Neutral Citation Number: [2022] EWHC 1661 (QB)

Case No: QB2022001024

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st July 2022

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

(1) CJ
(2) PJ
(By their mother and litigation friend DJ)
(3) OB
(By their mother and litigation friend NP)
(4) HD
(5) PD
(By their mother and litigation friend ED)

Claimants

-and-

The Chief Constable of Wiltshire Police

Defendant

Nicholas Bowen QC and William Chapman (instructed by Irwin Mitchell LLP on behalf of HD, PD, CJ and PJ and Farleys solicitors LLP on behalf of OB) for the **Claimant**
Matthew Holdcraft and Cecily White (instructed by Wiltshire Police Legal Services) for the **Defendant**

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 1ST July 2022 at 10.30

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Mr Justice Martin Spencer

Introduction

1. In this judgment, some of the protagonists have been anonymised to protect the identities of children who have been the victims of sexual abuse and in respect of whom anonymity orders have been made. Although the protagonists are not themselves entitled to anonymity, to name them would risk the identities of the children becoming ascertainable by virtue of what is sometimes called the "jigsaw" effect.

2. On 18 March 2016, MP was sentenced to 10 years' imprisonment, having pleaded guilty to an indictment containing 40 counts, comprising 2 counts of rape of children, 13 counts of sexual assault on a child under 13 and 25 counts of making or possessing indecent images of children.

3. The Claimants in this action are the victims of MP's crimes of rape and sexual assault. They claim either damages for negligence against the Wiltshire Police or "just satisfaction" by way of compensation for breach of their rights under Article 3 and 8 ECHR. These claims raise issues relating to the liability of the police for the criminal actions of a third party.

4. There were originally three claims for each set of Claimants issued in the Bristol County Court. By Order of District Judge Taylor dated 26 May 2021, they were transferred to the High Court and ordered to be tried together, and they came before me for trial on liability (including causation), with quantification to abide the outcome on liability.

5. In relation to the negligence claim, it is accepted that the Third, Fourth and Fifth Claimants cannot succeed on the basis of the law as it presently stands. However, their positions are reserved in case the legal position changes in the future as a result of any future decision of the Court of Appeal or the Supreme Court, whether in one of the cases that are pending before the Court of Appeal involving claims against Local Authorities or as a result of any appeal in the present case. The First and Second Claimants assert, however, that they are able to maintain an action in negligence and all five Claimants pursue their claims under Article 3.

History

The Laptop Examination and DS Ellerby's Investigation

6. The history of this matter starts with 21 December 2012 when MP's sister, CP, wanted to edit some photographs on a laptop computer which she had been given by her father. At that time, CP was studying to become a teacher, and was living at home with her boyfriend, her mother, her stepfather and her younger brother, MP. In her statement dated 13 December 2018, CP says that she used the search function on the laptop to see if she had a programme called "photoshop" and the results threw up some photographs which she didn't

recognise. On closer inspection, it was apparent that these were pictures of naked children. CP informed her mother, DG, who agreed that this was worrying and said that the police should be informed. DG first called a meeting of all the male members of the household, namely her other daughter's boyfriend, MX, her son, MP, and CP's boyfriend who had been staying with them at the time. She demanded to know how the images had got onto the computer and said that if no-one owned up, she would be going to the police. No-one did own up, so she and CP visited the police station that day.

7. It is relevant to mention that the family already had something of a troubled history in that CP's older sister DJ (the mother and Litigation friend of the Second Claimant, PJ) had herself been the victim of offences of indecent assault and incest at the hands of her father, BP, over a two-year period ending in September 1997 when DJ was aged between 12 and 14. On 16 April 1998, the father was sent to prison for a term of 42 months. He and CP's mother, DG, divorced and DG had remarried, but BP had retained contact with his two younger children and had given CP the laptop in question. Inevitably, perhaps, initial suspicion for the indecent photos had fallen on the father.

8. A contemporaneous record of what CP and DG said at the police station is contained in a document called a "Storm Log": this is likely to be more accurate than the recollections of witnesses many years later. It records as follows, referring to CP as "RP":

> "At approx. 1030 this morning whilst editing some pictures for her sister, she [CP] came across approx 10 photos which showed 6 yr old – 7 yr old boys naked in different poses. RP does not know the children, nor are they known to her family. The laptop she was using is a family computer located in the lounge of the home address. RP lives with her mum but states that her Dad is previous rape and incest [sic] towards her older sister. Dad was the one who gave RP the laptop but this was some time ago. … The images are still on the laptop at home. All family members have been asked about the pictures living at the RP's address but no-one can explain them. RP has stated she has recently downloaded Photoshop from the Internet through a free trial. When she went to edit the family pictures this morning, she typed Photoshop in a search on her computer and this is when the images popped up. She states they are actually saved to the laptop and not just pop-ups from the Internet. The boys in the pictures are around 6-7 years old and photos are of different boys. Most are either naked or without trousers and some have been edited using what appears to be effects from Photoshop such as one picture of a field in black and white, then a naked boy in colour in the middle. RP and family are very distressed about the photos. … Other photos look like they may have been taken at a home. … RP has given me a list of family names who have access to the computer and live at the home address: mum, stepfather, sister, sister's boyfriend, RP's boyfriend and MP brother."

9. CP and DG were told that an officer would come out later that evening. They were visited by 2 police officers, Det Sgt Tom Ellerby and a female officer. DG's account of the visit in her witness statement of 10 May 2016 is as follows:

> "At approximately 8pm that same day 2 officers, a male and female, attended my home address … The male officer sat and looked at the laptop, I could see what he looked at, I saw photos of 2 male children. I then saw the male officer jolt back and when I looked at the screen I could just see a zoomed picture of a bottom and an anus. The officer didn't say anything, just closed the laptop. … The officers asked [CP] if she wanted the laptop back once they had finished with it and CP said 'no', told them that they could destroy it."

10. An Occurrence Log had been opened when CP and DG visited the police station, and Det Sgt Ellerby made the following entry:

> "I attended [address] after [CP] reported that she had located indecent images of young boys on her laptop. CP stated she was given the laptop as a gift from her father, who had given [it] to her after purchasing from a friend. He told her he had cleaned the laptop of everything that was on it when he bought it [for] her. [The father] is a convicted sex offender and being monitored by PPU [Public Protection Unit].
> The laptop is a HP PAVILION ZE4800 and looks very old. It is in constant use in a busy household by a normal family. [CP] located the folder when she had tried to reuse an old programme she had downloaded as a free trial not long ago called Photoshop. When she did this, she opened a document titled 24068996WuK.jpg dated 09/12/2012. I checked the properties on the file and it says it was created at 1931 hrs 09/12/2012. There is the property [sic, should be "possibility") the document could be a malicious virus/download since the family did not have any anti-virus protection.
> I seized the laptop as exhibit TE/1 at 2200 hrs 21/12/2012 but the family are happy that it is now destroyed. I intend to submit this for examination because should the creation of that folder/document pre-date the time when [CP] was handed the laptop (about a year ago) then I will have cause to speak with [the father].
> As for the pictures themselves I have checked them briefly to check they were indecent. They appear to be lower end matrix, but I discontinued before seeing them all."

On 21 December 2012, DS Ellerby completed a Form 913 "Request for evidential computer/media examination/investigation Hi-Tech Crime Unit" repeating the above information and requiring the seized laptop to be examined "to ascertain recent Internet use in relation to child pornography, can we date the files described above, can we confirm the presence of any other indecent material held on the laptop." In the section asking for details of any

keywords/passwords required, DS Ellerby put in: “Password is ‘sexytime’.” The laptop was delivered to the Wiltshire Police Hi-tech Crime Unit on 2 January 2013.

11. The case had also been entered on the Wiltshire Police Information Management System, known as NICHE.

12. Nothing further was done by DS Ellerby about the matter at that time. In particular, he did not question any of the persons who were living in the household to ascertain any involvement in the downloading of the images, nor did he question CP’s father.

13. In a statement dated 31 May 2016 made to the Independent Police Complaints Commission (“IPCC”) DS Perry Watson, who was the manager of the Hi-tech Crime Unit, explained the “triage” procedure when items were submitted for examination:

> “When the request is risk assessed we look at the seriousness of the offence, this is more about the offence that is being investigated, whether it is rape, murder, GBH and then we look at whether the case would be of significant public interest. This could be a police officer, priest or a doctor, someone who if the media found out possibly cause public interest.
>
> The referral by DS Ellerby was assessed and judging by the score, I would say it would have been middle to low on our outstanding cases list. This was because of the fact that [the father] was an existing sex offender and was already being managed by the force and the other details provided on the 913 submission form.”

DS Watson said, in an interview with the IPCC, that a delay of over twelve months in examining an item was quite common at that time if the triage score was mid-range or low range but that, after twelve months, the case would be “called up”. The case was in fact called up on 21 February 2014 and the examination of the laptop was complete by 23 April 2014. I am not aware of whether DS Ellerby was informed by HTCU of the likely delay there would be in examining the laptop, but it is probable that he was.

14. In the meantime, DS Ellerby decided to close the case on Niche in August 2013 which had the effect that no update requests were flagged for him or his supervisors. He later said that if a Niche record was open for any length of time without being updated, it was perceived poorly by the force and he “wanted an inbox that made him, and his team look good”. On 15 August 2013, he recorded that action would commence on computer analysis providing a creation date for the offending files and that the file would be kept as an “NZ” file until the analysis was completed.

15. The laptop was examined by PC Timothy Gardner at the HTCU on 28 March 2014, and his report is dated 28 April 2014. Indecent images of children were divided into three categories:

(i) Category A – images involving penetrative sexual activity and/or sexual activity with an animal or involving sadism;
(ii) Category B – images involving non-penetrative sexual activity;
(iii) Category C – other indecent images not falling into Categories A or B.

There were eight indecent images on the laptop: one falling into Category B and the other seven falling into Category C. These images were contained within a folder named 'Mike' within the 'My Documents' folder of the user account of "Owner". The Category B image had been created at 01:32:54 on 21 December 2012. The Category C images had been created at various times during December 2012. In addition to the indecent images, there were a number of other images of naked boys not falling within the definition of 'indecent'. Examination of the Internet history showed that, at the relevant time, the user of the computer was accessing the web-based email account 'MPMP@rocketmail.com' thus showing MP to be responsible for the creation (downloading) of the images.

16. On 23 April 2014, PC Gardner sent an email to DS Ellerby stating that the initial examination of the laptop was finished and asking him to make contact to arrange for collection of the laptop along with PC Gardner's statement and report. DS Ellerby did not reply until 9 May 2014 when he asked if it would be possible to come down to the HTCU on 20 May 2014. The contents of the laptop were downloaded onto a police laptop which was handed over to DS Ellerby and he was given PC Gardner's statement which was also emailed to him. In his statement, DS Ellerby said that he sat down with PC Gardner who explained what had been found and that a workable job laptop was being issued to him with a password that would be valid for six weeks and which had copies of the files which could be used in interview.

17. DS Ellerby did not in fact progress the investigation at all thereafter. On 9 July 2014, he was advised by HTCU that the loaned laptop was due for return and he in fact returned it on 5 September 2014. He did not interview MP at any stage. A disciplinary panel conducted a misconduct hearing on 31 July 2017 and made the following findings which had been admitted by DS Ellerby and are admitted by the defendant in this claim:

> "The panel then considered the period of time spanning 20 May 2014 and the 1st July 2015 ('the second period'). During this period Mr Ellerby admitted the following:
> 1. Save for informing the Public Protection Unit that he had received the computer on 20 May, he did not inform any other person about the findings of the HTCU.
> 2. He did not ask for advice from any supervising officer or specialist as to the appropriate course of action he should take.
> 3. He did nothing actively to advance the investigation and failed to make any record on Niche as to the material that had been recovered by the HTCU. It is significant that Mr Ellerby had an understanding of how important it was for records to be updated."

