BRIEFING

PERSONAL INJURY: EMERGENCY SERVICES

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INTRODUCTION

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As lockdown eases and members of 1 Chancery Lane emerge, blinking, into the sunshine we are pleased to see the return of increasing numbers of in person hearings, although we miss being able to wear shorts/pyjamas/slippers /flip flops under our suit jackets when we go to court!

We believe we have adapted well to remote practice, becoming dab hands at Zoom, Teams, Skype for Business, Cisco Webex, smoke signals and semaphore. During lockdown members of Chambers have appeared by videolink in the Supreme Court, Public Inquiries, the Court of Appeal, the High Court, various County Courts and conducted many virtual conferences, round table meetings and mediations. We have enjoyed seeing some of you and each other for remote training and events, but we miss real world contact with our clients and colleagues and look forward to a time when it is safe for us to catch up in person.

Undeniably County Court civil work has been badly affected by the challenges in the court system during the pandemic, causing huge pent up demand. We are rolling up our sleeves to help our clients deal with the backlog of cases that now need to work through the system and our free helpline continues to be available for a while longer.

Whilst the world remains diverted by all matters Covid we know you enjoy being reminded that there are issues for discussion and debate that are not concerned with the pandemic. As such, we thought we would focus this issue of the Personal Injury Briefing on a core area of practice at 1 Chancery Lane: the emergency services.

If you can forgive the pun, 1 Chancery Lane has been a first responder for the emergency services for many decades. From the fire service in *Capital & Counties v Hampshire CC and Austin v East Sussex Fire* and Rescue Service to the police in *Ashley v Chief Constable of Sussex, Van Colle v Chief Constable of Hertfordshire and R (Laporte) v Chief Constable of Gloucestershire* 1 Chancery Lane has a long history of being involved in cases that have framed the law in this area.

More recently members of 1 Chancery Lane have represented the emergency services in appeal cases such as *Parker v Chief Constable of Essex Police and James-Bowen v Commissioner of Police of the Metropolis* as well as being instructed in litigation arising out of the shooting of Mark Duggan and the Hillsborough disaster. Currently members of Chambers are representing emergency services core participants in the Grenfell Inquiry and the Manchester Arena Inquiry.

Turning to the Briefing, with recent news in mind that members of the emergency services involved in responding to the Grenfell Tower disaster are bringing claims for psychiatric injury, Ella Davis discusses the fascinating but tricky topic of the law relating to claims by rescuers. Dominique Smith writes about the liability of the fire and rescue services. Ian Stebbings considers claims against the ambulance service and Paul Stagg considers two recent police cases that address the scope of the duty of care in the wake of the recent cases of *Robinson* and *CN*.

As always, if there is anything we can do during these challenging times to make your professional lives easier, please do contact us and we will endeavour to help.

CLAIMS BY RESCUERS

ELLA DAVIS

As well as facing liability for their handling of emergencies, emergency responders can of course also become victims of the events to which they are called. A recent example of this is the report that a group of firefighters and police officers who responded to the Grenfell Tower disaster are bringing claims for physical and psychiatric injuries suffered. The claims of those who suffered physical injuries are likely to be relatively straightforward (subject to identifying the correct defendant). However, rescuers who suffer only psychiatric injury as a result of attending an emergency caused by the negligence of a third party, continue to face significant hurdles in bringing such claims.

White v Chief Constable of South Yorkshire

The leading authority remains the House of Lords decision in *White v Chief Constable of South Yorkshire [1999] 2 AC 455*. This was another case arising out of the Hillsborough Disaster. Police officers who had suffered psychiatric injury sued the Chief Constable of South Yorkshire on two bases. First, they argued that the Chief Constable owed them a duty not to expose them to unnecessary risk of injury in the course of their employment. Secondly, they claimed to be entitled to recover as rescuers.

On the first basis, the majority of the House of Lords (Lord Goff dissenting), held that there was no duty on an employer to protect an employee from pure psychiatric injury. The general rules restricting the recovery damages for pure psychiatric harm applied to employees as much as to any other claimant.

