> (iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger: see 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: see Capital & Counties, Sandhar;

(vii) 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): see Gorringe;

(vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (eg Ancell, Alexandrou) and making matters worse (eg Rigby, Knightly, 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 (Ancell) or to an individual (Michael);

(ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between

[20] Before this court neither party demurred from this formulation. We confine ourselves to the single limited observation that it may not fully reflect that in *Robinson* the Supreme Court took as its starting point a positive statement, namely public authorities and police organisations, in common with private individuals and agencies, are subject to liability for causing personal injury in accordance with the law of tort: *Robinson*, paras [32], [43] and [45] in particular. It is the scope of this liability which falls to be examined in cases of the present kind.

> [21] The limited scope of this liability is based upon two well established, inter-related principles. First, public authorities generally owe no duty of care to prevent the infliction of harm upon a person by a third party. Second, public authorities generally owe no duty of care to confer a benefit upon a person by protecting them from harm. See *Robinson*, paras [35] and [37]. Notably the word "generally" is employed in each of these formulations of principle. Furthermore, the leading cases make clear that the circumstances in which the police may owe a duty of care to a member of the public include cases where (a) the police create a danger of harm which would not otherwise have existed - ie by positive conduct and actions - and (b) the police assume responsibility for another person's care. See *Robinson*, para [37] where, notably, the language is that of 'include.'"

This formulation of the governing principles was uncontentious as between the parties, as expressly confirmed by both parties' counsel.

[9] Since *Magill* was decided there has been one material development in the jurisprudential landscape. In *HXA v Surrey County Council* [2023] UKSC 52 two claimants, who when children had been subjected to abuse and neglect perpetrated by a parent or a parent's partner, sued the defendant local authorities in negligence. Their case was that the defendants had assumed responsibility for protecting them from such harm so as to give rise to a common law duty of care. In the first case, the assumption of responsibility asserted was based on two separate resolutions of the authority, namely to carry out a full Children Act assessment with a view to initiating care proceedings and to undertake keeping safe work with the claimant, each of which it had failed to implement. In the second case, the assumption of responsibility asserted was based on the authority's regular provision to the claimant of temporary respite accommodation away from the family home prior to a care order ultimately being made. The Supreme Court agreed with the judge's decision (reversed on appeal) that both claims should be struck out on the basis that it was not arguable that either authority owed a common law duty of care to protect either claimant from the abuse and neglect suffered.

[10] The decision of the Supreme Court was unanimous. At para [87] the Court observed that where the context includes statutory duties and powers, there is no cause of action for the tort of breach of statutory duty even if the breach is a negligent one. The effect of this is that:

> "…. the courts must decide whether there is a duty of care at common law by applying to the public authority the same principles that would be applied if the public authority had been a private individual."

Neither a common law duty of care nor a breach thereof can be founded simply upon the consideration that the public authority had statutory duties towards, and powers in respect of, the claimant. In such cases, in the abstract, a duty of care might be established on the basis that the authority had assumed responsibility for the safety of the claimant.

[11] The next step in the analysis was that because each case concerned a failure to benefit the claimants by protecting them from harm by a third party, each claimant would have to establish an assumption of responsibility by the authority concerned. In both cases, the only mechanism whereby either claimant could establish a duty of care was that of assumption of responsibility. At para [91] the Court stated:

> "It is very common for the language of 'assumption of responsibility' to be used at a high level of generality. However, it helps to sharpen up the analysis always to ask what is it alleged that the defendant has assumed responsibility to use reasonable care to do?"

At para [93] the analysis continues:

> "However, the nature of the statutory function relied on does not itself entail the local authority assuming responsibility towards HXA to perform the investigation with reasonable care. Furthermore, it is clear from para 81 of *N v Poole* that a local authority investigating HXA's position does not involve the provision of a service to HXA. Rather, the investigation is to enable the local authority to decide whether to bring care proceedings …
>
> In addition, no facts are alleged in the particulars from which it could be inferred that HXA had entrusted her safety to the local authority or that the local authority had accepted that responsibility."

