

Action 1 claim 8.13 stolen motorcycle not returned

The Appellant's eye witness, G Thomas, was gaoled during the time required to give evidence and only released with no charge after the hearing.

This was a deliberate conspiracy to further pervert the course of justice-an over arching observation by many who have studied both this judgment and court exhibits

The South Wales Police, in 1993, have prejudiced the case with yet another attempt to harass by hiding Appellant's property.

After arresting the Appellant and unlawfully locking him up in Cardiff prison for 'an offensive weapon' of which they had no evidence but using the pretext the Appellant could not be 'identified' a charge of stealing his own Guernsey registered motorcycle was added.

This bike, together with all his other four foreign registered vehicles, were also ssoon stolen with his veterinary ambulance being stolen twice in one day and finally found 'burnt out' on the outskirts of Barry.

One of the bike's many police incidents was p140 Action 1 claim 8.6, 20 May 1993 arrest at Grand Avenue Cardiff.

Three such incidents, by Oct 1993, had provoked much police embarrassment in various courts when prosecuting had collapsed each time, *'for failing to have UK road fund tax and UK MOT'.*

The above Grand Avenue incident indicates the police, by mid afternoon, had not only located the identity of last registered owner, the appellant but the one previously, the Guernsey police officer, Mr Farnham.

The learned judge noted in this judgement that by about that same time on the day of the offence, before the appellant was interviewed under caution, police records clearly had recorded the identity of their victim but was needing Guernsey to press for his extradition.

321. **Action 1 claim 8.13 stolen motorcycle not returned.** It is common ground that on 16th October 1993 Mr Kirk reported to police the theft of a BMW motorcycle from his premises, and that a police officer attended to record the crime. The pleaded allegation is that the Defendant's officers were well aware that Mr Kirk was the owner of the BMW motorcycle in question registered in Guernsey index number 1876, they recovered possession of it and thereupon became bailees of it, but "in breach of the duty pleaded in paragraph 5A above, the Defendants negligently failed to advise the Plaintiff"; further he was eventually told that they had the motorcycle in their possession and "with some difficulty the Plaintiff was able to recover his possessions from the police". The Defence denies that the matters complained of give rise to the alleged or any cause of action, and state that the Defendant has no record of the vehicle coming into their possession.

322. Mr Kirk's witness statement of 19 June 2009 is succinct, that this motorcycle stolen right outside the Barry surgery "while, no doubt, witnessed by those conducting police surveillance" and that it was to be some 6 weeks or so before he was tipped off as to its whereabouts by a client (described in oral evidence as a burly police officer called "Yosser" later identified as PC Nigel Hughes). It was in a Barry garage since the proprietor of the garage had been called out by the Barry Police within hours of it being stolen. The number plate was missing. The thieves had crashed the motorcycle so badly that it had to be written off. Mr Kirk then approaches the notion that the thieves would have stolen the number plate with bitter sarcasm.

323. At trial, he alleged that police officers positively arranged theft of the motor cycle or removed the number plate so as to make it unidentifiable.

324. PC 3126 Lee Driscoll attended on the morning of 16 October 1993. He states that there had been entry of the rear yard of the premises via an unlocked set of gates; that he arranged for a scenes of crime officer to attend and examine for finger prints (a disused washing machine having been moved to get the motorcycle out of the yard); and that he reported the details on the pro forma form PNC 150, then fed into the PNC. He had no further dealings with this incident. (I need not here set out his dealings on 29 October 1995 with the Honda Acti Van registered in Mr Kirk's name, trying without success to have it collected on Mr Kirk's behalf).

325. From his notebook, he appears to have been present at the scene for an hour or less (A1/4.17). In oral evidence he was asked by Mr Kirk how long he had served in Barry or the Vale of Glamorgan. He said some 12 years, but that he had not had occasion to meet Mr Kirk before this. He declined much knowledge about Mr Kirk. Asked whether he was not aware of an arson attack on a garage, where Mr Kirk's aircraft had been destroyed, he said that he was not aware an aircraft had been involved. (As a matter of detail, Mr Kirk mailed to the Court a link to a BBC Wales news item of apparently December 1992 reporting 'plain clothes' police officers making door to door enquiries following this arson attack). Mr Driscoll told me he was unaware of other Guernsey vehicles used by Mr Kirk's practice being stolen. Mr Kirk suggested that one was stolen just before this BMW motorcycle, but of which I have no further details. Mr Kirk showed interest in why Mr Driscoll had written registered in "Jersey" but I was for myself unsurprised by his answer that this was simply a minor error for Guernsey.