On the second basis the majority (Lord Griffiths dissenting) held that in order to recover compensation for pure psychiatric harm, rescuers must at least satisfy the threshold requirement of having objectively exposed themselves to danger, or at least to have reasonably believed that they were doing so. It is not, however, necessary to establish that the psychiatric condition was caused by the perception of personal danger. If rescuers were unable to show that they were within the range of foreseeable physical injury, they had to satisfy the control mechanisms applicable to secondary victims, that is:

(i) That they had a close tie of love and affection with person killed, injured or imperilled;

(ii) That they were close to the incident in time and space; and

(iii) That they directly perceived the incident or its immediate aftermath rather than, for example, hearing about from a third person.

The first of these will of course rarely be satisfied by emergency service workers.

Developments since White

Lord Steyn acknowledged the controversy surrounding the policy considerations underlying the rules relating to psychiatric injury and concluded that the only sensible strategy for the courts was to say “thus far and no further”. He considered that the law should be treated as settled for the time being and that the task of radical law reform should be left to Parliament. So far Parliament has not taken up the challenge. Consequently, while recent cases have refined our understanding of the law as it relates to secondary victims, there have been no significant developments in relation to the law as it relates to rescuers since White was decided over twenty years ago.

The following year, the Court of Appeal in Cullin & Ors v London Fire and Civil Defence Authority [199] PIQR 314 dismissed a defendant’s appeal against a refusal to strike out claims brought by firefighters who suffered psychiatric injury in incidents in which several colleagues died. Two of the claimants, S and W, attended a fire where a wall collapsed killing four firefighters. S and W assisted in the removal of the debris and the rescue of the body of the deceased. The third, C, attended a fire in which four firefighters were lost inside a burning building. C was part of a different team sent to search for the lost men. He witnessed the unsuccessful attempts to resuscitate two of them who

asphyxiated.

The defendants argued that to be a primary victim in respect of psychiatric injury caused by shock sustained because of what happened to others, it is necessary to be involved in the same incident which gave rise to the death or injury of those others. The Court of Appeal held that it would be necessary for a trial judge to make findings as to what was the relevant event (was it the collapsing wall, or the four firefighters getting lost – or should it be considered more broadly?). Further, Swinton Thomas LJ noted the importance of Lord Steyn's speech in White where he said that it is not necessary to prove that the psychiatric condition was caused by the perception of personal danger. The case was not suitable for strike out and whether the claimants could establish that they were primary victims was a matter to be determined on the evidence.

Two years after White was decided, *Greatorex v Greatorex [2000] 1 WLR 1970* was a claim in which a firefighter suffered PTSD after attending the scene of a road traffic accident involving a victim with whom unusually he had a close tie of love and affection, his son. The son, who was the first defendant, had been drinking when he negligently drove his car onto the wrong side of the road and was hit by an oncoming car. The court tried a preliminary issue of whether a victim of self-inflicted injuries owes a duty to a third party not to cause him psychiatric injury.

In an ambitious argument the claimant argued that the judge should follow the minority decisions in White and award him damages as a rescuer. Perhaps unsurprisingly the judge followed the majority decision and held that the fact that the claimant was a "professional rescuer" added nothing to the claim. The judge accepted, however, that the claimant met the control mechanisms governing claims by secondary victims. Nevertheless the claim failed on the basis that as a matter of policy the victim of self-inflicted injuries should not be held to owe a duty to a third party (usually a family member if they were to meet the secondary victim control mechanism) not to cause him psychiatric injury.

In *Donachie v The Chief Constable of the Greater Manchester Police [2004] EWCA Civ 405*, a police officer claimed to have suffered psychiatric injury after nine attempts to place a tracker under the car of a suspected gang of criminals. His case was that on each trip he subjected himself to an increased risk of being caught and attacked by the suspects. The stress of the situation caused a clinical psychiatric state leading to an acute rise of blood pressure and a stroke. The trial judge found a breach of duty in the system for testing the batteries in the tracker which caused the repeated trips to the car. However, he rejected the claim on the basis that the psychiatric injury giving rise to the stroke was not reasonably foreseeable, as the defendant was ignorant of the claimant's vulnerability to stress. The judge relied heavily on the occupational stress case of *Sutherland v Hatton [2002] PIQR P221*.