The absence of any provision of a service by the authority to HXA was re-emphasised at para [94]. The unfulfilled resolutions (noted above) fell significantly short of constituting an assumption of responsibility to use reasonable care to protect HXA from the abuse: para [95]. *Ditto* the provision of respite accommodation to YXA: para [97]. Finally, at para [108] the court made clear that in the kind of case which it was considering:

> "… it appears not to be a necessary feature of an assumption of responsibility in this area that there is reliance, in any real sense, by the claimant."

[12] In the present case there is also a statutory dimension. Section 32 of the Police (NI) Act 2000 provides:

> "**General functions of the police**
>
> (1) It shall be the general duty of police officers—
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice.
>
> (2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.
>
> (3) In subsection (2)—
>
> (a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a constable whether at common law or under any statutory provision,
>
> (b) "United Kingdom waters" means the sea and other waters within the seaward limits of the territorial sea,
>
> and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection."

This statutory provision, of course, postdates the Enniskillen bomb. McAlinden J was alert to this. At paras [7]-[8] he stated:

> "This provision replaced a similarly worded provision set out in section 18 of the Police (Northern Ireland) Act 1998. Prior to the 1998 Act, it appears that this function/duty was one founded in common law and recognised in statute. See section 1(4) of the Constabulary Act (Northern Ireland) 1922, section 11 of the Constabulary (Ireland) Act 1836 and section 5 of the Constabulary Act 1822 (all repealed).

> [8] This last provision contained the precise terms of the oath which constables in Ireland who were appointed under the 1822 Act had to swear. The language of the relevant portion of the oath is very similar to the wording of section 32 of the 2000 Act:
>
> "I A.B. do swear that I will well and truly serve our Sovereign Lord and King in the Office of Chief Constable [or Constable, or Sub-Constable, as the case may be] without favour or affection, malice or ill-will; that I will see and cause His Majesty's peace to be kept and preserved, and that I will prevent, to the best of my power, all offences against the same; and that while I shall continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof, in the execution of Warrants and otherwise, faithfully according to law. So help me God."

The appeal before this court proceeded on the basis that there is no error in these passages.

The Competing Arguments

[13] In every summary strike out application and above all in cases belonging to this particular field, the court is bound to scrutinise the plaintiff's pleading rigorously – the more so when it has been amended without leave of the court and, in this instance, following the invitation of the Master noted above and the intervention of newly instructed senior counsel, as explained to this court at the hearing. This is the reverse side of the principles rehearsed at para [6] above. The arguments of counsel must be subjected to the same forensic scrutiny. We shall address the latter issue first.

[14] The central submission advanced by Mr Southey KC and Mr Scott had the following interlocking components:

(i) The RUC assumed responsibility to use reasonable care to carry out a search of the buildings in the immediate vicinity of the route of the parade, including the Cenotaph, for explosive devices in order to protect those involved in or watching the parade. The sole reason why the RUC assumed that responsibility was because they carried out a proactive security operation prior to the parade.

(ii) The plaintiff relied upon the expertise and judgements of RUC police officers "to carry out an effective search." This reliance combined with "sufficient foreseeability" on the part of the RUC of such reliance. These two factors (rolled together in argument as "foreseeable reliance") operated to create an assumption of responsibility on the part of the RUC to the plaintiff.

(iii) Further or alternatively, in conveying a sense of reassurance to the plaintiff which caused him to attend the parade RUC police officers committed a "negligent positive act".

(iv) The provision of a service by the RUC to the plaintiff was not as a matter of law a pre-requisite to an assumption of responsibility on the part of the former to the latter arising and McAlinden J erred in holding the contrary.

[15] In counsels' skeleton argument one finds the following formulation:

> "The issue is whether a duty of care was owed to members of the public who foreseeably relied upon positive actions of the police in providing security for those attending a public event ….
>
> By providing security in the context of this case, it was foreseeable that the public would rely on that security. That means they were put at risk if the security was negligently provided. Harm resulted because reasonable expectations were not met."