The panel did not consider that dishonesty had been proved, but did conclude that, on the balance of probabilities, DS Ellerby's behaviour demonstrated a lack of integrity, stating:

> "He must have been aware that any competent police officer in his position would either have actively advanced the investigation or alternatively have handed it over to somebody more experienced. His failure to do either of these things over a period of 11 months was inconsistent with that which would be expected of' a diligent and competent officer. These failures demonstrated a lack of integrity in that he both failed to act in the right way and failed to do the right thing at any point in the second period.
>
> These failings are capable of justifying dismissal and therefore constitute gross misconduct."

18. An 'Outcome' hearing was held on 1 August 2017 at which the disciplinary panel stated:

> "Your serious failings, as we have found them to be, between 20 May 2014 and 1 July 2015 are difficult to understand. You have in reality offered no satisfactory explanation at any stage of proceedings for failing either to progress the investigation, or if, as you profess that you were too busy to advance it, hand it over to another officer. As a result of your behaviour, you created a risk of harm to children. You rightly pointed out in your interview you knew that there was a likelihood that had you recorded things that you should have done those in charge of issues of child protection would have potentially had access to information that could have helped them to protect the vulnerable. You will have to live with that decision.
> …
> Had matters rested there it is likely that we would have had no option but to dismiss you. We have however asked ourselves whether or not public confidence in the police force would be undermined if you were to remain an officer. We have had the unique opportunity in this case to hear the views of members of the public who are directly affected by your failings. They have been present throughout these proceedings and have heard you give evidence. They have demonstrated a degree of compassion and humanity which one may not have expected. Neither of the family representatives present here seek your dismissal. We find this to be the most compelling mitigation available and although not being determinative, we regarded their views as indicative of the wider public confidence in the police service.
> It is with this in mind that the panel has determined that the proportionate outcome is that of a final written warning rather than dismissal in relation to all three allegations. You

> need to be aware that but for the views expressed by the families today you would have faced immediate dismissal."

This indicates how seriously the disciplinary panel viewed DS Ellerby's failures and underpins the Claimants' contention in this case that what DS Ellerby did and failed to do can properly be described as egregious.

MP's activities and criminal behaviour

The Offences against CJ and PJ

19. MP was born on 22 January 1996 and he was therefore still only sixteen years old at the time that the laptop was seized in December 2012. As well as CP, he also had another older sister, DJ, who is the mother of the First and Second Claimants, CJ (male) and PJ (female). CJ was born on 8 December 2002 and PJ was born on 18 March 2008. There is also an older sibling born in 2000. It was DJ who had been sexually abused by her father. She was born in October 1982. She left home when relatively young and was only aged 17 when her first child was born. She married her husband, the father of her children, in 2005. As she and her husband both worked full-time, her mother, DG, helped out a lot with childcare. She states that her children regularly spent time with MP because of the amount of childcare provided by her mother. From the end of 2013, she began to pick up more shifts at work and DG would have the children at her house overnight. In April 2014, she got a new job as a carer which meant that she was working unsociable hours. From that point onwards DG would have the children overnight on at least a weekly basis and more often during the summer holidays.

20. The period of MP's sexual abuse of his nephew and niece was stated in the indictment to which he pleaded guilty to have been between 1 November 2013 and 11 April 2015. Those dates spanned the period when CJ was aged between 10 and 12, and PJ was aged between 5 and 7. Those dates also span the "first" and "second" periods considered by the disciplinary panel, namely the period between when the laptop was seized and when it was examined by the HTCU and the period between when it was examined by the HTCU and MP was eventually arrested (see also paragraph 33 below). In the Particulars of Claim, it is alleged that CJ was subjected to between 10 and 20 serious assaults, being subjected to "full adult sexual contact with MP" including exposure to pornography, oral and penetrative sex. PJ too was severely sexually assaulted by her uncle, the abuse including multiple acts of vaginal rape, oral sex, masturbation and exposure to pornography. Unsurprisingly, both children have been severely affected by these experiences with symptoms of PTSD, anxiety disorders and other psychological repercussions affecting their development and education.

21. DJ gave evidence to the court and relied on her witness statement made on 20 October 2021. She stated that had she been informed either in 2012 or at any point up to 2015 that MP was responsible for downloading the indecent images found by her sister, CP, on the laptop computer, she would have made sure that her children had more limited contact with him and that any contact was supervised. She said she would only have allowed her children to have contact with him at unavoidable family events and she would not have allowed her children to spend any time alone with him. She said she would have been

extremely vigilant about this given her own personal history, that being a reference to the abuse she had suffered at the hands of her own father. She said that she would have made alternative childcare arrangements so that her mother was not caring for CJ and PJ whilst MP was living with her and whilst that might have meant having to change her job it was "what I would have done to keep my children from having to go through what I did".

The offences against OB

22. The mother of OB provided a statement to the court. OB was born on 16 March 2008 and in September 2014, when OB was aged 6, his mother decided to find someone to help with OB's care: by now she was separated from OB's father and suffering from multiple sclerosis. She found MP through a website called www.childcare.co.uk, she interviewed him and he came across as a very charming, lovely guy who seemed ideal for the role. He told her that he was training to be a Scout leader and would like to provide help to a parent with multiple sclerosis without payment as his mother used to work for the Multiple Sclerosis Society. She said in her statement that MP produced a recent DBS check, although she conceded in cross-examination that she never in fact saw it, she simply accepted MP's word that he had one: she had no reason to doubt the validity of the DBS certificate and also assumed that anyone on the childcare website would have had a DBS check in any event. MP then started looking after OB from October 2014.

23. Towards the end of February 2015, OB's mother was giving him a bath one night when he started crying and eventually she managed to get out of him what had happened: he told her that MP had forced him to watch rude pictures. She referred the matter to a counsellor at a Children's Centre, Tanya Parkinson, and in turn the matter was reported to the police on 26 February 2015. The matter was followed up by the police through Darrhyl Davies, a member of the Child Abuse Investigation Team. MP's contact with OB was, of course, immediately terminated.

24. Evidence obtained from MP's phone disclosed that he had sexually assaulted OB and he pleaded guilty to 3 counts of sexual assault in the period 30 November 2014 to February 2015. Whilst, because of OB's young age, it has been difficult to establish the extent and nature of the sexual abuse, it is his mother's view that OB was in all probability subjected to full adult sexual contact with MP. OB has been examined by a Consultant Child and Adolescent Psychiatrist who has diagnosed PTSD with recurrent involuntary and intrusive memories of the abuse, recurrent distressing dreams involving the abuser, fear of thinking of or talking about the abuse, distressing response to reminders of the abuse, anxiety about being alone, rituals to protect himself from the abuser and periods during which he is emotionally distant.

The offences against HD and PD

25. HD and PD (both male) were born on 20 January 2007 and 17 June 2008 respectively, and have both been diagnosed with autism. In January 2015, their mother, ED and her husband were looking for a carer for 10 hours a week, funded by direct payments from the Local Authority, and they found MP through the same website as OB's mother. ED gave evidence to the court, and she

emphasised, wholly credibly, the care which she and her husband took to try and ensure that her children's carer was safe. In her statement, she says:

> "Prior to offering the job to MP, we ensured that he had a clean DBS certificate. I am a qualified teacher and all of my professional life I have worked with children. I am therefore very familiar with the DBS process and the look and feel of a DBS certificate. At the time we interviewed MP, he had recently turned 18 and the DBS certificate he showed us was for people under the age of 18, had been recently issued (within the previous couple of weeks) and I believe it had been requested by the Scouts, with whom MP already worked. At this time, MP also showed us all of his documents in his college issued National Records of Attainment folder, which included the DBS certificate. The certificate specifically covered the age category of children which was applicable to us and there was nothing on that DBS certificate that gave me any cause for concern. I would not have employed MP had he not been able to produce a clean DBS certificate because I am well aware of the importance of such a check due to my professional experience. MP's profile on Childcare.co.uk also included that he had a current and recent DBS certificate. We discussed that a new DBS certificate would be issued shortly because MP had turned 18.
>
> Part of the attraction of MP was that he was already well known to Scouts and he did work with Swindon Multi Agency Safeguarding Hub (SMASH) and was therefore known to the local authority as someone suitable to work with children. I recall that MP had two DBS certificates, one requested by Scouts [she said in evidence that she did not actually see this one] and one requested by SMASH. I recall understanding that to fulfil either role at Scouts or SMASH mentoring, MP must have had appropriate DBS certificates as both roles required them. I understood that Scouts certificates would cover the activity and age range of my children, and SMASH would cover the vulnerability my children were recognised to have. I recall seeing the one that had been requested by Scouts. This was of particular interest to me because I knew that Scouts did not accept certificates transferred from other organisations. The fact that MP already had a DBS certificate requested by Scouts meant that there wouldn't be a delay in him being able to start supporting the children in attending Scouts as he was already an accepted supporter."

ED also stated that she contacted someone at SMASH who told her that she would be happy to recommend MP and would be happy with him looking after her own children.

26. All this reassured ED and her husband with the result that they started to employ MP to support the children from 30 January 2015. HD was 9 years old and PD was 7 years old.

27. On the morning of 8 April 2015, HD made a remark concerning something which MP had said which rang alarm bells in ED's mind. She spoke to MP that evening telling him that she needed him to "pop over for a chat" and disclosing that "it is something to do with a conversation you had with '[HD]'". MP said that he was not available and the following morning, 9 April 2015, he texted ED resigning his job with immediate effect, stating that the reason was "to spend more time with my family". As a result of ED eliciting further information from HD that morning, she attended the police station at 1045 to report MP for sexual abuse. At this stage, the report by OB's mother from February 2015 was linked to the same suspect, a full police investigation swung into action and the registration number of MP's car was alerted to ANPR (automatic number plate recognition) for him to be located and arrested. He was in fact arrested the following day, 10 April 2015. Also that morning, an ABE interview of HD was carried out which gave further details of the sexual abuse that had occurred. MP was interviewed and made significant admissions in relation to his sexual abuse of HD. He admitted that there would be under-age pornography on his mobile phone for which he supplied the PIN. He supplied his email address and password. DC Sweeney was allocated to be the Officer in the Case ("OIC"). MP was granted police bail with conditions, pending further enquiries.

28. The counts on the indictment to which MP pleaded guilty relating to these children included three counts of sexual assault on HD, three counts of sexual assault on PD and one count of oral rape of PD, all in the period 29 January 2015 to 8 April 2015.

29. In the course of the investigation, MP answered his bail a number of times, was further interviewed and more evidence came to light. Examination of his phone revealed sexual images of his nephew and niece, CJ and PJ. Three Category A indecent images of children were also found as well as Category B and C images (see paragraph 15 above).

30. In the meantime, on 12 June 2015, DS Ellerby coincidentally, and belatedly, decided to turn his attention to his investigation of MP and the images found on the laptop seized on 21 December 2012. He then discovered that MP was being investigated for serious sexual assaults and that the OIC was DC Sweeney. He attempted to make contact with DC Sweeney, and then sent an email jointly to DC Sweeney and DS Smith on 1 July 2015 setting out the history of his involvement with MP, such as it was. In that email, having indicated that the laptop had been seized in December 2012, he stated:

> "I've now got the laptop results and am in a position to review them."

This was somewhat disingenuous: what he did not state was that he had in fact had the results since May 2014 and had been sitting on the matter for 14 months. A meeting took place between DC Sweeney and DS Ellerby at the HTCU on 19 August 2015 when DC Sweeney collected a copy of the HTCU report and formally took over DS Ellerby's investigation.

