Neutral Citation Number: [2011] EWCA Civ 3

Case No: B3/2010/0081

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON MR JUSTICE WYN WILLIAMS
[2009] EWHC 2362 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2011

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE LEVESON
and
LORD JUSTICE TOULSON

- -

Between :

DESMOND	**Appellant**
- and -	
THE CHIEF CONSTABLE OF NOTTINGHAMSHIRE POLICE	**Respondent**

- -
- -

Mr Vincent Paul Desmond in Person
Mr A Payne (instructed by **Malcolm Turner (Force Solicitor)**) for the **Respondent**

Hearing dates : 7TH and 8TH December 2010

- -

Approved Judgment

President of the Queen's Bench Division:

Enhanced Criminal Record Certificates

1. This is the judgment of the Court.

2. Part V of the Police Act 1997 is concerned with Certificates of Criminal Records. One main purpose of such certificates is to provide a measure of protection for children and young people under the age of 18. There have been alterations and amendments to this Part of the 1997 Act by the Serious Organised Crime and Police Act 2005, but these proceedings are concerned with the statutory provisions in their unamended form, and we shall refer to them as such.

3. Section 115 of the 1997 Act provided for Enhanced Criminal Record Certificates, and obliged the Secretary of State to issue an ECRC to any individual who applied in the prescribed form and manner and paid a prescribed fee. The certificate had to be required for one of a number of specified purposes, including when there was consideration of the applicant's suitability for a position which involved regularly caring for, training, supervising or being in sole charge of persons aged under 18. Thus typically and in the present case, a person applying to be a school teacher would need to apply for an ECRC.

4. The functions of the Secretary of State under this legislation are undertaken by the Criminal Records Bureau, who, upon receiving an application, search national computer records and other lists for records of convictions and the like and for information on a number of lists held under statutes relating to education and the protection of children and vulnerable adults. These are finite factual matters. Section 115(7) of the 1997 Act also provided that, before issuing an ECRC, the Secretary of State had to request the chief officer of every relevant police force (as defined by regulations) to provide any information which, in the chief officer's opinion might be "relevant" for the purpose for which the certificate was required and which "ought to be included in the certificate". By section 119(2) the chief officer was obliged to comply with the request "as soon as practicable". Responding to this request may not be a finite factual matter, but could, and very often would, require an exercise of judgment by the chief officer. Thus, an applicant may historically have been prosecuted for an alleged sexual offence, but acquitted; or, as in the present case, the applicant may have been arrested on suspicion of an alleged sexual offence, but never charged or otherwise proceeded against. The statutory question for the judgment of the chief officer would then be whether the matter was relevant for the purpose of an application for a certificate for consideration by a person deciding whether to offer the applicant a school teaching position, and whether it ought to be included in the ECRC. For the purpose of that judgment, the chief officer would, for instance, need to know how and why the applicant was acquitted, or how and why he was never charged. In the latter case, there could obviously be a spectrum of possibility. On the one hand, the evidence may have been on the face of it strong, but the complainant adamantly refused to proceed; on the other, police investigations may have established positively that the applicant had not committed the offence on suspicion of which he was arrested. In the first instance, the chief officer might judge the information to be relevant and that it ought to be included in the certificate. Although the applicant is legally innocent of the alleged offence, the protective policy of the Act could require discretionary disclosure. In the second instance, it is to be supposed that the chief

officer would decide against inclusion on both statutory grounds. Indeed, it would appear to be unfair to include such information where it had been positively established that the applicant had not committed the offence, since the mere inclusion of wholly exculpatory material would tend to prejudice the applicant's prospects of obtaining the teaching post. It is a sensitive judgment for the chief officer to make, which plainly needs to be made upon full and proper information.

5. Guidance on these matters is to be found in *Home Office Circular 5/2005: Criminal Records Bureau: Local Checks by Police Forces for the Purpose of Enhanced Disclosure*, in particular paragraphs 32 to 34, where examples are given. Paragraph 10 of this document emphasises that the key purpose of disclosure is to consider the risk or likelihood of an offence being committed against the vulnerable; and that the mere fact that a person has behaved badly, or is believed to have done so, is not relevant. Paragraph 15 advises that the implications of disclosure – balancing human rights and data protection considerations against considerations such as the prevention or detection of crime and the safety of the vulnerable – demand careful and mature judgment.

6. Other material provisions of the 1997 Act were:

    a) section 117, whereby an applicant who believes that information contained in an ECRC is inaccurate may make an application to the Secretary of State for a new certificate. The Secretary of State has to consider such an application and issue a new certificate, if he is of the opinion that the information in the first certificate was inaccurate.

    b) section 119(5), which relates to various sources of information including that provided by chief officers under section 115(7), whereby no proceedings shall lie against the Secretary of State by reason of an inaccuracy in the information made available or provided to him. The effect of this appears to be that no proceedings may be brought against the Secretary of State to whom a fee is payable, if the Criminal Records Bureau issues an ECRC which contains inaccurate information. There is no equivalent express statutory protection for chief officers who may supply inaccurate information to the Criminal Records Bureau.

    c) section 115(8), which requires the Secretary of State to request relevant chief officers to provide relevant information which ought not to be included in the certificate in the interests of the prevention or detection of crime, but could nevertheless be disclosed to a prospective employer. Thus the statute embraces the prospective employer being provided with sensitive information which might prejudice the applicant's employment prospects, which will not be disclosed to the applicant.