It is further submitted that there was in this case "an overlap between infliction of harm and assumption of responsibility." Arguably the clearest and most succinct formulation of the plaintiff's case is found in the following passage:

> "The essence of the appellant's claim is that RUC officers assumed responsibility for the safety of the appellant as an attendee at the parade and acted negligently in the way that they carried out the operation to protect those attending the parade by failing to search the Reading Rooms. Alternatively, harm was inflicted by the RUC because it provided reassurance and so encouraged attendance in circumstances in which it failed to take adequate steps to ensure safety."

In response to the court, counsel agreed that all references to "the public" must be reconfigured as "the plaintiff."

[16] The terms in which the plaintiff's case was argued, both in writing and orally, were in certain respects both opaque and incomplete. For example, and in particular, there was much obfuscation in the repeated formula that the RUC "… assumed responsibility to use reasonable care to carry out a search of the buildings in the immediate vicinity …" Ditto the submissions formulated in the terms of "It is relevant that ..."

[17] These are not the language of the law of negligence, which is: a specified relationship between tortfeasor ('T') and victim ('V') giving rise to the following legal duty owed by T to V, namely a duty on the part of T to take reasonable care for the safety of V in specified ways; the relationship between the parties said to give rise to the duty; the essential elements of the duty of care advanced, to include both the positive and the negative; particulars of the acts and/or omissions by T constituting the alleged breach/es of this duty; and the injury or other loss allegedly suffered by V in consequence. We shall explain infra why we consider that the amended statement of claim is non-compliant with these fundamental requirements.

[18] Following careful probing at the hearing, which elicited much necessary elucidation from counsel, the court established the correct and complete formulation of the plaintiff's case to be the following: RUC officers (a) assumed responsibility to take reasonable care for the safety of the plaintiff by undertaking a security operation which included searches of inter alia premises and places, (b) thereby encouraged the plaintiff to rely on this security operation (which he did) and (c) failed in the responsibility which they had assumed to take reasonable care for the safety of the plaintiff by failing to search the Reading Rooms, discover the explosive device and then take further appropriate protective measures such as disabling the device and/or excluding all members of the public from the adjoining area thereby ensuring the plaintiff's safety. With this much needed illumination and reconfiguration the fog previously enshrouding the plaintiff's case receded, without necessarily evaporating.

[19] In response to the court, Mr Southey stated that the "heart" of the plaintiff's case was that he relied on the RUC security operation. There were two critical factual ingredients: the positive act by the RUC of providing security and the omission of the RUC in failing to search the Reading Rooms. The concept of reliance also featured in counsel's submissions. The plaintiff (it was said) relied on the visible RUC security operation. Furthermore, it was foreseeable by the RUC that persons such as the plaintiff would thus rely. The court having probed these submissions in some depth, some obscurity nonetheless endured. For example, the court enquired whether the factors of foreseeable reliance coupled with actual reliance fortified the case for an assumption of responsibility by the RUC giving rise to a duty of care owed to the plaintiff: counsel did not appear to adopt this formulation. Ultimately, the submission advanced was that in this case *reliance* made the situation worse. In what respects? Mr Southey replied that in the context of a known risk of terrorist attack the reliance foreseeable by the RUC and the related actual reliance by the plaintiff made the situation worse by creating a false sense of security inducing the plaintiff to attend the location influenced by an expectation of an effective security operation.

[20] The following are the key elements of the riposte of Mr McGleenan KC and Mr Reid on behalf of the Chief Constable:

(i) This is a case of pure omissions, to be contrasted with one of a positive act creating a relevant danger.

(ii) The amended Statement of Claim does not disclose a relationship between the parties containing the ingredients and characteristics necessary to create a duty of care, whether by a positive act or an assumption of responsibility (in the terms of the court's formulation in the immediately preceding paragraph).