31. On 28 November 2015 MP was charged with the offences and he was remanded in custody. He pleaded guilty to all charges on 4 February 2016 and on 18 March 2016 he was sentenced to a total of 10 years imprisonment.

The Investigation into, and Disciplinary Proceedings against, DS Ellerby

32. I have already referred to the findings of the disciplinary panel on 31 July 2017 and the Outcome hearing on 1 August 2017: see paragraphs 17 and 18 above. Prior to the disciplinary proceedings, DS Ellerby's role and failings had been referred to the IPCC and on 5 October 2016, the Lead Investigator, Karen Cherry, produced her Report. It is submitted on behalf of the Defendant that the views expressed in that report are inadmissible and irrelevant, although it is accepted that I can take into account the evidence in the form of witness statements and other documentation garnered by the IPCC in the course of its investigation (see further paragraph 36 below). For the purposes of the present proceedings, the Defendant accepts the findings of the disciplinary panel referred to at paragraph 17 above, but otherwise makes no further admissions except as contained in the response dated 8 September 2021 to a Notice to Admit served by the Claimants on the Defendant on 21 July 2021.

33. The findings of the disciplinary panel were confined to the "second period", that is the period from 20 May 2014 to 1 July 2015, the panel stating:

> "The panel has considered the chronology of events and identified 2 periods of time; The first between 21 December 2012 and the 19 May 2014 ('the first period'). These are the dates which span the date of seizure of the laptop computer and it being analysed by the High-tech Crime unit (HTCU). The panel accepts that, during the first period, there was little of significance that could have been achieved by Mr Ellerby in progressing the investigation because the timing was entirely within the gift of the HTCU. The panel therefore has paid no regard to this period in assessing whether the admitted conduct amounts to gross misconduct. It is simply background to the fundamental issues that have to be decided."

The Letters of Claim and Particulars of Claim in each case, however, make it plain that the Claimants are relying on significantly more matters, and a significantly wider period of time.

34. The disciplinary panel heard an allegation against DS Ellerby contained within a Regulation 21 Notice (ie a Notice under Regulation 21 of the Police (Conduct) Regulations 2012) dated 16 February 2017. The Regulation 21 Notice had also alleged failings in the first period:

> "You did not take witness statements from any of the individuals present at the address, including MP, and you should have done. You based your decision not to question MP on the fact that he was helpful, "had a baby face" and was only sixteen years old. Your decision not to question him, for those reasons, was wholly misconceived. Further, he admitted having used the laptop during the relevant

period when the indecent images had been created, yet you did not ask him questions about that either at the time of seizure or at any time thereafter.
You passed the laptop to the HTCU who did not examine the laptop and provide the results of their analysis to you until April 2014. In the intervening period, and once you had received the results of the analysis, you did not carry out any or adequate investigations into the suspected offences resulting in unacceptable delays and inactivity. In particular, you failed to approach or question BP or MP. You did not inform the Child Abuse Investigation Team or the Public Protection Unit, and you should have done.
You also chose not to seek any guidance as to how to manage the Investigation, despite having no relevant experience of investigating sexual offences involving children. You did not inform your line manager or any other senior officer that you had ownership of the case, or that there were significant delays in the investigative process and you should have done. Your conduct in not involving your line manager or any other senior officer shows a lack of transparency to your actions.
You also failed to record the investigation as a crime, or record on Niche that MP was a nominal.
Your experience in investigating such crimes was totally inadequate and you should not have retained the investigation. You did so to improve your own skill-set, which was wholly inappropriate and reckless."

35. These allegations followed a report by the IPCC dated 5 October 2016 led by Karen Cherry, which investigated the conduct not only of DS Ellerby but also two further officers. The IPCC investigation involved taking statements from various witnesses and conducting interviews under caution. For example, it was during DS Ellerby's interview, when asked why he hadn't asked any further questions of MP, that he had stated that he was a baby-faced teenager, coming across as really helpful. In her report, Karen Cherry stated:

> "102. In my opinion, DS Ellerby, as the investigating officer, failed to sufficiently investigate the allegations against [MP]. In addition, the accounts that I have obtained throughout this investigation have shown that DS Ellerby, by failing to follow appropriate procedures, was not transparent and open with supervising officers and avoided formal audit and scrutiny.
>
> 103. DS Ellerby should have recorded MP as a nominal on Niche at the time the laptop was seized. Had he done so the data would have been transferred from Niche to PND [Police National database] creating a record associated with MP. As a result, several CRB checks conducted by babysitting web based companies did not highlight any concerns. This failure clearly contributed to [MP] being afforded unrestricted access to the children he offended against."

36. Mr Holdcroft, for the Defendant, submits that the opinion of Ms Cherry is inadmissible and should be ignored: he submits that I should go no further than the admissions which the Defendant has made based upon the findings of the disciplinary panel. I disagree. In my judgment, this would be wholly artificial: given the allegations made in the Letters of Claim and Particulars of Claim, I am seized of the whole period from when DS Ellerby took possession of the laptop computer on 21 December 2012 until April 2015 when MP was arrested. Although I am not bound by the findings of the IPCC, I take the view that I am entitled to take them into account in reaching my own findings. Furthermore, there is a logic to the course which I propose to take: the disciplinary panel confined itself to the conduct of DS Ellerby and thus made no findings in relation to the first period because it took the view, perhaps surprisingly, that there was little that DS Ellerby could practically have achieved until he had the results of the HTCU examination of the laptop. By contrast, I am looking at the overall conduct of the Wiltshire police which includes, for example, the length of time that it took for the laptop to be examined. I am also looking at the supervision of DS Ellerby and the systems in place which allowed him to retain the investigation and effectively do nothing for 2½ years.

<u>These Proceedings: Limitation</u>

37. Although the proceedings in relation to the three sets of claimants have been consolidated into this single claim in the Queen's Bench Division, they were originally issued separately in the Bristol County Court with two firms of solicitors:

    (i) Claim No E60YJ364 issued on 19 April 2018 by Irwin Mitchell LLP in relation to HD and PD;

    (ii) Claim No E67YX258 issued on 16 July 2018 by Farley Solicitors LLP in relation to OB; and

    (iii) Claim No E00YY994 issued on 18 October 2018 by Irwin Mitchell LLP in relation to CJ and PJ.

38. No limitation issue arises in relation to the claims in negligence as all the Claimants are minors. However, a limitation defence is raised in relation to the claims under the Human Rights Act 1998 ("HRA"). By S.7(5) HRA, a person who claims that a public authority has acted in a way which is unlawful under s.6.(1) must bring proceedings

> "before the end of (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances."

39. In relation to the claim of OB, I heard evidence from his solicitor, Mr Jonathan Bridge. He relied on his statements dated 20 October 2021 and 29 April 2022 in which he indicated that he first received instructions from NP, OB's mother, who contacted him in September 2016 because her son had been sexually abused and they were looking at potential actions against the website that had provided

MP's details and the police, and a CICA claim. He said that at that point the IPCC investigation was ongoing and there was very little information available about how the police might have failed OB and NP's primary intention at that stage was to ensure that the IPCC were able properly to investigate the case and deal with any disciplinary proceedings against the officers involved. The IPCC report only became available in August 2017.

40. Legal aid funding was available to obtain Counsel's opinion but when Mr Bridge became aware that an alternative solicitor was already acting for other victims of MP, it was agreed that the same barrister would be instructed and the claims coordinated. A letter of claim was forwarded to the Defendant on 9 March 2018 requesting a moratorium in relation to limitation under the HRA: no response was received and reminder letters were sent on 29 May 2018 and 29 June 2018. The consultation with leading Counsel took place on 25 June 2018, funding was extended to allow the issue of proceedings and the claim form was issued on 16 July 2018.

41. In cross-examination, it was put to Mr Bridge by Mr Holdcroft that he had sufficient knowledge by September 2016 to issue proceedings: Mr Bridge disagreed. He indicated that he had been aware of the limitation period and that pinpointing the limitation period is sometimes very difficult in Human Rights claims. There was lack of knowledge as to when the "act" took place for the purposes of the primary limitation period. He indicated that the date of knowledge was when they obtained the IPCC report. He accepted that the letter of claim had not been sent until nine months after receipt of the IPCC report and in answers to questions from the court he said that he had adopted "an arbitrary period of one year from the date of the IPCC report on the basis that this was a reasonable period from the date of knowledge." He asserted that they had tried to issue proceedings as soon as possible after the IPCC report but the consultation with leading Counsel had not been until June 2018 and then, when funding was extended, they issued straight away.

42. So far as the claims of HD/PD and CJ/PJ are concerned, I heard evidence from their solicitor, Fiona McGhie. She relied on her statements dated 21 October 2021 and 29 April 2022. She was instructed in November 2016 by ED on behalf of HD/PD, legal aid certificates were granted by March 2017 and ED informed her that she was aware that a mandatory referral had been made by the police to the IPCC following MP's conviction in March 2016. In January 2017, she wrote to the Defendant to advise them that Irwin Mitchell had been instructed and that they would be sending a letter of claim after the IPCC report had been published. She invited the Defendant to agree an extension of time for limitation under the HRA. There was no substantive response to this request and between January 2017 and February 2018 she wrote several times to the defendant in relation to limitation. It was not until February 2018 that the defendant confirmed that they were not prepared to agree to waive their right to raise a limitation defence. Ms McGhie stated that, due to the age of the Claimants, there was a much longer limitation period available to them in the negligence claim and therefore there was no prejudice to the Defendant in extending time for limitation under the HRA. Once the Defendant confirmed that it would not waive its rights in relation to a limitation defence in February 2018, she sought an amendment to enable proceedings to be issued and a protective claim form was issued on 19 April 2018.

43. In relation to CJ/PJ, she was approached by DJ in August 2017 following the publication of the IPCC report. At that time DJ was struggling to come to terms with what had happened to CJ and PJ, particularly because their abuser was her own brother and because of her own personal history and she was not emotionally able to follow through with the legal aid applications until March 2018. Legal aid certificates were granted in August 2018 and the claim form was issued in October 2018.

44. In cross-examination, Ms McGhie accepted that they had sufficient information to assess the merits of the claims once the IPCC report had been received and they had started drafting the Letter of Claim soon after receipt of that report. She had asked for a limitation moratorium but that had not been forthcoming, so she decided to issue proceedings in the case of HD/PD.

45. On behalf of the Defendant, Mr Holdcroft submits that protective proceedings could and should have been issued much earlier. He submits that, by the Autumn of 2016, the Claimants (or their Litigation Friends) had become aware of potential wrongdoing on the part of the Defendant, alternatively by August 2017 when the IPCC report was released. Given that the primary limitation period had long expired, he submits that it was incumbent on the solicitors to issue proceedings as soon as they reasonably could once they had the necessary knowledge which was by August 2017 at the latest, and the delay thereafter in issuing proceedings was such that the court should refuse to exercise its equitable jurisdiction. He submits that neither solicitor offered any good explanation for the delay in issuing the proceedings after the misconduct hearing and over three years after the events complained of: these were experienced solicitors, well versed in bringing proceedings under the HRA and in issuing proceedings protectively if required. He criticises their apparently shared belief that the one-year period began to run from August 2017. He also relies on the lack of merits in the claims.