7. The statutory structure which we have briefly referred to was considered in rather greater detail, but to the same relevant effect, in paragraphs 5 to 18 of the judgment of Lord Woolf CJ in the Court of Appeal in *R(X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 65. In that case, an applicant for an ECRC had challenged in judicial review proceedings the disclosure of information about two alleged incidents of indecent exposure, where no evidence had been offered at the applicant's trial, and

he had been acquitted because the complainant had identified someone other than the applicant. The claimant contended unsuccessfully that the disclosure had been procedurally unfair because he had not been allowed to make representations; and that the disclosure infringed his rights under Article 8 of the European Convention on Human Rights. Lord Woolf noted in paragraph 18 of his judgment that the applicant had the opportunity to persuade the Secretary of State to correct the certificate – a reference to section 117; that the chief officer is under a duty to provide the information referred to in section 115(7), which is subject to the requirement that the information *might* be relevant and ought to be included in the certificate – matters for the opinion of the chief officer; and that the applicant is able to provide additional information if he wishes, whether in conflict with the certificate or not, to the prospective employer, who will make the decision whether or not he should be employed. Lord Woolf said at paragraph 37 that it was an important parliamentary intention that information should be disclosed for the protection of children and vulnerable adults even if it only might be true.

8. In *R(L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, the Supreme Court, again in judicial review proceedings, held by a majority (Lord Scott of Foscote dissenting) that the effect of the approach taken to the Article 8 issue in the *West Midlands Police* case was to tilt the balance of the necessary Article 8(2) judgment too far against the applicant for the ECRC. Lord Hope, with whom Lords Saville, Brown and Neuberger agreed, described the relevant legislation and its effect in paragraphs 4 to 11 of his judgment and described how the system works in practice in paragraphs 30 to 34. He said that the effect of the Court of Appeal's decision in the *West Midlands Police* case had been to encourage the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant (paragraph 44). The legislation itself does not contravene Article 8 of the Convention, so long as it is interpreted and applied in a way that is proportionate (paragraph 41). Lord Hope said (paragraph 29) that the decisions which the chief officer is required to take under section 115(7) of the 1997 Act are likely to fall within the scope of Article 8(1) in every case; and that material disclosure is likely to affect the private life of the applicant in virtually every case. It should no longer be assumed that the presumption is for disclosure unless there is good reason for not doing so (paragraph 45). Public advice should indicate that careful consideration is required in all cases where the disruption to the private life of anyone is judged to be as great, or more so, as the risk of non-disclosure to the vulnerable group. In cases of doubt, chief officers should offer the applicant an opportunity of making representations before the information is released (paragraph 46).

9. Thus Article 8 of the Convention is likely to be applicable in every case and an established breach of Article 8 could be expected to give rise to a claim for damages by the applicant under section 8 of the Human Rights Act 1998. Consideration of such a claim would be likely to require consideration of whether in all the circumstances disclosure was proportionate, having due regard to the fact that a chief officer's decision to disclose is a matter of discretionary judgment. As will appear, the claimant in the present proceedings has brought an Article 8 claim. We shall say nothing as to the strength of this claim nor as to any defences which may be advanced against it, since it is not directly in issue in the present appeal. The availability and fact of an Article 8 claim is, however, a relevant factor in determining the main issue which is raised in this appeal.

Facts

10. On the evening of 25th May 2001, Vincent Desmond, the appellant, was having an evening out in Nottingham visiting a number of bars. Late in the evening, he encountered in Parliament Street a woman whom he asked for directions to a hotel he was staying at in Mansfield Road. The woman, assuming it was the same woman, referred to in these proceedings as Ms SB, arrived home very shortly before midnight in a distressed state saying to her father that she had been assaulted. Her father called the police, and PCs Ollerenshaw and Leeson arrived. SB told the police officers, and PC Ollerenshaw recorded, that she had been assaulted in Parliament Street by a man who had previously asked for directions to a hotel in Mansfield Road with a name beginning with the initial W. She gave a description of her assailant. She said that he had dragged her from Parliament Street into Newcastle Street, where he had pushed her head down towards her stomach and tried to pull her trousers down. PC Ollerenshaw left, leaving PC Leeson to take a witness statement, which she did. PC Ollerenshaw went with PC Routley to Mansfield Road, and they were at the Woodville Hotel there when Mr Desmond arrived in a taxi. He appeared to fit the description of SB's attacker. PC Ollerenshaw took Mr Desmond into a private room where, after some questioning, she arrested him on suspicion of an indecent assault on a female earlier that evening on Lower Parliament Street. He replied under caution "I asked a blond female for directions and that's all".

11. SB's witness statement spoke of two parts of her experiences that evening, the first when the man she described asked for directions to the hotel in Mansfield Road, and the second somewhat later after she had crossed the road and was walking in the direction of Glasshouse Street. She described the attack as happening during the second part by a man who came upon her from behind and grabbed her. She gave extended details of a violent assault of a sexual nature. She stated that her assailant did not attempt to pull her trousers down, although she thought he may have tried to rape her. She eventually managed to escape when, after a struggle, the man let her go. The part of the statement which concerned the assault contains no details from which alone the assailant could be identified except the colour of his hair – "I could not see his face but could see white hair" – nor any statement that the assailant was the same man who had earlier asked for directions to a hotel in Mansfield Road. As HHJ Inglis said in his judgment at first instance in this matter, it obviously remained a real possibility that the attacker was one and the same man, but without other evidence, it was plain that a case would fail at court on the question of identification.

12. After Mr Desmond had been arrested and taken into custody, PC Ollerenshaw had no more to do with his case. DC Kingsbury took over the enquiry. He interviewed Mr Desmond who then and since has always denied the allegations. DC Kingsbury saw the complainant and made other enquiries, some of which we shall refer to shortly. He initiated a crime file. Mr Desmond was released on bail on 26th May 2001. By 31st May 2001 a decision was taken to proceed no further against him, and DC Kingsbury closed the file. In doing so it is now known that he wrote

> "It is apparent Desmond is <u>not</u> responsible for the crime. The complainant visited and cannot state for certain if Desmond is responsible. Desmond refused charge and enquiries are continuing. All relevant paperwork attached."