326. In the bundle there is a statement handwritten by Mr Kirk and with the signature G Thomas, apparently at some time a fellow prisoner of Mr Kirk, that he was listening to his scanner "in 1994 or thereabouts" and heard an RTA police message, that he was soon there in his own car, and saw a person running near a taxi firm and throwing his helmet over a wall, and that he then saw that a BMW motorbike "had crashed into bus shelter, [undecipherable] bent back and fairings shattered. It had a foreign number plate. Police were there, but my car was not legal, and I left". The statement bears the signature G Thomas and "14-7-09", with at its head "A brief true account to the best of my belief 10.30am Tuesday 14th July 09 Cardiff Prison". The gist of this was put to Mr Driscoll, who said that he had not heard anything about or to that effect, but that if there was a crashed vehicle he had experience of the police calling out a local garage

to pick up the vehicle. Stating what is perhaps the obvious, he agreed that it would be uncommon for a thief to take the identifying mark from a vehicle.

327. Mr Kirk suggested to him that it would be rare to have a BMW 1000cc motorcycle stolen in Barry, but Mr Driscoll said that he had no particular interest in motorcycles. Mr Driscoll was forthcoming in manner, identifying "PC 566" as probably Robin Wilson (which is correct) and the large police motorcyclist as Nigel Hughes, observing that he was however then in the Traffic Department, and that back in the 1990's "lines of communication were not as good". He was asked by Mr Kirk, if Mr Kirk's motorcycle had been located, why was he not notified? Mr Driscoll said that "in the 1990's a lot of the records were paper records, and you couldn't match up with computers or cross reference as now you can, "maybe the system wasn't that good.....".

328. I heard evidence from Inspector Griffiths who in 1996 was asked to investigate incidents including this one. By letter dated December 5 1996, in reply to the police Force Solicitor, he reported that in 1993 a stolen vehicle book was kept at Barry Police Station where a record was made of all vehicles that were stolen; that entries were made of where and when they were recovered with the necessary IRIS cancellation message number; and that there was no record in this book of the vehicle having been recovered. Enquiries with the PNC Bureau also revealed that the vehicle had not ever been cancelled with them. He attached a copy of the PNC Bureau record in respect of vehicle 1876. Mr Griffiths gave evidence at trial before me, and was a witness who impressed Mr Kirk.

329. PC 566 Robin Wilson is now retired. In October 1993 he was a PC based at Eastern Traffic Sector, Cardiff. In his witness statement he said he had no recollection of attending upon Mr Kirk in respect of the theft and had no recollection of being involved in the recovery of this vehicle. He retired from the police on 3 September 2002, apparently now being employed in vehicle rescue (see his witness statement address). In oral evidence he told me that, in the traffic department, recovery of vehicles was, an every day event, and that Barry was then known as the world capital of stolen vehicles. He identified one recidivist, "the Barry Menace", and individual criminal families. He readily confirmed Mr Clode as operating one of the garages who, on a rota, were called out by the police to pick vehicles up, but said that he had no individual recollection of this motor cycle.

330. Mr Wilson was large in physique and personality. He spoke of an occasion when he saw Mr Kirk in a car with a dog on his lap and without a seat belt, called across to him to wear a belt and not to have a dog on his lap; "You fought back verbally, I fought back verbally louder". He was on his own account "a pretty blunt officer"; on this occasion Mr Kirk was biting back to ask on what authority he was telling him that, and "I said, Don't fuck about with me, I'm old in the tooth, I'm not a youngster, there was no danger, just [put it right]. Mr Kirk said, That's the way I like to be spoken to, I'll buy you a pint' ". Mr Kirk in fact warmed to the recollection of this; shook Mr Wilson's hand as he left the witness box; and remarked that he might yet buy him that pint. Mr Wilson did not appear to doubt that he might have been involved in arranging recovery of such a motorcycle, but knew nothing further of the case, or the circumstances of it being crashed. He was an impressive witness. In the course of his evidence, he made an interesting observation. When Mr Kirk suggested that police

officers in Barry were going out of their way to arrest him, he said that a lot of the police officers were afraid of Mr Kirk, “I don’t mean fear, you get called all the names under the sun, it flies over your head. [But to pick on Mr Kirk?] far from it, they didn’t want the hassle”.

