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Police and Common Law Duties of Care: Recent Developments

22nd June 2023

Paul Stagg

The importance of duty of care

The elements of a claim in negligence: *Clerk and Lindsell on Torts* (23rd edn) para 7-04:

- (1) The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.*
- (2) Breach of the duty of care by the defendant, i.e. that there was a failure to measure up to the standard set by law.*
- (3) A causal connection between the defendant's careless conduct and the damage.*
- (4) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*

The importance of duty of care

- Acts as a filter so that D is not potentially liable to all C for all types of harm suffered by C
- A control mechanism to keep negligence liability within reasonable bounds
- Enables cases to be struck out under CPR 3.4(2)(a) as showing no cause of action, where it is clear that no duty of care is owed, without expensive investigation into facts at a trial

The historical position

Hill v Chief Constable of West Yorkshire

- Mother of last victim of Yorkshire Ripper brought claim for failure to apprehend killer before her daughter's death
- No duty of care owed for two reasons:
 - If no duty owed to general public to capture a known criminal, no duty owed in relation to one whose identity not known
 - Contrary to public policy: would lead to defensive mindset and distraction from tackling crime

The historical position

Application of *Hill*

- *Elgouzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335: no duty owed to detained suspects in relation to ongoing investigations
- *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495: no duty owed to identified witness of fatal attack in street
- *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225: majority held that no duty owed to complainant to protect him from perpetrator

The historical position

Application of *Hill*

- Public policy ground largely discredited in subsequent decisions eg *Brooks* at [28]: "a more sceptical approach to the carrying out of public functions is necessary"
- However, reasoning related to breadth of duty and lack of any particular feature giving rise to liability remained valid
- Widely thought that police had "immunity" from claims in negligence

The modern approach

Michael v Chief Constable of South Wales

- [2015] UKSC 2, [2015] AC 1732
- Victim made 999 call received by neighbouring police authority, relayed to home police authority
- Call graded as requiring 60 minute response
- Victim made further call and was heard to scream, murdered by former partner
- Estate/family made claims under Art 2 and in negligence

The modern approach

Michael v Chief Constable of South Wales

- Held: no duty of care owed by 5-2 majority
- Majority judgment by Lord Toulson
- [97] Emphasis in distinction between:
 - D causing injury to C
 - D failing to protect C from injury caused by TP
- [115] Same rules apply to police
- [116] Police do not have "special immunity"

The modern approach

Michael v Chief Constable of South Wales

[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.

The modern approach

Michael v Chief Constable of South Wales

- [119]-[120] Cannot confine liability to particular types of crime or victims
- [121] No way to know if imposition of liability would improve police response to domestic violence
- [122] Can be sure that imposition of liability would have substantial financial implications
- [123]-[128] Fact that C had arguable Art 2 claim was not a reason to expand negligence liability
- [130] Police have no liability in "*cases of pure omission by the police to perform their duties for the prevention of violence*"



The modern approach

Robinson v Chief Constable of West Yorkshire

- [2018] UKSC 4, [2018] AC 736
- C, elderly lady, knocked over in street in course of struggle between police officers and suspected drug dealer
- Brought claim in negligence for injuries
- At trial:
 - held that police were negligent in trying to arrest when member of public in vicinity
 - but police could not be sued in negligence as a matter of law

The modern approach

Robinson v Chief Constable of West Yorkshire

- [21]-[28] Existence of duty of care is to be determined by looking at previous cases and "incremental development", not by application of three-part *Caparo* test
- [29] Public policy only relevant if existing cases do not provide an answer
- [31]-[32] Generally makes no difference if D is a public authority or private individual.

The modern approach

Robinson v Chief Constable of West Yorkshire

- [33]

.... if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

- [55] *Hill* does not establish a general immunity in respect of anything done in course of investigating or preventing crime



The modern approach

Robinson v Chief Constable of West Yorkshire

[34]

On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm This “omissions principle” has been helpfully summarised by Tofaris and Steel

“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.”

The modern approach

Robinson v Chief Constable of West Yorkshire

[70]

there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility.