13. Arising out of these events, two police computer records were made, neither of which recorded that there was "insufficient evidence to proceed". Mr Desmond has been very concerned in the course of these proceedings with the completeness and accuracy of the material recorded at the time of his arrest and discharge. He has been assiduous in seeking (not always successfully) disclosure of various materials including, as will appear, the crime file and DC Kingsbury's notebook. It is not, however, necessary for present purposes to consider these matters generally in greater detail, because Mr Desmond now sensibly accepts that no claim which this court is required to consider needs to assert failures by the Nottinghamshire Police in 2001.

14. Mr Desmond applied for and obtained an ECRC in December 2004 which had no adverse information on it. By the time he applied for another certificate on 4th July 2005, the national system for co-ordinating information had been altered. Nottinghamshire Police, upon receiving a request from the Criminal Records Bureau, ascertained that they had short details of Mr Desmond's arrest and discharge in 2001, but struggled to be able to enlarge on these details. There did not then turn up the crime file nor DC Kingsbury's notebook. They did not have SB's witness statement, nor the conclusion of DC Kingsbury nor the reasons for it. DC Kingsbury had retired and attempts to make contact with him were unsuccessful. PC Ollerenshaw was asked to recollect what had happened and provided an account (which Mr Desmond criticises) on 8th October 2005. It was largely on the basis of this account that a request for authority to disclose material to the Criminal Records Bureau was put before ACC Ditchett on 19th December 2005 in these terms:

> "I seek your authority to disclose that the applicant was arrested on 26/5/01 on Suspicion of Indecent Assault on a Female and Attempt Rape on a Female, together with the circumstances, that whilst walking down a street in Nottingham City Centre a female was approached by a man who engaged her in conversation, during the conversation he showed her a match box which had a picture of a hotel on it and he stated that he was staying at that hotel. Then he suddenly dragged her into an alleyway and attempted to forcibly remove her trousers. She resisted and during the struggle he let her go and he ran from the scene. Police attended the Hotel which was depicted on the match box and a person fitting the description of the attacker was just getting out of a taxi. When questioned about the incident he made significant comments and was arrested. On 05/06/2001 Mr Desmond was refused charge due to insufficient evidence to proceed.
>
> The OIC has since retired and we have been unable to establish why there was insufficient evidence to charge."

On the basis of this and apparently without further enquiry, ACC Ditchett acting for the chief Constable authorised disclosure on 21st December 2005 as follows:

> "Relevant to disclose. The prospective employer should have an opportunity to question the applicant and satisfy themselves that he poses no threat given the key position of trust he is applying for."

As a result of this disclosure, an ECRC was issued on 23rd December 2005 containing information in substantially the terms of the disclosure which ACC Ditchett had authorised.

15. The present appeal and cross-appeal centrally concern whether the Nottinghamshire Police, by whatever person or agency, owed Mr Desmond a duty of care in providing this information to the Criminal Records Bureau. If they did, there is, we think, an arguable breach of that duty. Shortly expressed, the arguable breach would be that, since on the face of the material provided to ACC Ditchett it had not been possible to establish why there was "insufficient evidence to charge", Mr Ditchett was unable to make the judgment necessary to decide whether to disclose the information or not. He did not know where on the spectrum of possibility this case lay. As will appear, it in fact lay well towards the end of the spectrum which would strongly suggest that the information should not be disclosed. Events have proved that the Nottinghamshire Police had access to the material, in the form of the crime file, which showed this.

16. Mr Desmond was understandably more than unhappy with this ECRC which, he claims, impeded his employment as a teacher and caused him loss, stress and anxiety. He challenged the certificate, and the whole of the year 2006 and the first weeks of 2007 were spent in him attempting to have the matter rectified as he saw it, and in the Nottinghamshire Police proceeding slowly and, as Mr Desmond would have it, obstructively to reconsider the application. Mr Desmond made an application under section 117 of the 1997 Act for a new certificate on 16th October 2006. Eventually, on 21st February 2007, the matter was put before a different ACC, Mr Ackerley, in modified terms. He declined to authorise disclosure "as given the information it is not proportionate or relevant for disclosure". As HHJ Inglis said in paragraph 27 of his judgment, "so it was that at the beginning of March 2007, Mr Desmond was in receipt of a clear certificate".

17. Mr Desmond is very critical of the details of how his case was handled by the Nottinghamshire Police especially during the autumn of 2006. He considers that their failures, as he sees them, during this period delayed the eventual outcome. He considers that they were culpable during this period and that this gives rise to a claim in negligence. We do not set out these matters nor consider them in detail for two reasons. First, if he can establish the existence of a duty of care relating to events in December 2005, breach of that duty (which we consider to be arguable) should by itself carry his claim, in principle at least, through to the end of February 2007 when he achieved a clean certificate. Second, if he cannot establish a duty of care for December 2005, he will not, in our view, establish any duty of care for 2006 when the facts are far more debateable. In our view, compendiously and in short, the 2006 facts will not by themselves sustain an assumption of responsibility which is not established for 2005.

18. After ACC Ackerley's decision on 21st February 2007 and the consequent clean ECRC certificate, Mr Desmond on 22nd October 2007 made an application for pre-action disclosure. He had been told in August 2007 that the Nottinghamshire Police no longer held the original complaint file which, they said, had been destroyed following the decision not to charge him. There was to be a pre-action disclosure hearing on 15th November 2007. Shortly before that, it appears that the Nottinghamshire Police found the crime file, which was then disclosed – as Mr Desmond would say in an incomplete form – by letter dated 13th November 2007. It

was said to have been "held in an archive on Division and was traced by the Force Data Protection officer ". We are not aware of any explanation why this file could not have been traced by an appropriate search in December 2005, especially if ACC Ditchett had asked for the search to be made.