(iii) Section 32 of the Police (Northern Ireland) Act 1998 (the "1998 Act") enshrines the applicable legal duty in the terms of a public law duty owed to the population as a whole, contraindicating the private law duty for which the plaintiff contends.

(iv) To ground a duty of care owed to the plaintiff via an assumption of responsibility (as defined above) would be inconsistent with and would reconfigure the aforementioned statutory duty by subjecting the police organisation to a private law duty of different content and contours, in conflict with the principles established in the leading authorities: *Hill, Michael, Tindall* and *Magill.*

(v) The private law duty of care canvassed on behalf of the plaintiff is further undermined by the absence of any characteristic of the plaintiff or any aspect of the plaintiff's situation at the material time differentiating him from any other person in Enniskillen in the relevant circumstances.

Our Analysis and Conclusions

[21] As a perusal of the single unanimous judgment in *HXA* confirms, the Supreme Court in that case drew heavily on its earlier decision in *Poole BC v GN* [2020] AC 780. In *Poole* the context was one of a child "in need" under section 17 of the Children Act and their mother being placed in a residential property by the local housing authority where they suffered significant harassment and abuse from a neighbouring family. Their claim for damages for physical and psychological damage was struck out as disclosing no reasonable cause of action. This was affirmed by the Supreme Court which held, inter alia, that a public authority does not owe a duty of care at common law mainly because it is possessed of statutory powers or duties and even if the exercise thereof could have prevented the relevant harm. The creation by a public authority of a source of danger or the authority's assumption of responsibility to protect the claimant from harm were recognised as two instances where a duty of care could arise. Mr Southey relied particularly on para [28] of the judgment of the Supreme Court:

> "Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 and *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit

> (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office,* as explained in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057, para 39."

[22] One of the tools of analysis, or tests, to be distilled from *Poole* is that of Whether:

> "… the imposition of a common law duty towards [P] … would be inconsistent with the statutory framework, since it would interfere with the performance by the authority of its statutory powers and duties in the manner intended by Parliament."

See para [54], reflecting what was stated in *Robinson* at para []. In *Poole* the Supreme Court reaffirmed the following principle drawn from *Robinson* at para [63]:

> "The court distinguished between a duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party. **A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it.**"
> [emphasis added.]

Continuing its exposition of what was decided in *Robinson*, the Supreme Court added at para [64]:

> "The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the

> requirements of public policy. Secondly, the decision reaffirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties) …
>
> Thirdly, the decision confirmed … that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles."

[23] As paras [64]–[65] and other passages in the relevant jurisprudence of the Supreme Court make clear:

(i) The assumption of responsibility by the authority to the claimant or the creation of a material danger by the authority may generate a duty of care owed by the authority to the claimant.

(ii) However, neither of these illustrations would have this effect where to do so would be inconsistent with the relevant legislation.

(iii) In principle, an assumption of responsibility by the authority concerned may arise out of the performance of statutory functions.

(iv) A common law duty of care cannot be derived directly from a statutory duty.

[24] As the review of the authorities in *Poole* demonstrates, the concept of *foreseeable reliance* can be traced to *Hedley Byrne v Heller* [1964] AC 465, in particular the speech of Lord Morris at 502–503. It is important to spell out this concept with precision. It entails actual or constructive foreseeability on the part of the authority concerned that the claimant would rely upon its special skill in respect of some service provided by or other act or conduct on the part of the authority. We consider that the following statement of Lord Devlin, at 530, applies to the present case:

> "Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility…"

[25] The submissions of Mr Southey also drew attention to two decisions of the Privy Council, *Airport Authority v Western Air* [2020] UKPC 29 and *Great Lakes Reinsurance v RAV Bahamas* [2024] UKPC 11. We consider it important to highlight the intensely fact sensitive nature of both cases. In the first, the two key contextual features were (a) the defendant's creation of the risk of the relevant danger by permitting defects in security fencing and (b) the defendant's status of being the sole

agency available to provide the relevant service to the claimant. In the second case, *Great Lakes Reinsurance*, the Privy Council's conclusion that no duty of care was owed was based upon (i) distinguishing *Western Air* on its facts and (ii) highlighting that by virtue of the relevant contractual arrangements the responsibility to take reasonable care fell on an agency other than the defendant. We would add that in *Western Air* the Privy Council did not consider any of the leading Supreme Court decisions which have occupied the attention of this court in both *Magill* and the present appeal.