The modern approach

Robinson v Chief Constable of West Yorkshire

- [72] In *Hill and Michael*, the police "*played no active part in the critical events*"
- [73] C's claim was based on acts of officers, not omission to protect her
- [74] Reasonably foreseeable that suspect might try to resist arrest and that by-stander might be injured
- [75]-[78] Trial judge entitled to find negligence
- [79]-[80] Actions of suspect did not break chain of causation

Applications of the modern approach

Tindall v Chief Constable of Thames Valley

- [2022] EWCA Civ 25, [2002] 4 WLR 104
- Driver, K, lost control on black ice and crashed
- K began to flag down approaching vehicles to warn them
- Police attended and put up "police, slow" sign and removed debris
- K taken to hospital
- Police left scene, taking sign away
- C's husband, H, skidded on ice and crashed fatally

Applications of the modern approach

Tindall v Chief Constable of Thames Valley

- [10]-[11] C's pleaded case had two elements
 - Police made situation worse by causing K to cease attempts to warn
 - Police failed to protect H having assumed responsibility
- [12] Master declined to strike out claim

Applications of the modern approach

Tindall v Chief Constable of Thames Valley

[54] Statement of principles:

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

ii) It 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

iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations



Applications of the modern approach

Tindall v Chief Constable of Thames Valley

[54] Statement of principles:

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

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

vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all)

Applications of the modern approach

Tindall v Chief Constable of Thames Valley

[54] Statement of principles:

vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually and making matters worse;

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 or injury to members of the public at large or to an individual;

ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between the authority and the individual is any different from the relationship between the authority and other members of the same class as the individual

Applications of the modern approach

Tindall v Chief Constable of Thames Valley

- [66] Police did not require K to leave or misled him into leaving and ceasing attempts to warn motorists
- [67]-[68] Putting up and removing sign did not make matters worse
- [71] Power to control a scene does not create a duty of care
- [72]-[74] Police's "*transient and ineffective*" response did not create a duty of care by assumption of responsibility
- Now off to Supreme Court?

Applications of the modern approach

Magill v Chief Constable of the PSNI

- [2022] NICA 49
- P participating in Orange Order parade
- Protestors threw missiles at parade
- Police officers took shelter
- Parade was halted further on, causing P to be exposed to attack
- P took no measures to halt attack
- P struck and injured by a missile

Applications of the modern approach

Magill v Chief Constable of the PSNI

- [4] Two instances of positive conduct alleged:
 - Police halted parade
 - Police prevented parade from moving on
- [5] Otherwise allegations of omission
- [19] *Tindall* was concerned with omissions
- [21] Formulation of exceptions to non-actionability are not comprehensive

Applications of the modern approach

Magill v Chief Constable of the PSNI

- [24]-[26] It was arguable that Statement of Claim disclosed a sufficient cause of action
- There was no consideration of:
 - Reasons why police halted parade
 - Whether police were authorised by legislation to halt it
- [27] Emphasised that resisting strike-out did not mean that P's claim would succeed

Applications of the modern approach

Holbeach v Chief Constable of the PSNI

- [2023] NIMaster 3
- P injured in Enniskillen Remembrance Day bombing in 1987
- P alleged that:
 - RUC had plan in place to ensure safety of public
 - RUC had carried out searches of locations on out of parade
 - RUC did not search location where bomb planted

Applications of the modern approach

Holbeach v Chief Constable of the PSNI

- Hearing before Master
- [37] P argued that where police engaged in a pre-planned operation to protect public, they assumed responsibility
- [38] Not accepted: the police were attempting to reduce the danger
- [39] No distinction between P and other members of the public

Applications of the modern approach

Holbeach v Chief Constable of the PSNI

[34] Statement of principle

.... it is reasonable to imagine that certain features will usually be present in cases where the court determines that police have assumed responsibility for an individual's safety. It is clear from previous decisions of the courts that where responsibility for a person's safety, or the safety of their property, has been assumed, three elements will usually be involved. Firstly, there will usually have been some form of engagement or relationship between the police and the plaintiff. Secondly, there will usually have been communication between the police and the plaintiff. Thirdly, some form of assurance will usually have been given by the police to the plaintiff (either expressly or implied).

Applications of the modern approach

Holbeach v Chief Constable of the PSNI

- [44] Master noted that P did not suggest:
 - he knew of security operation
 - police communicated with him about it
 - police gave him any assurances
 - he relied on skills of police in searching for explosives
- [46]-[47] Claim struck out

Applications of the modern approach

Woodcock v Chief Constable of Nottinghamshire

- [2023] EWHC 1062 (KB)
- Appeal to Ritchie J from decision of Circuit Judge after trial
- C was attacked and seriously injured by ex-partner G on leaving her home in the morning
- C's case based on
 - failing to warn her that G present outside her house after neighbour reported his presence
 - failing to protect her