19. Documents from the crime file show that, after Mr Desmond had been released on bail on 26th May 2001, he and his wife prepared for DC Kingsbury on 27th May 2001 a 6 page chronological account of his movements on the evening of 25th May 2001. This gave exhaustive details of the bars and a restaurant where he went, what he ate and drank and the people he encountered who would be able to verify the account he gave. The chronology includes the following:

> "Information regarding what happened between leaving the "Voodoo" bar and entering the Indigo bar, at 36 Carlton Street, Hockley, Nottingham, has already been stated on the interview tapes – therefore no need to reiterate."

A transcript of this interview has not been made available, but no doubt it gave Mr Desmond's account of his meeting with a woman on Parliament Street from whom he asked for directions to the Woodville Hotel.

20. This 6 page chronology gave DC Kingsbury the opportunity to make enquiries to check the accuracy of Mr Desmond's account, and it appears that he did so. We understand that CCTV cameras in and around Parliament Street did not show anything relevant, but that CCTV material in a bar did show that Mr Desmond was there when he said he was. This no doubt contributed to DC Kingsbury's positive conclusion that Mr Desmond was " not responsible for the crime", which itself provides Mr Desmond with the thoroughly arguable case that it was misleading to state that he was "refused charge due to insufficient evidence to proceed". The arguable case is that in truth he was not charged because DC Kingsbury positively decided that he was not responsible for the crime for reasons which are now evident, and which the Nottinghamshire Police could and should have come upon in December 2005. The factual negligence case for breach of a duty of care, if there was one, is succinctly summarised in paragraph 70 of Mr Desmond's original skeleton argument in this court when he wrote:

> "… the ACC [Ditchett] never made any concerted effort to contact DC Kingsbury, never mind to establish why there was insufficient evidence to charge."

The proceedings

21. Mr Desmond began these proceedings by claim form issued in the Nottingham County Court on 22nd November 2007. In particulars of claim dated 12th December 2007 he claimed damages, including aggravated and exemplary damages, for negligence which he particularised in 16 sub-paragraphs. He also claimed for misfeasance and for breach of Article 8(1) of the European Convention on Human Rights. Amended particulars of claim, dated 9th October 2008, much enlarge the detail of the claim, extending the initial particulars of negligence to 24 paragraphs. Embedded within these particulars and separately is a claim for breach of Mr Desmond's rights under the Data Protection Act 1998. There was also added a

negligent mis-statement claim against PC Ollerenshaw, a claim for conspiracy to injure, and another hugely particularised claim for negligence in relation to the events of 2006 and up to February 2007. Mr Desmond will forgive us, we trust, if we express the view that he has made his litigation over-complicated.

22. By judgment and order of 14th November 2008, HHJ Inglis struck out Mr Desmond's claims in negligence under CPR Part 3.4 as disclosing no reasonable ground for bringing the claims. The judge also gave summary judgment for the defendants under Part 24 in relation to the claims for misfeasance and conspiracy to injure. The essence of the summary judgment decision was that Mr Desmond had no real prospect of establishing the necessary element of malice. The judge gave permission to appeal his decision on negligence claims. He did not give permission to appeal on the misfeasance and conspiracy claims, and permission for these was subsequently refused by Wyn Williams J, who heard the appeal on the negligence claims and gave judgment partly in Mr Desmond's favour on 1st October 2009. The misfeasance and conspiracy claims are therefore at an end. The Article 8 claim remains unaffected by HHJ Inglis's order or this appeal, as does the claim for breach of the Data Protection Act 1998, in which Mr Desmond essentially contends that the Nottinghamshire Police were obliged to remove from their records and destroy details of his arrest and discharge within 42 days in 2001, because the discharge was on the basis of identity. We have not investigated in detail either this claim or the surviving Article 8 claim.

23. We express some regret that we are called upon to decide a difficult issue of law relating to the existence of a duty of care before any facts have been found, and when, so it seems, there remains the likelihood of a factual trial on the Article 8 claim which will raise much the same matters of fact as would a claim in negligence. We are well aware of authorities which warn against a court deciding difficult issues of the law of negligence upon assumed and potentially disputable facts. It is often preferable to decide the facts first. We are persuaded, however, that the proper progress of this case requires us to decide the main issue which this appeal raises.

24. Wyn Williams J's judgment is to be found at [2009] EWHC 2362 (QB), and it may be referred to for some greater detail than this judgment need contain. He allowed Mr Desmond's appeal in part in relation to the claim in negligence. The judge said in paragraph 65 of his judgment that he would identify at a directions hearing, with the assistance of counsel and Mr Desmond, the allegations of negligence within the amended particulars of claim which survived, but we are not aware that this has been done. Both parties agree that, without this, the judgment itself is not entirely clear at the fringes. Mr Desmond brings this second appeal with permission of Smith LJ and seeks to enlarge the ambit of the surviving negligence claim. The respondent cross-appeals, contending that the Chief Constable and the Nottinghamshire Police owed Mr Desmond no duty of care in providing information to the Criminal Records Bureau under section 115(7) of the 1997 Act.

25. Wyn Williams J reproduced in paragraph 32 of his judgment 9 of Mr Desmond's allegations of negligence relating to the period October 2005 to 21st December 2005, noting that a number of different persons is said to have been negligent. He considered in some detail authorities relevant to the question whether and in what circumstances the law may or (more usually) may not impose a duty of care on the police or individual officers in the execution of their operational duties in investigating, detecting and suppressing crime. A police officer may in particular

circumstances and on particular facts be held to have assumed a responsibility to take care so as to give rise to a duty of care to an individual. But, absent such particular circumstances, public policy requires the law to hold that the police do not owe a duty of care to victims of crime, for instance, or witnesses in the performance of their normal operational duties. The authorities which the judge considered included *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; *Van Colle v Chief Constable of Hertfordshire* [2009] AC 225; and *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335. The last of these raised the question of the significance of alternative remedies. Of this the judge said (paragraph 41) that it was at least arguable that public policy arguments based on the existence of alternative remedies do not prevent a duty of care arising where a claimant establishes that a defendant has assumed responsibility to take reasonable care in the particular circumstances of the case.