[26] The importance of alertness to fact sensitivity was emphasised in the submissions of Mr McGleenan, who, in addition to highlighting the manner in which the decision in *Western Air* had been confined in *Great Lakes Reinsurance*, submitted – correctly – that *Magill* is fundamentally different from the present case in two critical respects. These are (a) positive conduct by the police which (b) made a difficult situation worse. These are the features of the *Magill* matrix which, following amendment of the particulars of claim, allowed that case to withstand the summary strike out application.

[27] We turn to the amended statement of claim at this juncture. It is trite that the terms in which this is formulated are of fundamental importance. As already highlighted, it is inevitable that in a summary strike out application the plaintiff's pleading will be subjected to intense analysis. In this respect we are mindful that, as confirmed by Mr Southey, the amendments were made in a context wherein further instructions had been obtained from the plaintiff and those advising the plaintiff comprised his senior counsel, junior counsel and instructing solicitor. A further feature of this context was that the amendments materialised in reaction to the strike out order of the Master and in circumstances where the Master had specifically drawn attention to counsel's disinclination to accept the court's offer of an opportunity to amend the pleading (see para [4] above).

[28] The material contents of the amended statement of claim can be gleaned from paras [5]–[6] above. We have of course considered this pleading as a whole. It invites the following analysis:

(i) The plaintiff chose to drive to the relevant location without any knowledge or awareness of activity on the part of RUC police officers.

(ii) While the amended pleading contains two references to the military, the Chief Constable is the only tortfeasor sued. The plaintiff does not plead any relationship or association between the RUC and the military. Furthermore, the pleading avers that only RUC officers were present at the relevant location.

(iii) The presence of RUC officers is said to have "… influenced his decision to attend the parade …" This suggestion cannot co-exist with the indelible fact that, on his case, both as originally pleaded and amended, the plaintiff had driven to and arrived at the location before observing the RUC officers there.

(iv) The same observation does not apply to the plaintiff's expectation that police would be "present at the parade." The ensuing explanation for this expectation is unremarkable. However, this expectation does not extend beyond mere police presence. Its limitations must be recognised.

(v) As regards the remainder of the amended pleading, the material passages are rehearsed in paras [5]–[6] above. All of them relate to activity on the part of RUC officers prior to the explosion: searches at unknown locations had been carried out and a decision had been made not to search the Reading Rooms. The most important characteristic of these averments is that none of this was within the plaintiff's knowledge at the material time. Accordingly, he cannot make the case that he relied upon the positive acts of searches or the omission to search the Reading Rooms.

[29] This court accepts that, based on the amended pleading and taking this at its reasonable zenith, the plaintiff had an expectation that police would be present at the location. We further accept that this gave rise to some kind of reliance. But what specifically does the plaintiff claim to have been relying upon? The statement of claim is silent on this issue. While we are mindful of the averment that the plaintiff "… believed that the area was safe", this is specifically linked to his observance of police officers at the relevant location when he had arrived there.

[30] On the plaintiff's case he was aware of the potential for lethal terrorist attack at the location and in the circumstances prevailing. In his amended pleading he specifically draws attention to the murder of an RUC officer in a bomb attack perpetrated by PIRA at High Street, Enniskillen some ten months previously. In passing, his amended pleading fails to specify with any clarity how, if at all, this historical fact contributed to subjecting RUC officers to an assumption of responsibility generating a duty of care owed to him.