46. For the Claimants Mr Bowen QC submitted that the key factors to consider are the date of knowledge that there was a viable claim, the delay thereafter, the lack of prejudice to the Defendant, the dilatory conduct from the Defendant in pre-action correspondence and the nature of the claim. He submitted that it is not realistic to think that the families should have sought legal advice on a Human Rights claim before the close of the disciplinary proceedings and the receipt of the IPCC report. The claims were issued within a year of receipt of the IPCC report and the Defendant does not suggest any prejudice in dealing with the claim. The facts concerning this case had been addressed in an internal investigation, the IPCC enquiry and in the disciplinary proceedings against DS Ellerby. The underlying facts are largely agreed and uncontroversial. He submits that the refusal of a limitation extension would mean that these claimants and the wider public would be denied a judgment on the merits in a case concerning a very serious crime against five young children where the police had admitted serious errors in the investigation and there is a legal question relating to the scope of the claims under Article 3 ECHR.

Discussion

47. In relation to the legal framework concerning the exercise of the equitable discretion to extend the limitation period in relation to claims under s.6 HRA, and

the principles to be applied, I am grateful to Collins Rice J for her exposition in *Rafiq v Thurrock Borough Council* [2022] EWHC 584 (QB) which I adopt:

"14. There is guidance in the caselaw for courts exercising discretion under s.7(5)(b). The Supreme Court in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 said this (paragraph 75):

> 'The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one-year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant.
> However … the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980.'

15. So it is not wrong for a court to have regard to the s.33 factors if it considers it proper to do so in the circumstances of a particular case, but they must not be treated as a fetter on discretion. Instead, the court is to examine all the relevant factors in a case and consider whether it is equitable to allow a period of longer than one year. There is no predetermined list of relevant factors, although proportionality will generally be taken into account. The weight to be given to any particular factor is a matter for the court. (*P v Tameside MBC* [2017] 1 WLR 2127 at paragraph 67).

16. *P v Tameside* (paragraphs 77-79) is also authority that a court must have regard to the policy reasons for Parliament adopting a much tighter limitation period in HRA claims than usual, and that these may be similar to those for the tight 3-month limit in judicial review proceedings.

> It is clearly the policy of the legislature that HRA claims should be dealt with both swiftly and economically. All such claims are by definition brought against public authorities, and there is no public interest in these being burdened by expensive, time consuming and tardy claims brought years after the event.
>
> The court must look critically at the explanations given for the delay, set against these policy considerations. Delay is always a relevant consideration whether or not there is

> actual trial prejudice to a defendant. However the 'burden of persuasion' on a claimant is not necessarily a heavy one and there is no burden to establish lack of prejudice to the defendant.
>
> 17. The High Court in *Alseran & Ors (Iraqi Civilian Litigation) v MoD* [2017] EWHC 3289 (QB) took emphasis from the judgments of Lord Dyson and Lady Hale in *Rabone* that the merits of a claim may be the 'most important of all' the points which may militate in favour of granting an extension, and that it is 'important that fundamental human rights are vindicated'. It also noted that 'evidential prejudice' to a defendant, where delay means that witnesses cannot be traced or memories have faded, may militate against the fairness of granting an extension.
>
> 18. Most recently, the High Court in *Newell v MoJ* [2021] EWHC 810 (QB) directed itself not to put any qualification to, or gloss on, 'equitable having regard to all the circumstances'. It must mean being fair to each side."

48. In the present case, there are two factors in particular which, in my judgment, point clearly to the exercise of the discretion in favour of the Claimants to allow these claims to proceed. First, the acts complained of are the acts or omissions of the Defendant, and of DS Ellerby in particular, which allowed MP to commit the serious sexual abuse of the Claimants. Whether the "act complained of" is interpreted as the conduct of the Defendant or the conduct of MP, what is clear is that an action could never have been brought within 1 year because the knowledge of both what MP did and its relationship to DS Ellerby's investigation came significantly later, and realistically, in my view, only when the disciplinary proceedings against DS Ellerby had concluded and the IPCC report had been released. Thus, it was always going to be equitable to extend time to some extent, the issue being the <u>length</u> of the period of extension, not whether the period should be extended at all. Secondly, in contrast to the other cases cited, the Claimants in this case are all minors. In English domestic law, the limitation period for minors does not start until they attain their majority and although there is no such principle for the purposes of s.7(5), the fact that the Claimants are minors is, and should be, in my judgment, a significant factor in deciding whether to exercise the s.7(5)(b) discretion.

49. Apart from those two factors however, I would consider it appropriate to exercise my discretion to extend the limitation period for the following reasons, as submitted by the Claimants:

    (i) the date of knowledge that there was a viable claim: this was not, realistically, until the disciplinary proceedings against DS Ellerby had concluded and the IPCC report was released;
    (ii) the delay thereafter: I do not consider this to have been unreasonable. In particular, legal aid needed to be extended to cover the issue of proceedings and it was reasonable to co-ordinate the claims so that advice from Leading Counsel could be obtained. I should make it clear that I do not endorse any notion which may have existed in the mind of Mr Bridge that, in a HRA claim, the one-year period starts from the date

of knowledge: there is simply no authority for this proposition, and it involves an unfortunate, and ill-considered, amalgamation of s.14 of the Limitation Act 1980 and s.7(5) HRA. I would therefore warn against any solicitor who thinks that, in a HRA case, he or she has 1 year from the date of knowledge. Whether 1 year is or is not reasonable will depend on all the circumstances. In this particular case, though, and fortunately for Mr Bridge, I do think that it was reasonable;

(iii) the lack of prejudice to the Defendant: in my judgment, it is significant that much of the intervening period was taken up by the investigation into both MP's wrongdoing (culminating in his conviction in 2016) and thereafter DS Ellerby and the failures in relation to his investigation. Thus, there is no prejudice that I can see to the Defendant and all the evidence required in this case was garnered a long time ago;

(iv) in the case of CJ/PJ, the psychological state of their mother, DJ: she had, herself, suffered sexual abuse at the hands of her father and to discover that her children had suffered serious sexual abuse at the hands of their uncle, her brother, and that she had failed to protect them from him, must have been devastating for her: if she needed time to come to terms with what had happened and get into a fit emotional state to provide coherent instructions to Ms McGhie, this is wholly understandable and an important human factor which it is appropriate to take into account;

(v) the dilatory conduct from the Defendant in pre-action correspondence: although this is a weak factor, the Defendant should clearly have responded substantively to the requests for a limitation moratorium, and the eventual refusal to agree a moratorium in the case of HD/PD in February 2018 seems to me to be difficult to justify, in the circumstances of this case;

(vi) the nature of the claim: this is a claim involving serious sexual assaults, including the rape of a 5-7 year old girl, with significant psychological consequences for the Claimants: the court will be slow to drive such claims from the judgment-seat on the grounds of limitation and there is a wider public interest in seeing claims such as this properly considered, with both its factual and legal implications.

50. In the circumstances, I exercise my discretion to extend time to bring the HRA claims to the date of issue of proceedings in all three cases.

<u>These Proceedings: Amendment of the Particulars of Claim</u>

51. The Particulars of Claim in this case have been through a number of metamorphoses and the most recent version was produced as late as the morning of 10 May 2022, the final morning of the hearing. The Claimants seek permission to make the amendments, and this is opposed by the Defendant. I indicated that I would deal with permission to amend in the judgment.

52. The history of the application to amend is as follows:

(i) The original Particulars of Claim in the cases of OB and HD/PD were served on 21 March 2019; the Particulars of Claim in the case of CJ/PJ were served on 12 August 2019. In all three cases, the claim was brought both in negligence and under s.6 HRA for breach of the rights protected

under Articles 3/8 ECHR. The negligence claim in each case was pleaded at paragraph 5 and at various points later in the pleading.

(ii) At a Pre-Trial Review held before me on 13 April 2022, when an application to adjourn the trial on behalf of the Claimants was refused, the Claimants' counsel indicated that permission would be sought in due course to amend the Particulars of Claim to abandon the claims in negligence on behalf of HD/PD and OB on the basis that the existing legal framework prohibited such claims and to amend the residual claims to expand upon the factual matters relied upon in what he anticipated would be an uncontentious way: I indicated that, on that basis, I would deal with the application at trial and that a formal written application would be unnecessary.

(iii) On 28 April 2022, draft Amended Particulars of Claim were served in the cases of CJ/PJ, HD/PD and OB. In the cases of HD/PD and OB, the allegations of negligence were struck through. There were numerous other amendments.

(iv) In their skeleton argument for trial, the Claimants' counsel stated:

"It is accepted that the negligence claims in the OB and HD/PD cases are bound to fail given existing precedent (at 1st instance at least) and are reserved insofar as those cases proceed to a higher court. This Court is invited to dismiss the claims at §5 and 73 of OB and §5 and 83 of the HD/PD particulars of claim" (emphasis added).

(v) On the first morning of the trial, I pointed out to Mr Bowen QC that if the claim in negligence was struck out, there would be nothing to reserve to a higher court: on consideration of this, he indicated that he would in fact wish to reinstate the negligence claims of HD/PD and OB.

(vi) A second set of Amended Particulars was served on the morning of Thursday, 5 May, day 2 of the trial; however, in the course of submissions, Mr Bowen QC indicated that he would wish to amend the Particulars again.

(vii) Friday, 6 May was a non-sitting day given to the parties to prepare final written submissions: I had indicated the previous day that, in order that the Defendant could prepare its submissions based upon the final version of the Amended Particulars, the further version should be served by 1pm and this was done (although the amendments were not all shown in a clearly visible format – this was done in a further versions served at around 4pm that day). Unfortunately, these had the wrong title (referring to the old County Court proceedings, not the existing High Court proceedings): they were re-served with the correct title on 10 May 2022, but this was a cosmetic change only and did not affect the substance.

53. In relation to the reinstatement of the negligence claims of HD/PD and OB, this is uncontroversial: they were in the original Particulars of Claim, and the position is that the Claimants no longer concede that these should be struck through, merely that the court should give judgment for the Defendant in relation to them,

thus preserving them for consideration by a higher court. Thus, in relation to them, there is in fact no longer an application to amend.

54. It is, however, in relation to the other amendments that there is controversy. In his closing submissions, Mr Holdcroft, having the opportunity for the first time to address the case in its final pleaded form, objected that the Pleadings still made it unclear what was in issue. He submitted that the Claimants' case at paragraph 3 where it is now pleaded that

> "The Defendant was under a positive obligation to take preventive operational measures and to have effective systems to protect the Claimants (as individuals and as members of the general public) from the risk posed by MP's downloading and consumption and or transmission and manufacture of obscene sexual images of young children"

is a "seismic" change. Generally, he submitted that the pleadings are at best "chimeric" and, even now, are hopelessly vague and difficult to follow, lack clear dates and allegations of what should have been done.

55. For the Claimants, Mr Bowen QC submitted that the amendments are principally factual and do not prejudice the Defendant: all they do is expand on the Claimants' case as to the two routes of recovery and do not, for example, add any new causes of action.

56. In my judgment, if Mr Holdcroft is correct in relation to his criticisms of the Amended Pleadings, these are matters which go to the substance and merits of the claims against the Defendant rather than in resisting the application to amend, and indeed are criticisms which he was able to level against the original Particulars of Claim. There has been no successful application to strike out the pleadings or the claims, and, in the end, I consider that Mr Bowen is correct that the effect of the amendments is to expand upon, and make clearer (even if not necessarily clear) how the case is put on behalf of each set of Claimants. Mr Holdcroft was unable to point to any <u>evidential</u> prejudice arising from the proposed amendments: this is a case where the Defendant has chosen to call no evidence and it was not suggested that the amendments changed the position. Indeed, had that been suggested, the question of adjournment would have arisen to allow such evidence to be called, but no application to adjourn was made. In a case such as this, with its significance and importance for the Claimants, it seems clearly right that the Claimants' case should, however late in the day, be presented as representing the final, considered case, the best case that can be presented. If there are residual difficulties, as Mr Holdcroft suggested, then those difficulties go to the substantive merits of the case, and it would not then be open to the Claimants to say that their case failed because they had not been allowed to plead it properly.