Applications of the modern approach

Woodcock v Chief Constable of Nottinghamshire

- [16]-[59] Detailed review of case law: emphasising repeatedly that authorities have recognised that there may be exceptions to the general rule that police not liable for omissions
- [49] Could be liability where *"exceptional or special circumstances exist which create a duty to act to protect the victim and/or it would be an affront to justice if they were not held to account to the victim"*
- [60] Disclaims attempt to set out wider principle

Applications of the modern approach

Woodcock v Chief Constable of Nottinghamshire

- [49] Court will consider:
 - (a) foreseeability of harm and seriousness
 - (b) perpetrator's known words and actions
 - (c) course of dealing between police and victim and perpetrator
 - (d) actions of police in protecting victim
 - (e) balance of public policy reasons

Applications of the modern approach

Woodcock v Chief Constable of Nottinghamshire

[50]

.... only if factors (a) to (c) and (e) [and in some cases also (d)] are proven, on the balance of probabilities by the Claimant, with sufficient weight and severity and immediacy, will the common law combined with public policy exceptionally permit the Courts to rule that a civil law duty of care was owed by the police to the specific potential victim to protect him or her from the actions of the specific third party criminal in the circumstances or to warn him or her of danger. All cases in which the exceptions to Hill are asserted are utterly fact specific so I am unable to construct any clearer guidance for myself from the authorities.

Applications of the modern approach

Woodcock v Chief Constable of Nottinghamshire

- [99] Duty of care turned on events of morning in light of previous dealings
- [100]-[102] Detailed review of background facts, including extensive dealings between C, police and G.
- [105]-[109] Consideration of five factors points to duty of care existing
- [112] There were "special or exceptional" circumstances
- [113] C was relying on police to advise her of G's presence
- Now under appeal

How to deal with claims

First question: allegations of act or omission?

- Must look at substance of what case is about rather than way it is expressed: *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 at [121], [123]
- Can be useful to consider formulation in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 at [28]:

.... a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) ... 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.

How to deal with claims

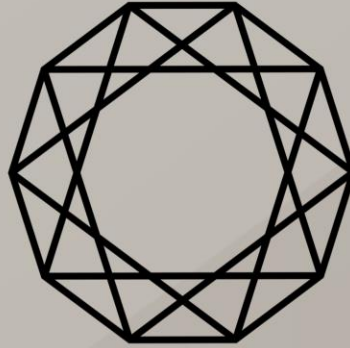
Second question: acts authorised by statute?

- Not yet considered extensively in case law
- But if police have duty, or possibly power to do something, then they cannot be liable in negligence
- eg where police have power under PACE s117 to use reasonable force and no more than reasonable force is used, would be inconsistent with that power to find that police breached duty of care
- Not considered in *Robinson* at all: would that be an answer?
- Or does it only apply to force used against eg person detained?

How to deal with claims

Third question: if an omission, does an exception apply?

- Consider the Tofaris and Steel formulation
- The formulation in *Holbeach* is helpful, albeit at first instance
- *Woodcock* is wrong to suggest that seriousness of case can make a difference: flatly contrary to authorities
- Appeal in *HXA v Surrey CC* to Supreme Court likely to consider assumption of responsibility in detail



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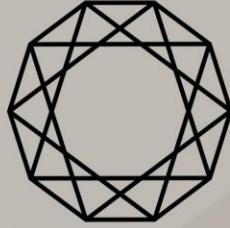
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Police Misconduct

22nd June 2023

Roderick Abbott



Overview

- Current environment and trends
- The basics of the misconduct regime
- Accelerated and non-accelerated proceedings
- “Special conditions”
- Challenges to excessively lenient panel decisions
- Collateral challenges and disability discrimination
- Conclusions

Current environment and trends

- Intense public scrutiny in the context of high profile recent cases.
- Desire of senior officers to act swiftly and decisively to address misconduct, and political pressure on them to do so.
- A perception on the part of senior officers that the current disciplinary regime is too slow and/or that their desire to take decisive action is being undermined because decisions are taken out of their hands.
- An expectation that the number of cases will increase as more resources are targeted towards misconduct, and that some of that increase will cause an increase in civil claims arising out of misconduct.



🕒 This article is more than 5 months old

Met police chief: it's crazy I can't sack 'toxic' officers who broke the law

Mark Rowley admits vetting procedures inadequate and says other bodies reinstated officers sacked by force



📷 Police officers on patrol in London. Photograph: Marcin Rogozinski/Alamy

The head of the UK's biggest police force has said it is "crazy" that he cannot sack "toxic" officers who have broken the law.