[31] The statutory and/or common law duty to which the RUC officers were subject at the material time had the character of a public law duty owed to the population, or a section of the population in this particular instance, as outlined in para [12] above. The RUC officers were not acting in a vacuum. They were, rather, operating within this legal framework. The submissions on behalf of the plaintiff did not really engage with this juridical reality. We agree with Mr McGleenan that to subject the RUC officers to a private law duty of care owed to the plaintiff in the prevailing circumstances would be inconsistent with the general public law duties in play. A distortion of the legal framework would ensue.

[32] The submission that the RUC by mounting a security operation made a bad situation worse is in our view untenable. Its substratum, namely the fact of a terrorist campaign in Northern Ireland, is quintessentially vague and lacking in essential particularity. Furthermore, it has no objective dimension. The suggested "worsening" focuses on the plaintiff's state of mind and not the situation itself. It fails to withstand the analysis required by para [28] of *Poole*.

[33] This court recognises that in certain instances the distinction between a positive act (causing harm thereby making things worse) and an omission (failing to confer a benefit, thereby not improving things) may be blurred. But over-complication and sophisticated analysis are more likely to obfuscate than clarify in a case of this kind. The simplicity of the plaintiff's case is unmistakable. It centres around a single failure, namely the failure of the RUC to search the Reading Rooms. This on any sensible analysis cannot be converted to the positive act for which the argument contends, namely the inducing of a certain state of mind on the part of the plaintiff. Nor can it be equated with causing harm or, so far as distinct, creating a material danger. It is an omission, plain and simple. The plaintiff's case on this issue fails in consequence.

[34] We turn to the issue of foreseeable reliance. Based on our analysis of the amended particulars of claim above we consider that this case is untenable. If this analysis is incorrect, we consider that this does not avail the plaintiff in any event as this is a paradigm case of a public authority exercising statutory functions in a manner which failed to confer a benefit on the plaintiff. Thus, the general principle that a public authority does not owe a duty of care to a claimant to prevent the misconduct of third parties must prevail.

[35] Furthermore, there is nothing in the amended particulars of claim, taken at their reasonable zenith, which would warrant the inference of an assumption of responsibility to the plaintiff by the RUC giving rise to a duty of care by reason of the particular way in which the RUC had, in the language of para [82] of *Poole*, "behaved towards" the plaintiff. The passage in *Poole* in our view makes this clear beyond peradventure:

> "… the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred."

Thus, in the colloquial language which has evolved, there is nothing in the present case "over and above" the relevant statutory/common law dimension.

[36] It is not for this court to take the course of allowing this appeal on the ground that the principles of negligence governing the territory under scrutiny have the potential to develop. If such potential were demonstrated with reasonable clarity, the position might be otherwise. However, that, in our view, is not this case. As exhorted by the Supreme Court, the fundamental task of this court in the present appeal is to apply the established legal principles. We have concluded that it is not arguable that the plaintiff could establish at trial a relevant assumption of responsibility giving rise

to a duty on the part of the RUC to take reasonable care for his safety at the material time. We are mindful of the need to be alert to basic dogma, and, in this context, we note that in three successive decisions – *Robinson, Poole* and *HXA* – the Supreme Court has cited with approval the following passage in "Negligence Liability for Omissions and the Police" (Tofaris and Steel) [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."

[37] Finally, we are cognisant that the only passage in the judgment of McAlinden J which was the subject of specific criticism was the single sentence at the beginning of para [23]:

> "In this case, there is no question of the plaintiff/appellant using a service which the police have offered to the public so the issue of reasonable foreseeability of reliance does not arise."

Based on a reading of the judgment as a whole, we are satisfied that in this passage the judge was in effect completing a checklist of possible ways in which an assumption of responsibility might be attributed to the RUC in this case, an exercise which he began in para [12] and continued in the following 12 paragraphs. If and insofar as the judge's formulation of the issue of reasonable foreseeability of reliance was too narrow, this is a matter of no moment, as our primary and alternative analyses of this issue above demonstrate.

Omnibus conclusion

[38] For the reasons given, we agree with both Master Bell and McAlinden J. The plaintiff's appeal is dismissed accordingly.