57. I therefore grant permission to amend, and I shall consider the case on the basis of the Claimants' final amended pleading as represented by the Amended Particulars of Claim which were served on the Defendant at about 4pm on 6 May (as Amended in relation to the title).

The Disclosure and Barring Service ("DBS")

58. Before considering my findings of fact, and what should have happened in this case, it is necessary and relevant to consider the Disclosure and Barring Service. In this respect, I am grateful to the parties for agreeing a note setting out the position.

59. The DBS started operating on 1 December 2012. It is a non-departmental public body of the Home Office, created under section 87 of the Protection of Freedoms Act 2012 with its functions defined under Schedule 8.

60. A core function of the DBS includes "any function under, or in connection with, Part 5 of the Police Act 1997". Part 5 of the Police Act 1997 is concerned with Certificates of Criminal Records etc. Section 113B is concerned with Enhanced DBS checks, and provides, inter alia:

> "113B Enhanced criminal record certificates
>
> (1) DBS must issue an enhanced criminal record certificate to any individual who—
> (a) makes an application
> (aa) is aged 16 or over at the time of making the application, and
> (b) pays in the prescribed manner any prescribed fee.
>
> (2) The application must—
> (a) be countersigned by a registered person, and
> (b) be accompanied by a statement by the registered person that the certificate is required for the purposes of an exempted question asked for a prescribed purpose.
>
> (3) An enhanced criminal record certificate is a certificate which—
> (a) gives the prescribed details of every relevant matter relating to the applicant which is recorded in central records and any information provided in accordance with subsection (4), or
> (b) states that there is no such matter or information.
>
> (4) Before issuing an enhanced criminal record certificate DBS must request any relevant chief officer force to provide any information which —
> (a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and
> (b) in the chief officer's opinion, ought to be included in the certificate."

Permission to give this information by the police to the DBS is an exception to the restrictions under the Rehabilitation of Offenders Act 1974.

61. There are four levels of DBS checks: Basic, Standard, Enhanced and Enhanced with Barred List. The minimum age at which someone can be asked to apply for a DBS check is 16 years old. The four levels of DBS checks are as follows:

(i) Basic DBS check

A Basic DBS check is for any purpose, including employment. The certificate will contain details of convictions and conditional cautions that are considered to be unspent under the terms of the Rehabilitation of Offenders Act (ROA) 1974. An individual can apply for a Basic check directly to DBS or an employer can apply for a basic check on an individual's behalf, through a Responsible Organisation, if they have consent.

(ii) Standard DBS check

A Standard DBS check is suitable for certain roles, such as a security guard. The certificate will contain details of both spent and unspent convictions, cautions, reprimands and warnings that are held on the Police National Computer, which are not subject to filtering. An individual cannot apply for a standard check by themselves. There must be a recruiting organisation who needs the applicant to get the check. This is then sent to DBS through a Registered Body. The service is free for volunteers.

(iii) Enhanced DBS check

An Enhanced DBS check is suitable for people working with children or adults in certain circumstances such as those in receipt of healthcare or personal care. An Enhanced DBS check is also suitable for a small number of other roles such as taxi licence applications or people working in the Gambling Commission. The certificate will contain the same details as a standard certificate and, if the role is eligible, an employer can request that one or both of the DBS Barred Lists are checked. There is a child barred list and an adult barred list, and these contain the list of those who are prevented by law from working with children or vulnerable groups. The certificate may also contain non-conviction information supplied by relevant police forces, if it is deemed relevant and ought to be contained in the certificate. An individual cannot apply for an Enhanced DBS check by themselves. There must be a recruiting organisation who needs the applicant to get the check. This is then sent to DBS through a Registered Body. The service is free for volunteers.

(iv) Enhanced with Barred Lists DBS check

An Enhanced with Barred Lists DBS check is also suitable for people working with children or adults in certain circumstances such as those in receipt of healthcare or personal care. An Enhanced with Barred Lists certificate will contain the same information as an Enhanced DBS certificate, but will also include a check of one or both Barred Lists.

62. MP solicited an Enhanced DBS check on three occasions:

(i) 1 August 2012 (Swindon College);
(ii) 10 February 2014 (Network Healthcare Professionals); and
(iii) 20 January 2015 (Scout Association).

In relation to all three checks, the Defendant admits that the police informed DBS that it had "no relevant information."

Findings of Fact

63. In my judgment, there can be no doubt that Wiltshire Police, through DS Ellerby, were negligent in relation to their investigation into the indecent images found on the laptop computer seized by DS Ellerby on 21 December 2012. Indeed, by reference to the findings of the disciplinary panel in July/August 2017, this is conceded (but only by reference to those findings). However, in my judgment, the negligence of the Defendant went significantly further than as found by the disciplinary panel. These are my findings as to what should have happened and what would probably have followed:

(i) When DS Ellerby had the laptop sent to HTCU for examination, he should have ascertained, after the laptop had been subjected to the initial "triage" process, how long it would probably be before it could be examined: had he done so, he would probably have been told that it was likely that it would not be for 12 months.

(ii) DS Ellerby should then have considered what he could do in the meantime to advance the investigation: the first priority would have been to ascertain who was responsible for the images being on the computer.

(iii) To this end, he should have interviewed those who had had access to the computer, starting with BP: had he done so, he would probably have ascertained that BP was unlikely to be responsible for the downloading of the images, and usage of the laptop would probably have led to MP being the prime suspect.

(iv) Interview, or further interview after the others had been interviewed, of MP would probably have led to MP admitting that he was responsible: at that time, MP was not yet 17 and an experienced officer such as DS Ellerby, interviewing a 16-year-old, could have been expected to elicit appropriate admissions.

(v) DS Ellerby should then have taken advice from a senior officer, or at least an officer experienced in the investigation of indecent images, as to how the investigation should then proceed: had he done so, he would probably have been advised that little further could be done at that stage so far as prosecution was concerned until the computer had been analysed at the HTCU, but the investigation should be kept open and, importantly, MP should be entered on Niche as a nominal: this was the conclusion of the IPCC and it is my conclusion as well. It is likely that this would have been in January or February 2013.

(vi) Had MP been entered on Niche as a nominal, the police would not have informed Network Healthcare Professionals or the Scout Association that

it had “no relevant information”: on the contrary, the information that MP was suspected of being responsible for the downloading of indecent images of children would have meant that the police would have regarded him as a person who was not suitable to work with children.

(vii) In addition, given MP’s age, combined with the suspicion that had fallen on other members of the family, DG would have been informed of MP’s admissions – indeed, it is likely she would have been present at the interview itself – and the information that MP had admitted being responsible for the images would have found its way to the other members of the family including, importantly, DJ. The other members of the family who lived with DG and her husband would have been relieved to be informed that the finger of suspicion no longer pointed towards them.

(viii) I accept DJ’s evidence as referred to in paragraph 21 above. In my judgment, this was not said purely with the benefit of hindsight: given her own background of having been abused, DJ would not have been happy for her young children to spend unsupervised time with someone who had shown an interest in naked children, even her brother, and MP would have been denied the opportunity to abuse CJ and PJ in the period covered by the indictment, from 1 November 2013.

(ix) In addition, as submitted on behalf of the Claimants, the identification of MP as a young man with an interest in naked children would probably have led to a referral to Social Services and it is to be hoped that his unhealthy interest in young children would have been addressed before it escalated into sexual abuse.

(x) MP would not have been able to represent himself as someone with a clean DBS check to the childcare website, to SMASH (a youth mentoring service), to the Scout Association or to NP and ED: it is unlikely that he would have been able to work with the Scouts and he would probably not have applied to work with children in any capacity as he would have known that he would be found out when the DBS check came back.

(xi) It is extremely unlikely that MP would have been employed by NP to look after OB or by ED to look after HD and PD.

<u>The Claims in Negligence</u>

64. The basic position is that it is well established, as a result of various decisions of the House of Lords or Supreme Court, that public authorities are generally under no duty of care to prevent the occurrence of harm: in this respect, they are in no different a position than private individuals. I can do no better than cite Lambert J’s summary of the key principles in *DFX v Coventry City Council* [2021] EWHC 1382 (QB) at [169] which I adopt for the purposes of the present judgment. In this passage, the key decision to which she referred are:

Smith v Littlewoods Organisation Ltd [1987] AC 270.
MP v Chief Constable of South Wales Police [2015] UKSC 2
Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4.

N v Poole Borough Council [2020] AC 780.

Lambert J said:

> "*The legal principles*
>
> 169. In determining the existence or otherwise of a duty of care in the three cases, Lord Toulson and Lord Reed applied the orthodox common law approach and the established principles of law. What follows is a distillation of the key general principles drawn from those cases. ...
>
> i) At common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority. It follows therefore 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 (*Robinson* at [33]).
>
> (ii) Like private individuals, public authorities are generally under no duty of care to prevent the occurrence of harm. In *MP,* Lord Toulson said at [97]: "English law does not as a general rule impose liability on a Defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] A.C. 241. The fundamental reason as Lord Goff explained is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else".
>
> (iii) The distinction between negligent acts and negligent omissions is therefore, as Lord Reed said in *Poole* at [28] of fundamental importance. Lord Reed reflected that the distinction to be drawn could be better expressed as a "distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale for the distinction drawn in the authorities and partly because the distinction between acts and omissions seems to be found difficult to apply".
>
> (iv) Public authorities do not therefore owe a duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body,

see *Robinson* at [35]. Lord Reed continues at [36] "That is so, notwithstanding that a public authority may

have statutory powers or duties enabling or requiring it to prevent the harm in question". The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be to say the least unusual if the mere existence of the statutory duty (or a fortiori, a statutory power) could generate a common law duty of care". It follows that public authorities like private individuals and bodies generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

(v) The general rule against liability for negligently failing to confer a benefit
is subject to exceptions. The circumstances in which public authorities like private individuals and bodies may come under a duty of care to prevent the occurrence of harm were summarised by Tofaris and Steel in "Negligence Liability for Omissions and the Police" 2016 CLJ 128. They are:

(i) when A has assumed 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;
(iv) A's status creates an obligation to protect B from that danger."

<u>The Submissions on behalf of the Claimant</u>

65. Based upon an inevitable acceptance of these legal principles at the level of first instance, Mr Bowen QC concedes that OB and HD/PD cannot succeed in their claims for negligence. By failing to take the steps which he did, DS Ellerby failed to confer a benefit, in other words he did not make things better by preventing MP from being able to rely on a clean DBS certificate and thereby gain employment from NP and ED and thus get access to those victims.

66. However, in the case of CJ and PJ, Mr Bowen submits that the situation is different. Here, he submits that DS Ellerby played a critical role in the unfolding events whereby, by a series of positive acts, he created a fresh danger or increased the danger already faced by CJ and PJ from their uncle or made matters worse. The positive acts relied on are:

(i) His retention of ownership of the investigation and decision to remain as OIC, rather than passing it on to another officer with more relevant experience or to a senior officer;

(ii) His closing the case on Niche in August 2013 without completing an intelligence report, whereby MP's details (as a person of interest or as a nominal) were not subsequently transferred to the Police National Database;

(iii) His positive decision not to pursue the investigation once he had received the HTCU report: thus, it is pleaded (at paragraph 29 of the Amended Particulars of Claim) that DS Ellerby

> "took the positive step of deciding not to follow up the identification of MP with any form of investigation into whether:
>
> (i) having considered the guidance then in place issued by the CPS and the sentencing guidelines, whether MP should be contacted, interviewed and consideration given to arrest and charge; and
>
> (ii) in terms of safeguarding, whether or not MP posed a risk to the Claimants (or other children) who he knew or ought to have known were frequent visitors to the MP household and who were often left alone with him".