26. The judge referred at paragraph 43 of his judgment to the statutory context and quoted at length from sections 115 and 117 of the 1997 Act. He noted (paragraph 44) that the Secretary of State performs his functions under these sections and that the Chief Constable delegates his functions under section 115 to a very senior officer. The judge drew attention to and quoted from the Home Office circular to which we have referred. It was submitted to the judge that the gathering of information and its disclosure under section 115(7) was inextricably linked to the suppression of crime and that the core principle in *Hill* should apply. Noting Judge Inglis's decision, the judge said (paragraph 49) that it was at least arguable that the collation of information in order that a decision could be made about disclosure was not necessarily an activity within that core principle, even though the protection of vulnerable people was crucial. Judge Inglis had accepted that no duty of care could arise in favour of Mr Desmond because it could not be shown that the respondent had assumed responsibility towards Mr Desmond in relation to the collation of information. The judge then said at paragraphs 51 to 53:

> "As is apparent from the speech of Lord Steyn in *Brooks* and as is expressly conceded by Ms Leek a duty of care can arise between persons for whom the defendant is responsible and particular individuals if the defendant is taken to have assumed responsibility in the sense that phrase is understood in the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465.
>
> Is it at least open to argument that the respondent assumed responsibility to the appellant to take reasonable steps to collate all the information which was available to the Force relating to the appellant in order that a decision upon disclosure could be taken in light of all relevant information? In my judgment it is properly arguable that such a responsibility was assumed. The following factors seem to me to support such a possible conclusion. First, the defendant knew or should have known that the appellant was required to pay a fee to obtain an enhanced certificate. Second, he knew that the any information disclosed would, in turn, be disclosed to prospective employers; information which was adverse was likely to have a very

> detrimental effect upon the appellant's prospects of obtaining employment. Third, Nottinghamshire Police Force had a designated unit consisting, at the very least in part of civilian employees, which was responsible for collating the information. Fourth, on the state of the evidence so far adduced, the relevant information could only be retained in a finite number of databases and/or documents and/or locations. Fifth, the appellant was entitled to rely, at least arguably, upon the respondent to ensure that reasonable steps were taken to ensure that the information placed before a decision maker was both accurate and complete.
>
> I appreciate, of course, that arguments can be made which point against the existence of the duty identified in the preceding paragraph. Ms Leek made them forcibly before me. However, I am not persuaded it is appropriate for me to conclude that the pleaded allegations of negligence set out in paragraph 32 above which relate to the collation of information cannot succeed because the identified duty did not exist."

27. The pleaded allegations which the judge had set out in his paragraph 32 included an allegation of failure to take reasonable steps to make contact with DC Kingsbury and of failure to review the crime file before making an informed decision whether to make the disclosure or not. It also included references to PC Ollerenshaw providing information and to ACC Ditchett authorising the disclosure of what was alleged to be false information.

28. In paragraphs following his paragraph 53, the judge proceeded to consider whether PC Ollerenshaw and ACC Ditchett were personally negligent, concluding that they were not. Mr Desmond in his grounds of appeal challenges these findings, contending that PC Ollerenshaw was in breach of a duty of care when she supplied inaccurate or incomplete information in 2005; and that ACC Ditchett was in breach of a duty of care in 2005 in disclosing inaccurate and incomplete information which he knew to be incomplete.

29. We are not entirely clear how paragraphs 51 to 53 of the judge's judgment reconcile with the subsequent paragraphs in which the judge held that ACC Ditchett in particular was not negligent. The judge had held that it was at least open to argument that "the Respondent" assumed responsibility to Mr Desmond to take reasonable steps to collate the information. Some person or people acting for the respondent must be referred to here. We understand the judge's reasoning that ACC Ditchett was entitled to assume that the information presented to him was accurate and sufficient. But we find difficult the judge's subsequent statement that it was difficult to imagine any decision-maker faced with the information provided to ACC Ditchett making a decision which was different from the one reached by him (paragraph 59). We have already indicated our view that it is thoroughly arguable that the very terms of the information provided to ACC Ditchett – "we have been unable to establish why there was insufficient evidence to charge" – required him to instigate further inquiries to elucidate that question. If these and related matters were the only issues in this appeal, it would at least be necessary to refine the judge's decision so as to define more precisely the ambit of the duty of care which he found and the extent of its

arguable breach. It is fair to recall that this is what the judge himself intended to do – see paragraph 65 of his judgment.

30. These are not, however, the only issues in the appeal. By respondent's notice, the respondent contends that neither he nor his subordinates owed Mr Desmond any duty of care in responding to the request for information under section 115(7) of the 1997 Act and that the judge was wrong to hold otherwise. The essence of the contention is that the chief officer's obligation to provide information derives from a statutory structure and that, in performing that statutory obligation, the chief officer is not to be taken to have assumed responsibility to Mr Desmond (in this case) so as to give rise to a common law duty of care. In our judgment, this contention is correct in law for reasons which we give below. The judge did not deal in terms with this way of putting the respondent's case, although he did refer to the statutory context (paragraph 43) and he did ask the question whether the defendant was to be taken to have assumed responsibility (paragraph 51).