In allowing the claimant's appeal, the Court of Appeal held that where the court is satisfied that reasonable foreseeability has been established, whether for physical or psychiatric injury or both, it is immaterial whether the foreseeable injury caused, and in respect of which the claim is made, is caused directly or through another form of injury not reasonably foreseeable. The judge found there was a reasonable foreseeability that the claimant would suffer physical injury, although not of the kind he actually suffered. He was thus a primary victim. The claimant's pre-existing vulnerability to stress was irrelevant and the defendant was obliged to take his victim as he found him.

The Present

Some of those bringing claims arising out of the Grenfell Tower disaster give harrowing accounts of the traumatic experience of speaking to victims inside the tower by telephone. It is not difficult to imagine that such experiences could cause psychiatric injury, even without the claimant being in any danger. In appropriate cases emergency responders may have stress at work claims against their employers (a topic which could fill a briefing on its own!). However, rescuers who attend a traumatic scene and suffer psychiatric harm as a result of witnessing that horrific event, still have very limited protection against that harm in law.

It is reported that some of the emergency personnel

bringing claims arising out of the Grenfell disaster are concerned that they may later suffer from lung conditions or cancers. The full particulars of those claims are not reported, but a freestanding claim for psychiatric illness caused by fear of a future illness is generally unlikely to be successful – *Grieves v FT Everard & Sons Ltd & Anor [2007] UKHL 39*.

It will be interesting to see whether the Grenfell cases move the law on any further. An important policy consideration in White was evidently the fear that the police should be seen to recover greater awards of compensation than relatives. However, many people have long argued that the law relating to psychiatric injury should be comprehensively reformed. The claims of those who suffered injury rescuing Grenfell victims may even provide the political will for legislative reform.

EXTINGUISHING CLAIMS: WHAT IS THE EXTENT OF THE DUTY OF CARE OWED BY FIRE SERVICES?

DOMINIQUE SMITH

Many of us are familiar with the children's TV programme 'Fireman Sam'. In the opening of each episode, we were reminded that "*when he hears that fire-bell chime, Fireman Sam is there on time*". But what if he wasn't? Sometimes, as is the case with every rescue service, things can go wrong. In the case of the fire service, a fire engine may fail to turn up to the correct address, resulting in a building becoming a total loss. In addition, firefighters could arrive at a scene and fail to fully extinguish a fire before leaving the premises. But how can negligence be established against the fire service, and, ultimately, what is the extent of the fire services' duty of care to the public?

Fire services do not generally owe a duty of care when attending a fire, nor are they under any common law duty to answer a call for help. The mere response of the fire service to an emergency call does not give rise to an assumption of responsibility sufficient to found a duty of care (*Capital and Counties Plc v Hampshire CC* [1997] QB 1004 (CA)). If the fire service fails to turn up to an address on time, for example, or if they become lost en route, they will not be held liable. In addition, a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of a premises to come under a duty of care, merely by attending and fighting a fire.

However, a fire service may owe a duty of care to an owner of a property on fire, or anyone else to whom the fire may spread, once they have arrived and started to fight the inferno. That duty will arise if the fire service is negligent and if the negligence directly causes damage.

The *Capital and Counties* case concerned four conjoined appeals that raised similar questions of law regarding the fire services' duty of care. One of those appeals was known as 'The Hampshire Case'. The Hampshire Case involved the attendance of firefighters at an establishment with an elaborate smoke detection system, as well as a heat-activated sprinkler system. The sprinkler system had been activated shortly before the arrival of the first fire engine. Shortly after their arrival at the scene, the sprinkler system was shut down on the instructions of one of the station officers. Consequently, the fire spread rapidly and became out of control, resulting in the building being rendered a total loss. At the initial trial, the Judge considered that the officer's actions in turning off the sprinklers was negligent. In the appeal, Stuart-Smith LJ upheld the trial Judge's findings of negligence: the turning off of the sprinklers was an act, rather than an omission, which directly resulted in damage to the property.