Responding to a disclosure in the Guardian that **150 officers are under**

- “We have some very worrying cases with officers who’ve committed criminality whilst police officers and yet I’m not allowed to sack them. It’s [...] crazy.”
- “We’ve got some officers who we sacked, but other legal bodies, who have a power to reinstate them, did. So I’ve got officers who we determined shouldn’t be police officers and yet I have to keep them. It sounds bizarre – I’m the commissioner, yet I can’t decide who my own workforce is.”



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Danny Shaw

Why the Met struggles to sack rogue police officers

3 December 2022, 9:58am



(Photo: Getty)



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Comments

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This week, the charity CrimeStoppers, which receives anonymous tip offs from the public, launched a new hotline – for people to report corruption and abuse by police officers. It's part of a drive by the

“Baroness Casey’s report, published in October, helps explain why the Metropolitan Police struggles to sack officers with a history of poor behaviour. It found that allegations were dealt with individually, so repeated or escalating misconduct wasn’t spotted; the threshold for ‘gross misconduct’ – which can trigger dismissal – was set too high; and the Met’s professional standards units were under-resourced and inadequately trained.”

“Some of the issues are capable of being addressed by Scotland Yard, which has set up a new 100-strong team to identify rogue officers using covert techniques usually deployed to catch paedophiles. But other flaws go to the heart of the police misconduct system, which is the responsibility of the Home Office.”

“The reforms [to the misconduct system in 2015-16] made an already overly-formal process even more legalistic, with hearings resembling court cases. Analysis by the Casey review found that allegations made by Met officers and staff against their colleagues are taking longer to resolve – around 13 months on average, with 20 per cent going on for two years or more. The delays are a source of ‘huge frustration’, her report says.

“There is also some emerging, though far from definitive, evidence that a legally-qualified chair (LQC) is less likely to dismiss an officer than a police chief was...

... Police officers are different. They are servants of the Crown, and not subject to employment laws in the same way as prison staff and other public sector workers. But it must be possible to devise a speedier and simpler mechanism for handling misconduct cases so that corrupt and abusive officers are barred from policing for life.”



Current environment and trends

- Frustrations are understandable, but it is important to understand the real reason for delays or unexpected outcomes.
- The status of police officers as office-holders, and the implications of disciplinary action for them, necessitates a different approach to employees in general.
- Delays are often caused by the need for proceedings to be fair where there are substantive disputes of fact, or due to reasons outside the disciplinary process itself (such as delays with concurrent criminal proceedings).
- Excessively lenient decisions made by non-police decision makers can be challenged, and challenged successfully.
- There are other areas (in addition to addressing delay and excessive leniency) where the disciplinary regime and regulations need reform.

Basics of the misconduct regime

- What follows relates to “Home Office” forces. Non-territorial forces (BTP, CNC etc.) have their own regime, with very minor differences.
- Statutory power to make regulations derives from s.50 Police Act 1996.
- Exercising powers under that section (and also ss.51 and 84 of the 1996 Act) the Home Secretary has issued the Police (Conduct) Regulations 2020 (“the Regulations”).
- Regulations provide for:
 - The Standards of Professional Behaviour (reg. 5 and sch. 2)
 - Investigation processes and procedures (Part 3)
 - Composition of panels in misconduct hearings (reg. 28)
 - Available outcomes in misconduct proceedings (reg. 42)
 - Appeals from misconduct proceedings
 - Accelerated Misconduct Hearings (Part 5)



Standards of professional behaviour

- Honesty and Integrity
- Authority, Respect and Courtesy
- Equality and Diversity
- Use of force
- Orders and instructions
- Duties and responsibilities
- Confidentiality
- Fitness for Duty
- Discreditable conduct
- Challenging and Reporting Improper Conduct

Panels and LQCs

- Under reg. 28, a misconduct hearing (cf. an accelerated misconduct hearing) must (where the Officer Concerned is a non-senior officer) be conducted by a panel of three persons comprising:
 - A legally qualified chair (“LQC”)
 - A police officer (Supt or above)
 - A further “lay” (non-police) member
- LQCs were introduced by the Police (Conduct) (Amendment) Regulations 2015, and were intended to introduce a greater degree of independence into misconduct proceedings, and to ensure that the outcomes were legally robust.