331. Asked by Mr Kirk whether “the Barry Menace” might have been ‘a police menace’ he was firm that there was no such thing. Asked whether he was not aware of incidents involving Mr Kirk from the newspapers, he said that he did not ever read the papers, and wryly observed that he stopped doing so when “reading about incidents didn’t seem to be the incidents which I had attended”. The handwritten police log of vehicles stolen in Barry records this vehicle as stolen, on 16 October, but, unlike a number of other vehicles, has no entry for its recovery. Mr Wilson was an impressive witness.

332. Whether or not the vehicle was recorded by the police as recovered in their records, I received witness evidence in writing from Mr Clode, whom the Defendant did not require to be called. In his witness statement, dated 23 April 2009, Mr Clode stated that he had recently been approached by Mr Kirk, still had his garage recovery book of 1993, with its entry opposite Sunday 12 November of Mr Kirk’s collection of a BMW bike model K100 RT, in other words this motorcycle. He stated “the information concerned refers to a BMW motorcycle that I recovered on 16/10/93 – South Wales Police incident number 1137 of same date, the BMW had no registration plate at the time of recovery, I found a frame number 0020823K100 RT which I phoned into control to try to find the owner. The BMW had suffered substantial damage. The recovery took place in the dark about 8 to 9pm. PC 566 was in attendance (incident number 1137).” (A1/4.3H). The entry itself in his diary has the name Kirk written in, with what from other documents I establish is Mr Kirk’s then telephone number. Mr Clode then traded as Auto Care Cardiff and Barry.

333. I am satisfied by the evidence of Mr Clode that it was recovered on request by the police to his premises, and that he reported to the police that Mr Kirk had reclaimed his vehicle some 4 weeks later. Therefore on any view the police records were incomplete.

334. There was a statement of 2009 from a Mr Gerald Thomas, vividly describing apparent discard of the motor cycle by the (presumed) thief and police attendance (whereupon he left) but he was not called before me, and in 2009 was describing an individual incident of some 16 years earlier (assuming that this be the same one) where I do not know to what extent if any he was motivated by a desire to please or assist Mr Kirk, then a fellow detainee in prison. I cannot attach great weight to it.

335. The evidence of Mr Kirk himself in chief was simply that it was right outside the Barry surgery that the motorcycle was taken, but unusually so, in that all the other motorcycles were stolen from the front; and that Nigel Hughes was the client who had informed him of the location of the motorcycle, when the police had not.

336. The pleaded case is that the police recovered possession and became bailees of the motorcycle and negligently failed to advise Mr Kirk of its recovery in breach of “a duty and obligation as bailees to use their best endeavours to protect any property which comes into their control and particular to protect any items of stolen property to ensure that it is not damaged or vulnerable to further theft” (in fact 5B not 5A as pleaded).

337. In cross examination, Mr Kirk said that this was pleaded by Bristol solicitors in 1994 in an attempt to get the police off his back, but as time went by he would put the matter rather differently, he believed it was a deliberate withholding of information not “this nonsense about not finding the motorcycle”. He believed it was deliberate because the BMW had a big frame which would identify it, not simply the number plate albeit he did not suggest that the police arranged the theft (“No. I can’t push it that far. They were there within seconds”). I infer that the interest which Mr Kirk has in this incident is less in seeking damages, than in supporting the case that he was under surveillance at 52 Tynewydd Road, and that police saw “some of” the events concerning it.

338. The real questions for me are whether there was incompetence going so far as negligence, or malice, and or what actionable duty if any here exists.

339. In law there is no general actionable duty of care upon the police to take steps to preserve or protect the possessions of a member of the public: I adopt the conclusions as to the law which I set out in my written judgment on Preliminary Issues dated 30 November 2011 at paragraphs 8 to 24.

340. As to whether the police can be under any duty as a bailee, in written submissions on those preliminary issues the Defendant accepted that *prima facie*, and subject to considerations of public policy,

“[The Defendant] could be capable of acting as a bailee in respect of any property seized from Mr Kirk and retained by the Defendant. In those circumstances there is no higher duty upon the Defendant other than to take reasonable care in the circumstances in respect of such property, see Sutcliffe –v- the Chief Constable of Yorkshire 1996 RT I86 CA, where a vehicle was seized and retained by the police pursuant to the powers conferred on them by sections 19 and 22 of Police and Criminal Evidence Act 1984 [“PACE”]. In that case the Chief Constable conceded the duty of care as bailee without it being argued. The Court of Appeal held that the duty upon the police as bailee was no higher than to take reasonable care of the chattel, regardless of the provisions in PACE 1984.”