67. In so submitting, Mr Bowen relies on the decision of the Court of Appeal in *Rushbond PLC v The JS Design Partnership LLP* [2021] EWCA Civ 1889.

(i) This was an appeal against a decision of O'Farrell J whereby she had struck out the claim on the basis that the Respondent did not owe the Appellant a duty of care. The claim in negligence arose out of damage to the Appellant's property cause by an intruder who, it was alleged, had gained access to the property as a result of the breach of duty of the Respondent. The Respondent's representative, a Mr Jeffrey, when visiting the property, the disused Majestic cinema in Leeds city centre, had failed to secure the door from Quebec Street which meant that whilst he was in another part of the building, an intruder was able to get into the cinema and hide there until Mr Jeffrey left. Later that day, the intruder started a fire which destroyed the roof and interior of the building causing damage valued at around £6.5m.

(ii) In its defence, the Respondent accepted that the risk was reasonably foreseeable, pleading, in particular:

> "It was reasonably foreseeable that risk of harm to the Property by an unknown third party was (marginally) increased for one hour on the morning of 30 September 2014. However reasonable foreseeability of harm is inadequate to give rise to a duty of care at common law."

Coulson LJ considered that the concession in the first sentence was significant because "that increase in the risk of harm can only have been caused by Mr Jeffrey, who disabled the alarm and did not lock the Quebec Street door before he went to inspect other parts of the property."

(iii) Mr Bowen QC, in the present case, places particular reliance on paragraph 44 where Coulson LJ said:

> "44. As explained, for this appeal to succeed, it is only necessary for the appellant to show that its claim is arguably not one based on 'pure omissions', or if it is, that it arguably falls within one of the exceptions to that rule. In my view, it is arguable that this is not a claim based on 'pure omissions'. That is for three reasons. First, I consider that, standing back from the detail and the authorities, that must be the answer as a matter of general principle. Secondly, I consider that, unlike the authorities set out in Section 4.1 above, this is a claim based on the respondent's critical involvement in the activity which gave rise to the loss, so it is not a 'pure omissions' case. Thirdly, I consider that the case falls within a well-recognised line of negligence authorities, noted in Section 4.2 above, where a duty has been found to be owed by a defendant in respect of the security of the claimant's property."

(iv) Mr Bowen submits that the same principle applies in the present case whereby DS Ellerby played a critical role in the unfolding events which led to MP assaulting CJ and PJ. He refers to paragraphs 48 and 49 of *Rushbond* where Coulson LJ distinguished between "pure omissions" cases where the Defendant did nothing, and those cases where the Defendant was involved in a particular activity, and it was the negligent carrying out of that activity that gave rise to the claim. An example of the latter, in the context of claims against the police, is *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 where the Defendant's police officers caused foreseeable injury to an elderly passer-by whilst attempting to arrest a suspect on the street. The Supreme Court found that there was a reasonably foreseeable risk of injury and that police officers owed a duty of care towards pedestrians, including the Claimant, in the immediate vicinity when the arrest had been attempted.

68. Alternatively, Mr Bowen submits that he can bring the case of CJ/PJ into the "Tofaris" exceptions (see paragraph 64 above, at v) in Lambert J's principles) because DS Ellerby's actions and omissions:

(i) Amounted to an assumption of responsibility; or
(ii) Amounted to doing something which prevented another from protecting the Claimants because, had he passed the case on to a specialist officer, they would have protected the Claimant from the danger presented by MP; or
(iii) From the time he received the HTCU report, DS Ellerby had the power to exercise a special control over the danger posed by MP, but he elected to do nothing; or
(iv) His status as a police officer created an obligation to protect CJ/PJ from danger.

The Submissions on behalf of the Defendant

69. For the Defendant, Mr Holdcroft submitted that the stance taken by the Claimants in relation to OB and HD/PD should equally apply to CJ/PJ. On the basis of the authorities, the police have no liability for omissions where harm has been caused by a third party. The Claimants' submissions amount, in effect, to no more than an attempt to dress up a failure to act in the clothes of positive actions.

70. Mr Holdcroft considered each of the supposed positive acts set out in the Amended Particulars of Claim:

    (i) At paragraph 20, it is pleaded that DS Ellerby "took the positive decision to retain ownership of the case and remain as OIC": Mr Holdcroft submitted that to leave things as they are is not a positive act and in reality what is being said is that he did nothing. He submitted that if the claimants are right, it would constitute an answer in every case and obliterate the distinction between positive acts and omissions. If the claimants are right, every failure to act could be transformed into a positive act simply by adding the words "X took the positive decision" as in
        - X took the positive decision not to warn the blind man he was about to walk into a lamp post
        - X took the positive decision not to turn on a fire hose
        - X took the positive decision not to save the drowning man.

    He relied on the observations of Stacey J in *HXA v Surrey County Council* [2021] EWHC 2974 (QB), as to which, see paragraph 76 below.

    (ii) Exactly the same objection applies to paragraph 21 where it is alleged that DS Ellerby took a positive decision to close the case on Niche without completing an intelligence report resulting in MP's details not being transferred to the Police National Database.

    (iii) Again, the same objection applies to paragraph 29 where it is alleged that DS Ellerby took the positive step of deciding not to follow up the identification of MP with any form of investigation once he had received the report from HTCU.

    (iv) As to paragraph 30 (taking the positive decision to retain ownership of the case for his benefit alone and not making his supervising officer aware of any outstanding work), this adds nothing to paragraph 20.

71. Mr Holdcroft further submitted that, applying the test of Lord Reed in *N v Poole Borough Council,* namely distinguishing between causing harm (making things worse) and failing to confer a benefit (not making things better), none of the matters relied on by the claimant could be said to have made matters worse: no new danger was created and the existing danger arising from MP had not been made worse.

72. Mr Holdcroft further submitted that the "Tofaris" exceptions did not apply. First there had been no assumption of responsibility, as shown by the statement of DG who said:

> "10. The officers left without giving us an indication of next steps. They didn't mention anything about us giving formal statements and didn't leave us a card with their contact details. We weren't given a crime reference number or left with a receipt for the laptop they'd taken. It was only later on that I realised that I hadn't actually been left with any information.
>
> 11. I had just assumed that it would be investigated thoroughly, particularly with our family history. I had reiterated this to the officers who attended at our house as well as the officer I had spoken to earlier that day at the police station."

By reference to this statement, none of the required elements for an assumption of responsibility were present and DG accepted that she did not contact the police herself. Nor was there any explicit representation by DS Ellerby or reliance on him. In reality, there was nothing said or done by DS Ellerby which would not be said or done in virtually every investigation, and there was nothing here which could be said to give rise to a special relationship. Indeed, DS Ellerby did not even know of CJ's and PJ's existence or that they were at risk of harm.

73. Mr Holdcroft further submitted that it could not properly be suggested that DS Ellerby had a "special level of control over the source of danger" to qualify within the third Tofaris exception: this requires a "special relationship" and DS Ellerby had no special relationship with MP. He referred to what Lord Toulson said at paragraph 99 in *MP v Chief Constable of South Wales* [2015] AC 1732 excluding the exception in that case because Ms MP's murderer had not been under the control of the police: equally, MP was not under the control of the police here.

Discussion

74. The starting point, as it seems to me, is that it is difficult to understand why Mr Bowen QC in this case distinguishes the claims of OB and HD/PD from the claims of CJ and PJ: if it is correct that DS Ellerby took positive steps such that this was not a "pure omissions" case, or he made matters worse, or assumed responsibility for the actions of MP or otherwise can be brought within one of the "Tofaris" exceptions, then OB and HD/PD were as much the victims as CJ and PJ. It does not seem to me to matter that they were victims who had not yet come into contact with MP, whilst MP already had a relationship with CJ and PJ and social contact with them, being their uncle. The period of the indictment against MP in relation to CJ and PJ starts on 1 November 2013, and it is to be assumed that until then, he had a normal relationship with them. At the time of DS Ellerby's initial defaults and negligence, as I have found (see paragraph 63 above), they were as much MP's future victims as were OB and HD/PD. It is true that the negligence of DS Ellerby spanned the period before and after CJ and PJ started to be abused by MP but it is difficult to understand how, in principle, this means that he owed a duty towards them but not to OB and HD/PD, on the law as it presently stands.

75. The fundamental question, in my judgment, is whether DS Ellerby owed a duty of care towards these Claimants. Thus, failing to confer a benefit will not generally bring a person, or a public authority, within the sphere of tortious

liability in negligence, even where the public authority has a duty to act but fails to do so. But making matters worse by one's actions does give rise to a duty of care: in a sense, the law thus echoes the first duty of a doctor, namely "do no harm".

76. In my judgment, Mr Holdcroft is correct when he submits that, properly analysed, the positive acts relied on by the Claimants on the part of DS Ellerby are no more than omissions or failings on his part to act, in disguise. In this context, the dictum of Stacey J in *YXA v Wolverhampton City Council* [2021] EWHC 2974, which concerned a Local Authority's failure to prevent harm being done by the Claimants' families and another, is illuminating and apposite:

> "63. In spite of Mr Levinson's valiant efforts to describe the claims in terms of allegedly negligent acts, in both cases all the allegations relied on are unquestionably allegations of negligent omissions, as is abundantly clear if considered by reference to the terminology preferred by Lord Reed and the "distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions". In both cases the harm was being done by the claimants' families and Mr A. The essence of the claim is an allegation of a failure to take care proceedings timeously and not making things better. The attempt to carve out positive acts from a case which is principally about a failure to confer a benefit is to fail to identify correctly the underlying complaint, as per the Court of Appeal in *Kalma*:
>
> "merely because something can be presented as an act does not mean that what are, on a proper analysis, omissions can be, as the judge put it, "brought wholesale within the parameters of a duty of care"" [121]
>
> Or to put it colloquially, to fail to see the wood for the trees."

77. Just as the wood in that case consisted of the Council's failure to protect the Claimants, so here the wood is DS Ellerby's failure properly to investigate the images on the laptop computer seized on 21 December 2012 and thus carry out an investigation which would have "nipped in the bud" MP's danger to these Claimants and deprived him of the opportunity sexually to abuse them. In my judgment, it does not avail the Claimants to depict some of the individual trees as positive acts when, together, they amount to a failure to confer a benefit rather than acts which made matters positively worse.

78. In my judgment, the decision of the Court of Appeal in *Rushbond PLC v The JS Design Partnership LLP* (see paragraphs 67 and 68 above) does not assist the Claimants. Firstly, that case fell within a well-recognised line of negligence authorities where a duty has been found to be owed by a Defendant in respect of the security of a Claimant's property. Secondly, in any event, the actions of the third party had been facilitated by the positive act of Mr Jeffrey in disarming the burglar alarm and in failing to lock the Quebec Road door. Indeed, this had the effect of allowing the door to swing open, as it would only stay shut if locked:

thus, the practical effect of what Mr Jeffrey did was positively to open and leave open the door and thus create an invitation to enter for anyone passing along Quebec Street: this was thus significantly more than just a failure to lock the door, it positively made matters worse. This is what I interpret Coulson LJ to have meant by the respondent's "critical involvement in the activity which gave rise to the loss". Even accepting, as I do, that DS Ellerby's omissions were causative of the harm that befell all the Claimants in the sense that, but for those omissions, the harm would not have occurred, this is insufficient for the purposes of the tort of negligence in this kind of case: the involvement needs to be more closely connected to the harm, as where, for example, there has been an assumption of responsibility or, in Coulson LJ's words, a "critical involvement in the activity which gave rise to the loss."