Therefore, *Capital and Counties* illustrates the crucial distinction between an ineffective rescue and a rescue that makes the position worse. It is pertinent to note that there will be no liability for incidents where a fire service has failed to fully extinguish a fire before leaving the premises, with the result that it revives and causes damage. The distinction between that scenario and the one in *Capital and Counties*, is that the act of switching off the sprinkler system directly added to the damage sustained, contributing to the spread of the fire.

The duty of care of the fire service remains limited. Unless it can be established that the fire service has positively acted to create a danger, or indeed worsen the fire, it is unlikely liability will be established.

WHO'S PROTECTING THE PROTECTORS?

IAN STEBBINGS

Emergency service personnel by the very nature of their occupation are likely to be exposed to numerous traumatic events throughout their career. Many who undertake emergency service work appreciate the nature of the job and the incidents they are likely to face since their job involves dealing with traumas. This is particularly true of Ambulance Service personnel.

Front line emergency ambulance personnel often encounter the public at a time of extreme distress. Many will, over time, see a variety of injuries again and again which may, build up some sort of professional tolerance or conditioning. It may also over time have an adverse effect on the mental well-being of those staff.

Many front-line staff are also on scene at major traumatic events, such as the Hillsborough disaster, the London and Manchester bombings and the Grenfell Tower fire.

Many ambulance workers have suffered Post Traumatic Stress Disorder as a result of dealing with trauma at work. MIND, the UK mental health charity, conducted a survey and found that 92% of emergency service workers suffered from stress, low mood or poor mental health at some point in their careers as a result of dealing with trauma. So much so that in 2015 MIND launched "The Blue Light Programme" to provide support services to managers and to support staff who might be struggling. A more recent online survey in 2016 found that one in four emergency workers had contemplated taking their own life.

Where does all this leave the courts when a member of the ambulance services takes action against their employer for failure to guard against such psychological injuries?

British courts have sought to limit or have been reluctant to award damages to emergency service personnel who have suffered a psychological injury as a result of attending a horrific scene as a result of a third party's negligence.

The courts have traditionally 'Pigeon Holed' claimants for psychiatric injury into three categories:

1. Those who personally involved in the event and who receive both physical and psychological injuries. These victims can claim for both the physical and mental injury sustained;
2. Persons who are put at risk of a physical injury but do not sustain such but go onto suffer from some psychological injury. Known as primary victims;
3. Persons who are not in physical danger but suffer psychological injuries as a result of the events that they have witnessed. Often referred to as secondary victims.

As a result of this there are a number of potential routes to a claim by an ambulance employee who suffers psychiatric injury as a result of their experiences at work.

The position of those who suffer psychiatric injury as a result of an incident during which they suffer a physical injury (for example if they are assaulted whilst at work) is often fairly straightforward if the physical injury occurred as a result of the employer's breach of duty and causation of the consequent psychiatric injury can be proved. Similarly, those who were within the scope of foreseeable physical injury (for example working on a victim in a building when the roof collapses) will fall into the category of primary victim (*Page v Smith* [1996] AC 155).

Many potential claims by ambulance personnel fall into the category of secondary victims who suffer PTSD as a result of traumatic events witnessed whilst undertaking their role. Ella Davis discusses the law in this regard in her article on Rescuers.

The third potential route is to bring a claim for occupational stress. It is often argued in cases involving employees whose work involves graphic and distressing content that there is no need to prove foreseeability because the work is inherently stressful and places the employee at obvious risk of harm. The Court of Appeal in *Barber v Somerset* [2002] ICR 613

rejected the notion that there is such a thing as an inherently stressful job (per Lady Justice Hale at 24), observing "it is not the job, but the interaction between the individual and the job which causes harm." This applies to emergency services workers as much as to any other employee, the example considered by the Court of Appeal being the "traffic police officers who regularly deal with gruesome accidents or child protection officers who regularly investigate unthinkable allegations of child abuse." As a result, a claimant in a claim for occupational stress will still need to overcome the "threshold test" of foreseeability in order to proceed to the question of whether there has been a breach of duty. This requires the employer to know that the particular employee is at risk of "(1) an injury to health; which (2) is attributable to stress at work" (per Hale LJ at 25).