and, although there was an absence of authority,

“It is at least arguable that it is not just, fair or reasonable to impose such a duty upon the Defendant in merely carrying out the requirements placed upon the police by either the Road Traffic Regulation Act (in relation to removing a vehicle preventing an obstruction to traffic) or indeed PACE 1984 (in respect of the general powers to seize and retain property), and as such, the Defendant arguably should not be regarded as a voluntary or true bailee of the property, particularly where the subject property, in this case, Mr Kirk’s vehicle was immediately recovered by a reputable garage for safe storage”.

341. The police in the present case are not pleaded to have arranged or conspired in the theft of the motor cycle. The suggestion that they did so, made in oral evidence at trial,

is not supported by other evidence. If a motor cycle crashes on the public road, as here, there are powers and duties in the police to arrange its removal to prevent an obstruction. There may be other cases where the argument against permitting a duty of care against the police and/or treating the police in law as a voluntary bailee is less strong, eg if it were alleged that the acts or omissions of the police have contributed to the loss of a vehicle (eg by closing a road but with inadequate signage which led to the vehicle crashing, albeit if the vehicle had already been stolen and was crashed by the thief who made off with it, there might be difficulties for a Claimant in establishing causation); but that is not this case.

342. In my view, in circumstances such as the present case, short of participation in the theft of the motorcycle the highest any duty of care could be put against the police in law, is a duty as bailee to take reasonable care of the vehicle as to its physical state and preservation. There is in my view no evidence that the vehicle suffered deterioration or damage at the hands of, or while in the custody of, the police. The recovery of such a vehicle as this, which had been reported stolen, was plainly in the course of and a part of their duties for the investigation and/or suppression of crime. The core principle is that for such police acts there is - in general - no privately actionable duty of care to members of the public for loss or damage (Hill v Chief Constable West Yorkshire Police 1989 1 AC 53 and other authorities).

343. Suppose the vehicle in question was a hire car, such that delay in recovering it might deprive its owner of the opportunity to hire the vehicle out during the period of delay. In my judgment, it would be surprising if any court were to formulate any duty of care so as to permit recovery of damages against the police for failure to protect the economic interests of the vehicle owner. Accordingly, in my view there is as a matter of law, no claim for inconvenience or expense to Mr Kirk by reason of delay in recovery of the motor cycle, and as a matter of fact there is no evidence of expenditure in the present case.

344. Mr Kirk's belief as expressed at trial is that there was a deliberate failure to inform him of the whereabouts of the motor cycle, so supporting his case of police harassment. This is not the case pleaded, which is that the police "negligently failed to advise him" of the recovery of the motor cycle; still less is it a claim of some police action to arrange or police participation in the theft of the motor cycle, which is what at trial Mr Kirk was (at least at some times) suggesting. It is not a matter of pedantry for a court to confine itself to the pleaded case but whether a party will have prepared for trial to meet a particular case, where it might have sought to interview and/or call other witnesses and/or evidence as to system. I do not consider it fair to consider that different and very late case as to delay in recovery of the motor cycle.

So why cannot the Appellant rely on:

- 1. Criminal investigation and subsequent prosecution of police who caused the Appellant's witness to be locked up ,so he could not give oral evidence and**
- 2. especially as the burglar who had committed the offence had already pleaded guilty and**
- 3. NEGLIGENCE — Duty of care — Police — Urgent telephone calls to police**

indicating imminent attack on victim by group of youths — Police failing to respond timeously — Victim suffering serious injury from attackers — Whether prior knowledge of identity of victim required for duty of care to arise by virtue of Convention rights — Whether material that violent incident already ongoing — Human Rights Act 1998, Sch 1, Pt I, arts 2, 3