79. As Mr Holdcroft also submitted, support for the Defendant is to be derived from the recent decision of the Court of Appeal in *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25**.** In that case, a driver called Mr Kendall had an accident on a fairly fast stretch of country road, on a winter morning when a portion of the road had been frozen over causing black ice due to a nearby water leak and flooding. The vehicle came off the road. Mr Kendall sustained non life-threatening injuries. By chance, Mr Kendall had worked as a road gritter, and was familiar with the stretch of road in question. He was very concerned that any further vehicles coming at speed down that road would encounter the unexpected ice and have accidents. At the scene of the accident whilst awaiting rescue he started to warn vehicles in the road by signalling to them to slow down. When the police attended he stressed to them that the situation was dangerous. He had also stressed that when he made his emergency call. During the rescue the police put out a warning sign, and then, once the accident was cleared sufficiently and the road swept of any debris and Mr Kendall removed to hospital, the police at the scene removed the sign and left the site effectively as it had been prior to Mr Kendall's accident, which is to say covered in black ice and dangerous. Nobody remained to warn traffic, no signs were left and no functional steps were taken at the site to ensure further traffic knew of the hazard once the police left. Not long afterwards Mr Tindall was driving his vehicle on the same stretch of the road. An oncoming driver (Mr Bird) lost control on the ice, and there was a head-on collision with Mr Tindall's vehicle. Mr Tindall and Mr Bird were both killed. For the purposes of the appeal, the Chief Constable accepted that, but for the arrival of the police, Mr Kendall would have continued his attempts to alert other road users. For her part, the claimant accepted that it was simply the arrival of the police on the scene that influenced Mr Kendall to go in the ambulance. The police did not say or do anything (either directly to Mr Kendall or generally) to encourage him to stop his attempts or to go in the ambulance; still less did they direct or in any way coerce him to stop what he was doing or to leave. The explanation for his decision to go in the ambulance (if any explanation is needed for someone who was removed on a body board) was his private expectation and assumption that the police would take over and alert road users to the danger.

80. It was pleaded on behalf of the Claimant that the officers "having promptly attended were in a position to (and did) take control of the accident scene but their negligence in assuming control/responsibility and then relinquishing it prevented Mr Kendall and other interested members of the public exercising self-help and protective measures." It can be seen that the involvement of the police "in the activity which gave rise to the loss" (echoing the words of Coulson LJ)

was significantly closer in Tindall than any activity of DS Ellerby in the criminal behaviour of MP.

81. Nevertheless, the Claimant failed in *Tindall*. Having conducted a comprehensive review of the authorities, Stuart-Smith LJ set out, at paragraph 54, the principles to be derived from those authorities:

> "(i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. In general the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible: see East Suffolk, Stovin;
>
> (ii) If follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently: see Capital & Counties, Gorringe, Robinson;
>
> (iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see East Suffolk, Capital & Counties;
>
> (iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger: see Stovin;
>
> (v) Mere arrival of a public authority upon, or presence at, a scene of potential
> danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger: see Capital & Counties, Sandhar;
>
> (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): see Gorringe;
>
> (vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (e.g. Ancell, Alexandrou) and making matters worse (e.g. Rigby, Knightly, Robinson);
>
> (viii) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property (Alexandrou) or

> injury to members of the public at large (Ancell) or to an individual (MP);
>
> (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: see Gorringe, per Lord Scott."

82. In my judgment, principle (vii) above is particularly apposite to the present case: what DS Ellerby did in this case was to act ineffectually rather than make matters worse. Furthermore, as per principle (viii), it is not sufficient that the police have been specifically alerted to the risk of injury: in the present case, DS Ellerby was in fact never specifically alerted to the risk of contact offences by MP and, in that sense, *Tindall* was a significantly stronger case than the present, but the Claimant there still failed. The position was made clear by Stuart-Smith LJ at paragraphs 71-72 where he said:

> "71 I cannot accept the claimant's submission that a duty can arise in circumstances "where a defendant had the power to exercise physical control, or at least influence, over a third party, including a physical scene (such as the accident scene in the present case) and, absent their negligence, ought to have exercised such physical control." The submission is far too wide. If correct, it would mean that whenever a public authority has the power to prevent harm and, if acting competently, ought to have prevented it, then a duty of care to prevent the harm arises. This is directly contrary to the firmly established principles that are set out in and derived from the authorities to which I have referred.
>
> 72 The claimant cites a passage from the judgment of Lord Toulson in *MP* that I have set out at [45] above in support of what she calls the "control exception". Comparison with what Lord Toulson described as the "classic example" demonstrates how far removed it is from the present case. In *Dorset Yacht* the prison officers had created the danger by bringing the borstal trainees who were in their custody and under their control onto the island and into close proximity with the boats to which damage was caused. The officers knew or ought to have known that the trainees were likely to try to escape and to take a vessel in attempting to make good their escape; but they went to bed leaving them unsupervised. It was therefore a case where the officers' control over the trainees was (or should have been) complete, the trainees were a known source of danger, and the officers introduced the danger into close physical proximity to the claimants' boats. In the present case, the officers came across a potential danger for the existence of which they had not in any way been responsible. This is not to be equated with a case where a public authority has been responsible for the creation of the danger by the manner in

> which it has exercised control over a third party or failed to exercise the power to control which it had."

83. In my judgment, the decision of the Court of Appeal in *Tindall* and the terms of the judgment of Stuart-Smith LJ are fatal to the claims in negligence by all three sets of Claimants in this case. No clear or principled distinction is to be drawn between the Claimants and their claims stand or fall together. In my judgment, the failures of DS Ellerby do not come close to establishing the necessary proximity for the Defendant to be held liable in negligence for the actions of MP, whether to CJ/PJ or to any of these Claimants.

The Claim under Article 3 ECHR

84. Article 3 ECHR provides:

> **"Prohibition of torture**
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

85. Article 34 ECHR provides:

> "The court may receive applications from any person… claiming to be the victim of a violation by one of the High contracting Parties of the rights set forth in the convention…"

86. It is common ground that the sexual abuse suffered by the Claimants in this case amounted to inhuman treatment for the purposes of Article 3 and that they are potential victims for the purposes of Article 34.

87. By s.6 HRA, it is unlawful for a public authority to act in a way which is incompatible with a convention right. Wiltshire Police are a public authority for the purposes of this section. By s.7 HRA "a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority in the appropriate court, but only if he is (or would be) a victim of the unlawful act."

88. It is accepted by the parties that the leading case for the purposes of this claim is the decision of the Supreme Court in *D v Commissioner of Police for the Metropolis* [2019] AC 196, although the decisions in the courts below are also relevant and relied upon. This case concerned the notorious driver of a black cab in London, John Worboys, who between 2003 and 2008 committed a legion of sexual offences on women. DSD was one of his first victims: she was attacked in 2003. NBV was attacked in 2007. Many others were attacked in the intervening period and yet more after the assault on NBV. DSD and NBV brought the proceedings pursuant to Article 3 and the HRA against the Metropolitan Police Service ("MPS") for their alleged failure to conduct effective investigations into Worboys' crimes. The kernel of DSD and NBV's claims was that the police failures in the investigation of the crimes committed by Worboys constituted a violation of their rights under article 3 of ECHR. They succeeded at first instance before Green J and the MPS' appeal was dismissed by the Court of Appeal and the Supreme Court. It was held that:

(i) The Human Rights Act 1998 imposes on the state a general duty rigorously to enforce laws which prohibited conduct constituting a breach of article 3 of the Convention so as effectively to deter such conduct, which requires that complaints of ill-treatment amounting to a violation of article 3 be properly investigated (the "investigative duty").

(ii) The positive obligation on the part of state authorities to investigate complaints arises both where state involvement in the acts said to breach article 3 was alleged and also in circumstances where non-state agents were responsible for the infliction of the harm.

(iii) Even serious failures which are purely operational will suffice to establish a claim that an investigation carried out pursuant to an article 3 duty infringed the duty to investigate, provided that they were egregious and significant and not merely simple errors or isolated omissions.

89. Derived from *D v Commissioner of Police for the Metropolis* the Claimants assert in the present case that:

(i) there were serious, egregious failures on the part of the Defendant, through DS Ellerby, to conduct a proper investigation into the indecent images, and in particular in the period between May 2014, when MP was identified as the person responsible for having downloaded the images and April 2015 when MP was arrested for the sexual abuse of HD and PD;

(ii) these failures were causative of the sexual assaults on OB and HD/PD in that (as I have found) but for them those assaults would not have occurred and were also causative of any assaults that occurred against CJ/PJ after DS Ellerby had been informed of the outcome of the HTCU examination and arguably of the assaults before then as well;

(iii) given that the Claimants are victims for the purposes of articles 3 and 34, they are entitled to "just satisfaction" in the form of compensation for the loss and damages which they have suffered.

90. The Defendant contests this reasoning. They contrast the Worboys case where, by reason of the serious sexual assaults, the investigation by the police was an "article 3 investigation" from the start, with the present case where the investigation by DS Ellerby into the indecent images which was never an "article 3" investigation, so that the victims' article 3 rights were not engaged at that time. Their article 3 rights were only first engaged by the investigation of DC Sweeney into the allegations of serious sexual assault from April 2015, and there is no complaint about that investigation, which was carried out competently. Indeed, by the time of that investigation, all the sexual assaults of which complaint is made had already happened and there were no further assaults to be avoided.

91. In order to decide this part of the claim, I asked the parties to agree the issues which arise for determination, and they have helpfully identified the issues as follows:

(i) Are the claimant's victims for the purposes of section 7 HRA?

(ii) Is the threshold for 'seriousness' under Article 3 determined in relation to a) the ultimate abuse suffered by the claimants or b) in relation to the possession of child pornography on the computer seized in 2012 or c) or in relation to the children depicted in those images. Is the threshold met?

(iii) If c) 'in relation to the children depicted in the images', can the claimants rely on those children's Article 3 rights to demand an Article 3 compliant investigation from the time the laptop was seized?

(iv) Should the court be concerned with failures in the overall investigation into MP (starting with Ellerby on 21/12/12 and ending with Sweeney's take over on 19/8/15) or in two separate investigations (Ellerby's and Sweeney's)?

(v) Is it necessary to establish a breach of Article 3 that the OB and HD/PD children were capable of being identified at the time a) the computer was seized in 2012 or b) the time the computer was, or should have been, examined and reported upon?

(vi) What were the failures in the (overall) investigation?

(vii) Were the failures to comply with the implied obligations 'unduly burdensome' on the police?

(viii) Were such failures in the (overall) investigation egregious?

(ix) What causation test must the claimants' satisfy for the purposes of Article 3? Is it 'a real prospect of altering the outcome or mitigating the harm' or 'balance of probabilities'?

(x) Did those failures cause the claimants to lose a real prospect of altering the outcome or mitigating the harm sufficient to engage the responsibility of the State?

It is the answer to issue (iv) which is at the heart of the dispute between the parties, as illustrated by their respective responses. The Claimants say:

> "It is the Claimant's case that the court should be concerned with the overall investigation into MP. Only that approach satisfies the state's overall positive obligation under A3 to investigate and prevent child abuse. To hold otherwise is to salami slice the state's obligations to a nullity. At the core of this case is the police's failure to a) obtain intelligence about MP timeously b) share it with those who were capable of acting on it to protect the claimants from abuse. Otherwise, why bother with 'Working Together' and Enhanced DBS checks?"

The Defendants say:

> "The subject of the investigation which began in December 2012 was the provenance of the indecent images. The

subject of the investigation which began in April 2015 was the abuse of the Claimants HD/PD (and later OB and CJ/PJ) following the first report of a contact offence. The latter engaged Article 3 ECHR. The former did not."

92. Whilst issues (i) to (v) will be addressed and answered when I discuss the parties' submissions, issues (vi) to (x) can be answered immediately.