The Law

31. The very well known cases to which the judge referred – *Hill*, *Brooks*, *Van Colle* and *Elguzouli-DAF* - establish a core principle of general application, somewhat modified since *Hill* was originally decided, that, in the absence of special circumstances, the police and the Crown Prosecution Service do not generally in the interests of the whole community owe individual members of the public, be they victims, witnesses or those who are prosecuted, a common law duty of care in undertaking and performing their operational duties of investigating, detecting, suppressing and prosecuting crime. The principle is one of public policy which has regard to the practical needs of law enforcement; the need not to inhibit the police from taking difficult operational decisions and so as to avoid defensive policing; and the undesirability that judgments of policy and discretion in the most advantageous deployment of resources and so forth should be elaborately and expensively investigated in litigation or otherwise with consequent diversion of police or CPS resources. It is relevant to the question whether the police or the CPS may owe a common law duty of care to see if the aggrieved person has other remedies. The core principle may lead to hardship in some individual cases, but the greater public good outweighs individual hardship. We note as relevant to the later part of this discussion that Morritt LJ said in *Elguzouli-DAF* at page 352C that it would be surprising to find a common law duty in that case in the circumstances that the CPS was a recent creature of statute, but under no statutory duty to individuals; and that Steyn LJ said at page 346D that the general approach must take account of the public nature of the functions of the CPS.

32. The modified core principle in *Hill* may not apply in exceptional circumstances at the margins; to an ordinary case where, for instance, in a road accident the police cause personal injury or physical damage by negligent driving; nor to cases where on particular facts a police officer is taken to have assumed responsibility to an individual claimant. Cases where liability for negligence against the police have been established or the existence of a duty of care has been held to be arguable include *Knightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Gibson v Orr* [1999] SC 420 as to which see *Van Colle* at paragraph 79; *Swinney v Chief Constable of Northumbria Police* [1997] QB 464 as to

which see *Van Colle* at paragraphs 80, 120; and *Costello v Chief Constable of Northumbria* [1999] ICR 152, as to which see *Van Colle* at paragraph 120.

33. If the issue in the present appeal was simply whether the modified core principle deriving from *Hill* applied to negative a duty of care arguably owed by the respondent Mr Desmond, we can see the force of the judge's conclusion that to an extent it did not. There is a reasonable argument that providing information to the Criminal Records Bureau is not, notwithstanding Mr Payne's submission to the contrary, part of the core operational police activities to which the policy considerations derived from the cases may apply. But it is, in our judgment wrong to confine the inquiry to this question alone.

34. Many hundreds (perhaps thousands) of pages of modern United Kingdom law reports, and those of other common law jurisdictions, have been devoted to defining circumstances in which defendants may owe claimants a common law duty of care. On one view, the law is scarcely accessible to an unrepresented litigant such as Mr Desmond. We note that, in the recent House of Lords decision in *Customs and Excise Commissioners v Barclays Bank* [2007] 1 AC 181, it was considered that the tests used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined. The court would focus its attention on the detailed circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole. In the present case, a short introductory summary of one general approach will suffice.

35. The proper analysis of any claim in negligence requires the court to ask and answer a composite single question, that is whether in all the circumstances the scope of the duty of care contended for is such as to embrace damage of the kind which the claimant claims to have suffered. In cases where, as here, the damage is essentially economic not physical, reliance by the claimant on the defendant is an intrinsically necessary ingredient. The court examines with care the relationship between the claimant and the defendant, and asks, as the judge did in the present case, whether the defendant is to be taken to have assumed responsibility to the claimant to guard against the damage for which compensation is claimed. In short, the question in each case is whether the law recognises that there is, in all the circumstances, a duty of care – see *Phelps v Hillingdon London Borough Council* [2000] 3 WLR 776 at 791. One circumstance which will necessarily feature in this inquiry is if the relationship between the claimant and the defendant arises from the provision of a statute or in a statutory context. Such is the present case.

36. We give below a summary of relevant legal principles which we derive mainly from the decisions of the House of Lords in *Stovin v Wise* [1996] AC 923 (the opinion of Lord Hoffmann, but including principles from the opinion of Lord Nicholls, who dissented in the result); *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, with reference back to *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, *Barrett v Enfield London Borough Council* [2001] 2 AC 550, and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; *D. v East Berkshire County Health NHS Trust* [2005] 2 AC 373; and *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 All ER 197. We also in particular acknowledge valuable general assistance from paragraphs 3.142 to 3.148 of Law Commission Consultation Paper No. 187 *Administrative Redress; Public Bodies and the Citizen*

(2008). We are conscious that, in *Gorringe*, Lord Steyn said at paragraph 2 that no single decision is capable of providing a comprehensive analysis and that an intense focus is necessary on the particular facts and the particular statutory background.

37. Public authorities discharging statutory functions operate within a statutory framework. It is necessary to have regard to the public nature of the powers or duties and the funding for them. There is often a distinction to be made between a statutory duty and a statutory power, and an omission to act requires different treatment from positive conduct. There may also be a distinction between a claim for personal injury or physical damage and a claim for economic loss.

38. A statutory power cannot of itself generate a common law duty of care – *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 – see *Gorringe* at paragraph 41. Whether a statutory duty gives rise to a private common law cause of action is a question of construction of the statute. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for its breach. If the statute does not create a private right of action, it would be unusual, to say the least, if the mere existence of the statutory duty could generate a common law duty of care. The existence of a broad public law duty alone can scarcely give rise to a common law duty of care owed to an individual.

39. The common law should not impose a concurrent duty which is inconsistent, or may be in conflict with, the statutory framework. If the policy of the statute is not to create a statutory liability to pay compensation, the same policy should also ordinarily exclude the existence of a common law duty of care. Lord Scott of Foscote put the essential principle for statutory duties as follows in paragraph 71 of *Gorringe*:

> "… if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty".