If foreseeability can be established front line staff may potentially pursue a claim against the relevant Ambulance Trust if that entity fails to provide reasonable and adequate provision to deal with the exposure to those traumatic events. Thus, a negligent act by the relevant authority occurs after the traumatic event that may give rise to PTSD as a result of lack of care and counselling. Lack of care was seen in the case of *Daw v Intel Corps Ltd [2007] EWCA Civ* 70 where the court found that the employer had been negligent in failing to take adequate steps to obviate the risk of an employee, who had become stressed and overworked, from suffering a breakdown. The employer will be aware of major traumatic events through news coverage and its liaison with other emergency service branches and as such are under a duty to provide counselling services to any member who wishes to partake in such. It is unlikely however, that if such counselling provisions are made and used and the worker still goes onto to develop PTSDS that a claim would be successful.

It is difficult to see how employers can prevent ambulance personnel from viewing major traumatic events when the very nature of the job means that they must do so in order to carry out rescue and provide aid to the injured. It is important that those employers have in place mechanisms to support their employees, particularly those they know are at real risk of psychiatric harm as a result of their work.

Whilst emergency services personnel are at the forefront of protecting and assisting the injured the courts are at present reluctant to protect the protectors.

CLAIMS IN NEGLIGENCE FOR PERSONAL INJURY AGAINST THE POLICE POST-*ROBINSON*

PAUL STAGG

About thirty years separate two landmark decisions of the highest court in the land concerning the liability of the police in negligence. Both claims were brought against the West Yorkshire Police. *In Hill v Chief Constable of West Yorkshire Police* [1989] AC 53, the mother of the final victim of the Yorkshire Ripper brought a claim alleging negligence in the conduct of the inquiries by police into the serial killings of Peter Sutcliffe, stating that had Sutcliffe been apprehended earlier, her daughter would not have been killed. Striking out her claim, the House of Lords held that there was no sufficient relationship of proximity between the police and the victim, and that in any event it would be contrary to public policy for the police to be liable in negligence in respect of the investigation and suppression of crime. For many years thereafter, this public policy consideration was broadly interpreted so exclude duties of care to those injured as a result of police activities in many different contexts. The result was that it was thought that the police owed duties of care only in restricted areas, such as in relation to road traffic accidents and employer's liability. Many claims against the police for negligently-inflicted injury could therefore be struck out at a preliminary stage.

In that context, it is not an exaggeration to describe the decision in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 as revolutionary. Lord Reed, giving the lead judgment, emphasised that the same basic rules applied to determine whether the police owed a duty of care as with other private or public bodies or individuals. If a defendant directly caused injury by positive acts, generally a duty of care would exist without more, whereas if the allegations were of omission, a duty of care could only arise in

certain circumstances. Only in novel cases, where existing precedent did not give to a clear answer as to whether a duty of care should be owed, was it necessary to consider whether it was fair, just and reasonable for a duty to exist and to consider public policy issues in doing so. The unfortunate Mrs Robinson, an elderly lady who was injured when plain-clothes officers attempted to arrest a suspected drug dealer in the street when she was passing by, had been injured as a result of the positive acts of the officers and a duty of care was owed to her, which had on the findings of the trial judge been breached.

Many questions are posed by the judgment in *Robinson*. To name just three: how does one draw the distinction between acts and omissions? When will the exceptions to the rule that no duty of care is owed in relation to omissions apply? And how does the duty of care interrelate to other causes of action and the defences traditionally employed by the police when they have caused injury?