Accelerated procedure

- Governed by Part 5 of the Regulations.
- The person conducting the hearing is usually the Chief Constable.
- The Appropriate Authority can appoint a person to advise the Chief: reg. 8(6).
- Very tight procedural timescales and restrictions apply:
 - Date of the hearing is 10-15 working days from the date that the Appropriate Authority certifies that the “special conditions” are satisfied.
 - Officer must respond to the allegations within 7 working days.
 - No oral evidence (except from the Officer).
- If the Chief finds gross misconduct proved then they have the same powers in relation to outcome (i.e. sanction) as a panel chaired by an LQC.
- If gross misconduct is not found proved then the case can be remitted to be dealt with under the “unaccelerated” (Part 4) procedure as “mere” misconduct.

Special conditions

- For the case to proceed under Part 5, the Appropriate Authority must certify that the “special conditions” are satisfied.
- Special conditions are found in reg. 49(2), and are that:
 - (a) there is sufficient evidence, in the form of written statements or other documents, to establish on the balance of probabilities that the conduct of the officer concerned constitutes gross misconduct, and
 - (b) it is in the public interest for the officer concerned to cease to be a member of a police force or a special constable without delay.

Special conditions

- Guidance issued by the Home Office under ss. 87 and 87A of the 1996 Act states that the accelerated procedure is:

designed to deal with cases where the evidence is incontrovertible in the form of statements, documents or other material (e.g. CCTV) and is therefore sufficient without further evidence to prove gross misconduct and it is in the public interest, if the case is found proved or admitted, for the officer to cease to be a member of the police service straightaway.

(Emphasis added)

Gannon

R (Gannon) v Chief Constable of Merseyside Police & anr [2009] EWHC 2133 (Admin)

- HHJ Pelling QC sitting as a judge of the High Court.
- Decided under the previous regulations from 2008.
- Paragraphs 11-18 deal with “The Test”.

Gannon

Paragraph 12:

It is plainly necessary that a disciplinary hearing should be fair not least because of the potentially grave consequences of such proceedings for someone in the position of the Claimant. Fairness requires that there be a hearing at which an accused officer has the opportunity to question the witnesses against him where he disputes the factual allegations made by those witnesses.

However, a Part 4 hearing is by its nature time consuming and expensive. Unnecessary delay in the disposal of proceedings against officers accused of gross misconduct is not in the public interest. The 2008 Regulations attempt to balance the need for fairness so far as the accused officer is concerned with the public interest in speedy disposal.

The [accelerated] procedure was created in order to provide a cheaper and quicker alternative where fairness could be achieved without the need for a Part 4 hearing.



Gannon

Paragraph 12 (cont'd):

Where the material facts alleged to constitute gross misconduct are either admitted or are incapable of realistic dispute, then the focus of any hearing should be on whether [those facts] amount to gross misconduct and on any mitigation. It is only in relation to a case where there is no or no realistic dispute as to the facts alleged and/or there is no or no realistic dispute as to any factual evidence relevant to whether the factual allegations constitute gross misconduct that the Part 5 procedure will be fair.

Gannon

- At paragraphs 14-16, Judge Pelling held that there was no tension or inconsistency between the term “sufficient” evidence in reg. 49(2)(a) and the term “incontrovertible” evidence in the Home Office guidance.
- At paragraph 17, he went on to note that the evidence would be unlikely to be “incontrovertible” where there was a factual dispute between witnesses, because the person conducting the hearing could not rationally prefer one witness’s evidence over another’s without hearing them, save in circumstances where the evidence is inherently incredible or is inconsistent with other evidence which is incapable of credible challenge (such as CCTV or contemporary documentation).

Gannon

- Judge Pelling's approach was cited with approval by:
 - Burnett J (as he then was) in R (Evans) v Chief Constable of Sussex [2011] EWHC 2329 (Admin) at paragraphs 14-15; and
 - the Court of Appeal in R (Gray) v Police Appeals Tribunal [2018] EWCA Civ 34; [2018] 1 WLR 1609, per Sir Terence Etherton MR at paragraphs 57-58 at 1623A-G.

Gannon

- Whether or not the special conditions are satisfied can and should be reconsidered up to the start of the substantive hearing: see paragraph 13 of Gannon.
- Both Gannon and Evans proceeded on the basis that the person conducting the hearing had the power to decide whether the special conditions were satisfied, and, if not, to remit the matter to the “non-accelerated” procedure under Part 4, but that is wrong: the Regulations do not confer that power, and the decision as to whether the special conditions are satisfied is taken by the Appropriate Authority (effectively the prosecution).
- The Appropriate Authority’s decision could be judicially reviewed, but that is a clumsy mechanism. It would be preferable that the person conducting the hearing had the power which the judges in Gannon and Evans thought that person had (with their decision appealable to the Police Appeals Tribunal rather than judicially reviewable).