4. **Sarjantson and another v Chief Constable of Humberside Police**
5. [2013] EWCA Civ 1252; [2013] WLR (D) 393
6. CA: Lord Dyson MR McFarlane, Sharp: 18 October 2013
7. The positive duty on the state (the police) to avert a real and immediate risk to life or injury, pursuant to articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, was not limited to identified or identifiable persons.
8. It was sufficient that such potential victims were known or should be known to exist; and it made no difference that the risk arose during an incident which had already commenced.
9. The fact that the state's response in carrying out the duty would have made no difference, in the particular circumstances of a case, was not relevant to the question of liability but would be relevant to the question of quantum in a claim for damages.
10. The Court of Appeal so held, allowing the appeal of the claimants, Christopher Sarjantson and Tracy Alexandra, from the judgment of Judge Walden-Smith who in the Central London County Court on 14 November 2012 had (i) struck out their claim relating to the alleged failure of the police to respond promptly to a 999 telephone call in the early hours of 9 September 2006, which had resulted in a serious assault on the first claimant, in breach of statutory duties under articles 2 and 3 of the Convention, on the basis that it had no prospects of success, and (ii) held that the duty could not have arisen until the victim (the first claimant) had been expressly identified, and that even if the duty had arisen earlier, there had in any event been insufficient time between the first 999 call to the police and the time of the assault for the police to attend the incident.
11. The Court of Appeal remitted the case to the county court for trial.
12. The first claimant had sustained a serious head injury when attacked by a group of young men, armed with baseball bats, who had subsequently been convicted in the Crown Court at Grimsby, in respect of that incident, of causing grievous bodily harm and violent disorder and had received substantial terms of imprisonment.
13. A number of 999 calls had been made in quick succession to the police about a violent incident taking place in Dame Kendal Grove, Grimsby; the first claimant's name had not been mentioned until some seven minutes after the calls. An internal police investigation of the incident had criticised the police's performance and concluded there had been an 11-minute delay before officers had been deployed to the scene. The second claimant was the first claimant's partner.

14. LORD DYSON MR said that the leading authority on the existence and scope of the duty under article 2 was *Osman v United Kingdom* (1998) 29 EHRR 245. The claimants had submitted that the judge's conclusions were inconsistent with clear jurisprudence of the European Court of Human Rights and were wrong in principle. The judge had distinguished *Mastromatteo v Italy* Reports of Judgments and Decisions 2002–VIII, p 151, one of the cases relied on, but, as the claimants pointed out, the court's focus had been on whether the relevant authorities had been aware of a sufficient level of risk: para 76. Commentators had accepted that the case established that a duty might be owed to the public at large: see *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights*, 2nd ed (2009), p 46; *Öneryildiz v Turkey* (2004) 41 EHRR 325, para 32; and *Gorovenky and Bugara v Ukraine* (Application Nos 36146/05 and 42418/05) 12 January 2012, para 32.
15. The judge's conclusion that the Osman duty required the identity of the individual victim or victims was taken from para 116 of the court's judgment, but the court had not had to explore the boundaries of the scope of the duty or purported to do so.
16. The subsequent jurisprudence showed that the court had not limited the scope of the article 2 duty to the real and imminent risk to the lives of identified individuals. There was no reason in principle for so limiting the scope, which would be inconsistent with the idea that the provisions of the Convention should be interpreted and applied in such a way as to make its safeguards practical and effective.
17. On the facts in the present case the police had known that there were individuals in the vicinity of the street where the youths were causing mayhem, and where to find them in order to protect them if reasonably necessary to do so. The essential question was whether the police had known or should have known that there had been a real and immediate risk to the life of the victim of the violence, and whether they had done all that could reasonably have been expected of them to prevent it from materialising.
18. It was sufficient that they had known that there were such victims. As para 116 of the Osman case made clear, it had to be established that the police knew or should have known "at the time" of the existence of the real or immediate risk from the criminal acts of a third party.
19. The duty to provide protection had arisen when the first emergency call had been made; the tone and contents of the 999 calls suggested there had been every reason to think that there was an imminent likelihood that the young men would injure or kill one or more persons in the vicinity.
20. The fact that a response would have made no difference was not relevant to liability: *Kiliç v Turkey* (2000) 33 EHRR 1357. If it were established that a timely response by the police would have made no difference, that would be relevant to quantum and might mean that there was no right to damages.
21. The defendant submitted that the facts showed that, once the violent incident had started, it had been too late to prevent the risk from materialising so that there had been no duty to act. There was no support for such a proposition in the jurisprudence, and it was inconsistent with the idea which underpinned the Osman duty. It made no difference that the risk had arisen during an

incident which had already commenced.

22. In principle such a duty was capable of arising in the case. It would however be a matter for the trial judge to decide whether the police failure in the case amounted to a breach of the duty bearing in mind all the circumstances, including but not limited to the length of delay and the reasons for it, and the gravity of the risk of which they had been made aware by the 999 callers. Hindsight should be ignored.
23. MCFARLANE and SHARP LJJ agreed.