The first question has troubled philosophers for aeons and lawyers for scarcely less time. Did the motorist who mowed down a pedestrian crossing the street do so as a result of his positive act of driving at an excessive speed or his omission to apply the brakes in time? In his later, equally significant, judgment in *N v Poole BC* [2019] UKSC 25, [2019] 2 WLR 1478, Lord Reed recognised that the bald distinction was unhelpful and suggested that "a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better)" was a better formulation. The more recent judgment in *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 has emphasised that the realities of the case have to be examined rather than the language used by the parties' advocates in determining on which side of the line a case falls.

In the context of claims against the police, the courts have so far been very reluctant to decide summarily on which side of the line a claim falls. In *Chief Constable of Essex Police v Transport Arendonk BvBA* [2020] EWHC 212 (QB), [2020] RTR 22, the cargo of the claimant haulier's lorry was stolen when it was left in a lay-by after its driver was arrested for drink-driving. It was suggested that the police ought to have taken steps to ensure that the lorry was secure. Laing J held that it was not clear whether it was a case of acts or omissions, or if the latter whether one of the exceptions might apply. She also thought that there was "a wider public interest" in proper consideration at a trial of the issue of whether a duty of care could be owed in this situation, and declined to strike the claim out. Master McCloud took a similar approach in *Tindall v Chief Constable of the Thames Valley Police* [2020] EWHC 837 (QB). The claimant's husband had been killed in a road traffic accident when a driver coming in the opposite direction skidded on black ice. Earlier, another driver had crashed after skidding on the ice. Police had attended, placed warning signs and arranged for the debris to be cleared. On leaving, they removed the warning signs and took no steps to ensure the safety of motorists passing the scene later. The Master, following the approach in *Transport Arendonk*, declined to strike the claim out. It was arguable that the removal from the scene of the warning signs had created a danger which did not previously exist.

It is understood that permission to appeal has been granted in *Tindall* but refused on paper in *Transport Arendonk*.

Similarly, the courts are reluctant to determine summarily whether an exception to the general rule of non-liability for omissions could be made out. Lord Reed cited from an academic article in both *Robinson* and *N v Poole BC* which gives the following list of exceptions:

(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.

In *Magee v Chief Constable of the PSNI* [2019] NIQB 83, the claimant's son committed suicide in front of a train after leaving a hospital where he had been taken by police who found him after it was reported that he was suicidal. The police had not detained him under the mental health legislation or remained with him in hospital until he was seen by a doctor and social worker. Maguire J held that on the facts, it was arguable that the police had assumed responsibility for the deceased's safety and allowed an appeal against the

striking out of the claim.

On the question of the relationship between negligence and other causes of action and the defences employed by the police, this will arise most acutely in cases involving uses of force by the police against suspects. The police have common law rights in the case of self-defence and statutory rights under section 3 of the Criminal Law Act 1967 and section 117 of the Police and Criminal Evidence Act 1984 to use reasonable force in connection with their functions. It is not clear exactly how these defences will interact with a negligence claim. *Gilchrist v Chief Constable of Greater Manchester Police* [2019] EWHC 1233 (QB) concerned the use of force against a man with learning and psychiatric difficulties who became disturbed and began to smash property. The police subdued him with CS gas and Taser and restrained him on the ground. O'Farrell J cited *Robinson*, but drew no distinction between the claimant's claims in battery and negligence. She held that one use of Taser by an officer "was unnecessary, unreasonable and inappropriate. It amounted to trespass to the person and the injury inflicted on the claimant was a breach of the defendant's common law duty of care."

The most simple solution for the courts to adopt will be to proceed on the basis that a negligence claim adds nothing of substance to a claim for assault or battery; if the police have a defence that no more than reasonable force was used, then the fact that reasonable force was used should mean that there was no breach of the duty of care. An alternative way to look at it would be that a duty of care would be inconsistent with the police's statutory rights to use reasonable force.

One thing is very clear from the post-*Robinson* authorities discussed above. Until case law provides greater clarity, particularly in relation to the circumstances in which an assumption of responsibility can arise, the courts will be reluctant to strike out negligence claims against the police where a person is injured as a result of police action. Any claimant proceeding against the police should therefore consider whether a claim in negligence provides a basis for a claim. The expense of fighting personal injury actions to trial may place greater pressure on the police to reach negotiated settlements.

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