Challenges to panel decisions

- R (Chief Constable of the British Transport Police) v Police Misconduct Panel
[2023] EWHC 589 (Admin); [2023] A.C.D. 62.
- Officer approaches a lone female pedestrian unknown to him whilst off-duty and engages her in unsolicited conversation.
- Shows her his warrant card to prove that he is a police officer.
- Remarks that she is “too curvy to be Asian”.
- Shows her photographs of him working out in the gym.
- Asks for her telephone number and for a hug.
- Later that evening messages her, addressing her as “babe”.

Challenges to panel decisions

- Panel finds that the officer committed gross misconduct but decides to issue a final written warning rather than dismiss him.
- Chief Constable challenges the decision in the High Court on the grounds that the panel's decision on sanction was irrational, and that it had failed to properly follow the structured approach to disciplinary outcomes set out in the Guidance on Outcomes in Police Misconduct Proceedings 2017.
- High Court agrees, finding that (1) the panel had merely identified the structured approach but not actually applied it in a methodical way and (2) that correctly applying the guidance, the only reasonable outcome was dismissal.

Challenges to panel decisions

- *Obiter* comments of the judge agreed with the Chief Constable's observations that the proceedings captured a real and present national concern about police officers' conduct towards lone women, and that the correct approach to outcome involved a consideration of wider factors including the central importance of upholding public confidence in the police. The case was not an overreaction to the well-publicized serious crimes of which certain policemen had been convicted in recent months and years.

Disability discrimination

- Eckland v Chief Constable of the Avon and Somerset Constabulary [2021] EWCA Civ 1961; [2022] ICR 606.
- Claimant, a former officer, gave false evidence in court, and is dismissed as a result following a misconduct hearing before a panel.
- Claimant asserts that at the material time he was suffering from a mental health condition constituting a disability for the purposes of the Equality Act 2010, and which had led him to give false evidence.
- Brings proceedings against the chief constable on the basis that his dismissal, and the panel's failure to make reasonable adjustments, were discriminatory, and the chief was legally responsible for the acts and omissions of the panel.

Disability discrimination

- Chief constable objects, as a preliminary point, that they have no legal responsibility for the panel.
- Employment Tribunal and Employment Appeal Tribunal disagree.
- Court of Appeal also disagrees, applying the Supreme Court's decision in P v Commissioner of Police of the Metropolis [2017] UKSC 65; [2018] ICR 560.
- P concerned the implementation of EU equal treatment law by s42(1) of the Equality Act 2010.

Disability discrimination

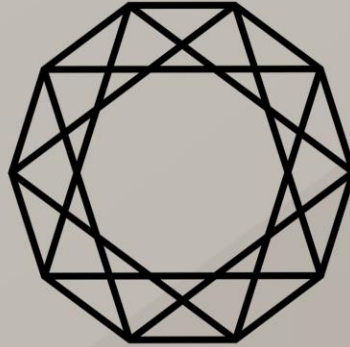
- The Supreme Court held that the principle of judicial immunity did not prevent an officer subject to a decision of a panel from bringing a claim under the Equality Act alleging that the decision was discriminatory.
- But Lord Hughes noted that “there exists a considerable potential for parallel or collateral proceedings in an employment tribunal and the ... [police appeals tribunal]” and that whilst this was “in the present state of the legislation, unavoidable. It might, however, usefully be considered in the event of any review of the overall structure”.
- The current state of the law is unsatisfactory and ripe for reform.

Conclusions

- Police misconduct is a growth area, and that in turn is likely to lead to more civil claims arising out of the same facts as the misconduct.
- There is pressure to speed up disciplinary proceedings and to challenge excessively lenient outcomes. This had caused some senior officers to question the role of legally qualified chairs in non-accelerated proceedings.
- Whilst there is scope to reduce delays, a distinction must be drawn between those cases which are genuinely capable of summary disposal (and which can already be dealt with relatively quickly under the existing regulations) and those where there are substantive disputes of fact.

Conclusions

- The regulations should be amended to allow for a more efficient mechanism for resolving disputes as to which cases are and are not suitable for summary disposal (i.e. whether the “special conditions” are satisfied).
- Where there are substantive disputes of fact there is a need for realism as to how quickly they can be resolved within a process that is fair and robust.
- Excessively lenient decisions can be successfully challenged.
- The current state of the law (which effectively permits collateral challenges to decisions on the grounds of discrimination) is unsatisfactory and should be reformed.



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