40. There may be special circumstances in which a public authority has assumed an obligation to a claimant to act in a particular way. But if Parliament stops short of imposing a private law duty in favour of individuals, sufficiently compelling special circumstances are required, beyond the mere existence of the duty or power, to make it fair and reasonable to impose a duty to an individual of a scope to be derived from the special circumstances. There may be particular cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities such that they are taken to have assumed responsibility to a claimant so as to give rise to a common law duty of care.

41. Factors to be taken into account include the subject matter of the statute and the intended purpose of the statutory duty or power; whether a concurrent private law duty might inhibit the proper and expeditious discharge of the statutory functions; whether such a duty would expose the authority's budgetary and other discretionary

decisions to judicial inquiry; the ability of the claimant to protect himself; and the presence or absence of a particular reason why the claimant was relying or dependent on the authority. If there is reliance, it may easily lead to the conclusion that the authority can fairly be taken to have assumed responsibility to act in a particular way. But reliance alone is usually not enough. Some statutory duties or powers are less susceptible to a concurrent common law duty than others. The law does not favour blanket immunity. See for these propositions Lord Nicholls (who dissented in the result) in *Stovin v Wise* at 937C to 938E. In the present case, we consider that the modified core principle to be derived from *Hill* (see above) is relevant, but arguably not of itself determinative.

42. There are cases where a public authority may be held liable for breach of a duty of care on what Lord Hoffmann in *Gorringe* (at paragraph 38) referred to as a solid, orthodox common law foundation, where the question is not whether it is created by a statute, but whether the terms of the statute are sufficient to exclude it. He gave as an example a hospital trust providing medical treatment pursuant to a public law statutory duty, but where the existence of a common law duty was based simply on its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. *Barrett v Enfield* and *Phelps v Hillingdon* are examples of cases where, upon a longer analysis, public authorities acting under statutory powers were held in principle vicariously liable for alleged breaches of duty by their child care, health or education professionals. The professionals themselves arguably owed the children a duty of care, and the employing local authority was prima facie vicariously liable if the professional was in breach of that duty. On the other hand, health care and child care professionals employed by statutory authorities do not normally owe a duty of care to the parents of children whom the professionals may wrongly allege to have abused their children. The child, not the parent, is the doctor's patient, and the doctor has to be able to act single-mindedly in the child's interest without regard to the possibility of a conflicting claim by the parent – see *D v East Berkshire County Health NHS Trust*, where the factor which Lord Nicholls labelled "conflict of interest" (paragraph 85) was a major, if not determinative, consideration. Likewise, where action is taken by an authority acting under statutory powers designed for the benefit or protection of a particular class of persons, the authority will not owe a common law duty of care to others whose interests may be adversely affected by the exercise of the power. The imposition of a duty of care might inhibit the exercise of the statutory power and be potentially adverse to the class of person it was designed to benefit or protect, thereby putting at risk the statutory purpose - *Jain v Trent*, where the facts in favour of the imposition of a duty of care were, on one view, very strong.

This case

43. In the present case, the chief officer had a positive statutory duty to act, either by providing information to the Criminal Records Bureau or by refraining from doing so. There was necessarily a relationship deriving from the statute between the chief officer and Mr Desmond. The chief officer had a duty to act in the public interest with a view to the proper protection of vulnerable young people, but in Mr Desmond's case the relationship was personal to him. Mr Desmond may be said to have relied on the chief officer performing his duty properly.

44. Mr Desmond, who has put a huge amount of time and effort into the preparation and presentation of this case, relies on *Spring v Guardian Assurance* [1995] 2 AC 296, and this authority is perhaps a high point of this part of his case. In *Spring*, the majority of the House of Lords held that an employer, who gave a reference for a former employee, owed the employee a duty to take reasonable care in its preparation and would be liable in negligence if he failed to do so and the employee suffered economic damage. The employer had a quasi-statutory obligation to make full and frank disclosure under paragraph 3.5(2) of the Lautro rules, whose general intent, we may suppose, was to maintain standards in the insurance market. The majority held that this did not preclude an existence of a duty of care (see e.g Lord Goff at page 321E), where the employer had special knowledge of the former employee's character, skill and diligence; where it is difficult for an employee to obtain fresh employment without the benefit of a reference from his present or previous employer; and where the employee relied on the former employer to exercise proper skill and care (page 319). The second and third of these matters in particular may be said to apply to Mr Desmond in the present case. He was unlikely to obtain employment teaching young people without a clean ECRC. On the other hand, the relationship between him and the chief officer was purely statutory and at arm's length; whereas there had been a previous employer/employee relationship in *Spring*, whose importance the speeches of the majority clearly emphasise – see Lord Brown in *D v East Berkshire* at paragraph 135.

45. Mr Desmond also relies on *Yetkin v London Borough of Newham* [2010] EWCA Civ 776, a recent decision of the Court of Appeal, where a local highway authority had exercised its statutory power by taking positive action, which had created a hazard to pedestrians, by planting and maintaining shrubs which restricted the view of pedestrians using a pedestrian crossing. Smith LJ, who gave the only substantive judgment, considered *Stovin v Wise* and *Gorringe* at some length, concluding that *Gorringe* in particular was not concerned with cases where the public authority had done something positive which had or may have given rise to a common law duty of care (paragraph 25). She held that the overgrown bushes amounted to a trap or enticement and that the local authority owed a common law duty of care to the injured pedestrian. In our view, *Yetkin* is an example of a case, which all the authorities recognise as a possibility, where on particular facts a statutory authority acting under statutory power is to be taken to have assumed responsibility to the injured claimant by taking particular positive potentially dangerous action which the statute did not oblige it to take. It is also a case where the claimant suffered direct personal injury. By contrast, the chief officer in the present case had a positive statutory duty to respond to the request for information; and Mr Desmond's main claim is for economic loss.

46. Other cases to which Mr Desmond has referred include *R (A) v Secretary of State for the Home Department* [2004] EWHC 1585 (Admin), a first instance decision concerning immigration officers performing statutory functions in the name of the Secretary of State; and *Welton v North Cornwall District Council* [1997] 1 WLR 570, a decision of the Court of Appeal concerning requirements by an Environmental Health Officer, which were well beyond those required by the exercise of statutory powers in relation to food hygiene, giving rise to a duty of care because they were detailed positive requirements beyond the ambit of the legislation. These authorities are not relevantly persuasive in the present context.

47. In our judgment, the facts of Mr Desmond's case taken with the statutory policy and context do not support the existence of a duty owed by the chief officer to Mr Desmond to take reasonable care in responding to a request for information under section 115(7) of the 1997 Act. Wyn Williams J was wrong, we think, to conclude that to an extent there was an arguable duty of care. We have reached this conclusion, in the light of the principles of law to which we have referred, for the following summary reasons.

48. We agree with the judge that it is reasonably arguable that the modified core principle in *Hill*, taken alone, might not preclude a common law duty of care. The modified core principle is a relevant background starting point, but not by itself decisive. The statutory context in which the chief officer was obliged to operate is important. The statutory purpose of ECRCs is to provide a degree of protection to vulnerable young people generally. The chief officer acts pursuant to a statutory duty. In so acting, he does not assume a responsibility which the statute has not obliged him to undertake. He had no choice – cf *Customs and Excise v Barclays Bank* at paragraph 14. There are no special facts in this case from which the court might conclude that, apart from the statutory duty, this particular chief officer is to be taken to have assumed responsibility to Mr Desmond in particular. The statute does not provide or envisage a remedy in compensation or damages for breach of the statutory duty. There is nothing beyond the existence of the statutory duty from which a common law duty of care might be discerned. The fact that the Secretary of State is protected by section 119(5) from proceedings for an inaccuracy in the information made available or provided does not in the statutory context taken as a whole indicate a parliamentary intention or understanding that the chief officer should or would owe a common law duty of care towards persons in the position of Mr Desmond. He has other potential claims (referred to in paragraph 51 below) which a blanket statutory protection for chief officers might have affected.

49. Not only is there no proper basis for concluding that the chief officer is to be taken to have assumed responsibility to Mr Desmond in the performance of a responsibility imposed by statute, but the structure and purpose of the statute strongly suggests that there should be no duty of care. If there were, there would be a plain conflict between the chief officer's putative duty to Mr Desmond and the statutory purpose of protecting vulnerable young people. This is illustrated by the very facts of this case in which ACC Ditchett had to make a delicate judgment, on whatever information he acquired, whether or not to disclose information which might properly be regarded as relevant to the decision which the prospective employer might make. It was important that an officer in ACC Ditchett's position should not be inhibited by the possibility of proceedings for breach of a conflicting statutory duty of care to Mr Desmond. This being our view as to the existence of a duty of care generally, we do not consider that constituent parts of the performance of the statutory duty can be separated out so as to attach a duty of care to one or more of the parts – for example in the present case, a segregated duty of care to ensure that ACC Ditchett acquired better information. We note that there could be a relevant and possibly more acute conflict with the parallel operation of section 115(8) of the 1997 Act.

50. We have had no case drawn to our attention (and we know of none) where an authority undertaking a statutory duty or operating in a statutory context has been held to owe an arguable common law duty of care which persuades us by analogy that

there should be an arguable common law duty of care in the present case. There was no particular assumption of responsibility beyond that required by the proper performance of the statutory duty. There was no sufficient relationship between the chief officer and Mr Desmond such as existed, for instance, in *Spring* and *Phelps*. Certainly ACC Ditchett, as the chief officer's delegate, is a professional police officer, but his relationship with Mr Desmond was not analogous with that of a health care professional and his patient. He did not assume or undertake an obligation beyond that required of the chief officer by the statute. And crucially, as we have said, a common law duty owed to Mr Desmond would conflict with and inhibit the performance of the statutory function, whose purpose was the protection of vulnerable young people.

51. It is, in our view, a relevant supporting consideration, as Mr Payne submits, that there is a series of other possible remedies potentially available to Mr Desmond. There is the statutory remedy under section 117 of the 1997 Act which operated in this case. Mr Desmond could have brought proceedings for judicial review, which was the procedure adopted in other cases referred to earlier in this judgment in which challenges have been made to ECRCs. Another decision of Wyn Williams J in this category – *R(S) v Chief Constable of West Mercia Constabulary* [2008] EWHC 2811 (Admin) – on which Mr Desmond relies and which he drew to the judge's attention in the present case, was a successful judicial review claim, which has no positive bearing on the existence of a common law duty of care. Mr Desmond has his claims under the Human Rights Act 1998 for breach of Article 8 of the European Convention on Human Rights and his claim for breach of the Data Protection Act. There could also on appropriate facts be possible remedies for misfeasance in public office, for maladministration to an ombudsman, or under the Police Conduct Complaints Procedure.

52. We say for completeness that, although we have concentrated on the existence of a duty of care in relation to ACC Ditchett's decision in December 2005, equivalent considerations apply to negative the existence of a common law duty of care at other stages. We also say for completeness that Mr Desmond's contention, relying on *Osman v United Kingdom* [1999] 1 FLR 193, that striking out his negligence claim is a breach of Article 6 of the European Convention on Human Rights is, in our view, unarguable. We are not according the respondent any form of blanket immunity, but rather deciding that on the particular facts of this case there is no common law duty of care.

53. For these reasons, in our judgment Mr Desmond's appeal fails and the cross-appeal succeeds, so that Judge Inglis's order striking out the negligence claims should be restored.