93. Issue (vi): What were the failures in the (overall) investigation? I have addressed the failure in the investigation at paragraph 63 above. In particular, I accept that there was a failure by DS Ellerby to record on Niche that MP was a suspect for downloading the images. I do not accept that there was a failure by HTCU to examine and report on the seized computer by no later than 1 year after it was seized: I do not consider that there is sufficient evidence upon which I could conclude either that the triage process was erroneous, it appearing that the images were not particularly serious, nor that once the computer was called up by PC Gardner, the delay to April 2014 was culpable. I accept that MP should have been recorded on Niche as a prime suspect for downloading the images, that the Local Authority Designated Officer and Social Services should have been informed and that intelligence should have been provided on the various Enhanced DBS checks solicited by MP and his prospective employers including the Scout Association. However, as submitted by the Defendant, I do not accept there was an "overall" investigation. There were two separate investigations which eventually amalgamated in about July 2015. Whether the initial investigation by DS Ellerby is to be treated as part of the "article 3" investigation is considered at paragraph 121(d) below.

94. (vii): Were the failures to comply with the implied obligations 'unduly burdensome' on the police? This issue is poorly drafted, but it is my view that it cannot be regarded as "unduly burdensome" to require the police not to act negligently. The Defendant's response that "it would be unduly burdensome to require police forces to conduct "article 3" investigations which do not involve treatment contrary to Article 3" addresses a different question and is answered below.

95. (viii) Were such failures in the (overall) investigation egregious? I have no doubt that DS Ellerby's failures once he had received the report of HTCU were egregious, and this was effectively the opinion of the disciplinary panel which would have dismissed him from Wiltshire Police with immediate effect but for the generous approach of the families. However, in relation to the period prior to May 2014, in my judgment the failures which I have identified, although culpable, were not such as to be described as egregious. DS Ellerby had not yet received the report from the HTCU and his other duties caused him to prioritise those ahead of a further investigation into what may have appeared to him to be relatively minor indecent images. Furthermore, he appears to have assumed that BP, the father, was most likely to be responsible, and he was already being monitored as a sex offender because of his offences against DJ.

96. (ix) What causation test must the claimants satisfy for the purposes of Article 3? Is it 'a real prospect of altering the outcome or mitigating the harm' or 'balance of probabilities'? Although this is more an issue at the quantification stage, should that stage be reached, it is probably overborne in any event by my findings at paragraph 63 above which would satisfy both tests.

97. (x) Did those failures cause the claimants to lose a real prospect of altering the outcome or mitigating the harm sufficient to engage the responsibility of the State? I have already found that DS Ellerby's failures caused the Claimants to suffer abuse when otherwise they would not have done. However, the alignment of that question with engagement of the state's responsibility amalgamates two questions and begs the question whether the investigation by DS Ellerby engaged the state's Article 3 responsibilities at all, which remains to be decided.

The Submissions on behalf of the Claimant

98. The case for the Claimants is relatively simple, and involves the following submissions:

(i) Article 3 is in issue and engaged because the investigative duty is triggered by the subjection of all 5 Claimants to inhuman treatment at the hands of MP.

(ii) Pursuant to the Convention, the State has an obligation to ensure that reasonable and proportionate steps are taken to prevent such inhuman treatment, there being well-established negative and positive obligations to avoid violations. Reasonable and proportionate steps could have been taken which would have prevented the Claimants' sexual abuse by MP.

(iii) The duty imposed on the State must not be unduly burdensome, and what the Claimants are suggesting should have happened is not unduly burdensome, but basic policing in accordance with established systems.

(iv) The court's approach should be to give practical effect to the Claimants' Article 3 rights: to deny the Claimants a remedy in the present case would be to empty Article 3 of its potency and cause the protection afforded by Article 3 to be neither practical, nor effective.

99. Mr Bowen QC referred to the Defendant's case that no investigative duty was triggered before 9 April 2015, when the investigation was opened into MP's alleged sexual assaults. He submitted that if this is right then, despite there being obvious preventability, there was a complete absence of protection under the Convention and if that is correct, it would defeat the entire purpose of protection under the Convention and the HRA and the safeguarding scheme. He submitted that if that is indeed the law, then the law needs to change. The policy was concisely expressed by the ECtHR in *Z & Others v United Kingdom* 34 EHRR 3 at paragraph 73 where the court stated:

> "73. The Court re-iterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms to find in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment

> administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."

For the Defendant, the operative words are the final ones, "ill-treatment of which the authorities had or ought to have had knowledge."

100. Alternatively, Mr Bowen submitted that even if the Article 3 obligations were not triggered until the contact allegations were raised in April 2015, the police would then have looked at the overall span of the offending, as illustrated by the amalgamation of the two lines of inquiry (the Ellerby and Sweeney lines) in July 2015: he submits that it is then legally necessary to look at the whole span from December 2012 and ask: what steps should have been taken to avoid the abuse?

101. Mr Bowen acknowledged and accepted that *D v Commissioner of Police for the Metropolis* can be distinguished from the present case because there the investigation was an "Article 3 investigation" from the start, the initial complaint being one of rape. He submits that, here, Article 3 is engaged from the "get go" because we have five children whose Article 3 rights have been violated. The failures pre-dated the abuse, but he submits that does not prevent them from biting: this is a necessary consequence for the law to command the confidence of the public and to make sense: the control mechanisms are that the obligation must be practicable and effective, and not impose an over-burdensome onus on the state; breach of the operational requirement to investigate requires egregious error; and the treatment must be sufficiently severe to satisfy the threshold under Article 3.

102. Mr Bowen referred to the judgment of Green J (as he then was) at first instance in *D v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) where, from paragraph 139, he analysed the authorities on the duty on the police to investigate torture and degrading and inhuman treatment committed by third parties where the police are not complicit in the perpetration of the treatment. Following his analysis of the authorities, Green J identified 13 main propositions to be derived from those authorities. For present purposes, Mr Bowen relies in particular on the fifth and sixth:

> "216. Fifthly, where a credible allegation of a grave or serious crime is made, the police must investigate in an efficient and reasonable manner which is capable of leading to the identification and punishment of the perpetrator(s) (*MC v Bulgaria* para [153]; *Vasiliyez v Russia* para [100]). The question of what is meant by "capable" raises some important issues and I have addressed these in more detail at paragraph [226] below.
>
> 217. Sixthly, the duty is one of means, not results, i.e. the police will be in breach of Article 3 if the conduct (the means) of the inquiry falls below the requisite standard. The breach can occur in principle regardless of whether the investigation leads in fact to arrest, charge and conviction

(the result) (*Edwards* para [71]; *Beganovic v Serbia* para [75]; *Milanovic v Serbia* para [86]).”

103. Mr Bowen submitted that there is further significant support for the Claimants’ case in *D v Commissioner of Police for the Metropolis* in the Court of Appeal: [2016] QB 161 where it held (see headnote) that :

> “although Convention guarantees were only enjoyed against the state, and ill-treatment by a non-state agent did not of itself constitute a breach of article 3, it was inherent in the Convention’s purpose that the state was to protect persons within its jurisdiction against such brutalities, whoever inflicted them; that as a result article 3 accorded safeguards which were broader than the bare prohibition of acts of torture or gross ill-treatment by servants of the state and extended to ill-treatment by persons who were not state agents, and had an overall, strategic, purpose to safeguard and protect in all the myriad situations where individuals might be exposed to ill-treatment of the gravity which the article contemplated; that investigative processes could be regarded as ancillary to that purpose or adjectival to the substantive right where there was a credible allegation of ill-treatment by state agents; but that where ill-treatment was by non-state agents there was no antithesis between what was substantive and what was adjectival and in such a case article 3 generally required a proper investigation and criminal process where the investigation so led; that, in applying a single principle with varying degrees of rigour according to the gravity of the case, there was a sliding scale from deliberate torture by state officials to the consequences of negligence by non-state agents; and that the margin of appreciation enjoyed by the state as to the means of compliance with
> article 3 was wider at the bottom of the scale than at the top, so that at the lower end of the scale the state’s provision of a judicial system of civil remedies would often suffice, but serious violent crime by non-state agents was higher up the scale and required a proper criminal investigation, the first and second cases being in the latter category.”

At paragraph 45, Laws LJ said:

> “There is perhaps a sliding scale: from deliberate torture by state officials to the consequences of negligence by non-state agents. The energy required of the state to combat or redress these ills is no doubt variable, but the same protective principle is always at the root of it. The margin of appreciation enjoyed by the state as to the means of compliance with article 3 widens at the bottom of the scale but narrows at the top. At what may, without belittling the victim, be called the lower end of the scale where injury happens through the negligence of non-state agents, the

> state's provision of a judicial system of civil remedies will often suffice: the individual state's legal traditions will govern the means of compliance in the particular case. Serious violent crime by non-state agents is of a different order: higher up the scale. In these cases, which certainly include D and V, a proper criminal investigation by the state is required. I will explain what I mean by "proper" when I come to ground 3."

104. Referring to the expression used by Lord Kerr in the Supreme Court in *D v Commissioner of Police for the Metropolis* ("(6)… it is suggested that it would require the clearest statement in consistent decisions of the European Court of Human Rights Grand Chamber to the effect that a positive duty was owed by the state to individuals who suffered treatment contrary to article 3 at the hands of another individual before holding that the investigative duty of the state was animated"), Mr Bowen submitted that in this case Article 3 and its obligations is animated merely by virtue of the fact that the violation of the children could have been prevented. He referred to the judgment of Lord Kerr at paragraph 20 where he said:

> "What is not in the least uncertain, however, is that, if the relevant circumstances are present, there is a duty on the part of state authorities to investigate where non-state agents are responsible for the infliction of the harm. That cannot be characterised as other than an operational duty. The debate must focus, therefore, not on the existence of such a duty but on the circumstances in which it is animated."

105. Mr Bowen also relied on passages from Chapter 3 of the Textbook, Harris, O'Boyle and Warbrick "Law of the European Convention on Human Rights", dealing with Article 3. They refer to the obligation on the State to have a "framework of law", effectively enforced, that provides "adequate protection" against ill-treatment by state agents or private person. The requirement has a practical dimension, namely "to take such preventative operational measures that, judged reasonably, might be expected to avoid the risk." The following passage from the conclusion is particularly instructive:

> "The obligation contains both preventative and investigative elements and follows the example of the positive obligation of protection in Article 2. The preventative obligation requires the state to take appropriate steps to protect individuals against other private person, so that, most significantly, there is a duty to protect children from physical and sexual abuse by parents and others and to protect against domestic violence."

The emphasis on the protection and safeguarding of children also emerges from "Working Together to Safeguard Children 2010" and "Investigating Child Abuse and Safeguarding Children 2009". The latter was the relevant guidance in 2012 from the National Police Improvement Agency ("NPIA"), produced on behalf of the Association of Chief Police Officers ("ACPO"): it refers specifically to the problem of indecent images, stating: "Every effort should be made to attempt to

identify the victims of abuse whose images are distributed via the internet or by other means". Reference is made to the fact that sexual offending by children, even if relatively minor, eg exposure, may escalate to more serious sexual offending. Thus, MP was still underage when the laptop computer was seized, and the images were relatively minor (only one being in Category B) but the risk of escalation to more serious sexual offending was known in these key documents. At page 139 of the NPIA/ACPO guidance, there was relevant advice in relation to interviewing in connection with child abuse images:

> "Interviewing a suspect prior to the digital examination of seized storage media provides an opportunity to establish specific information such as the ownership of the computer and who has access to it."

106. Mr Bowen submitted that it did not matter that the identities of the future victims was unknown, relying on *Sarjantson v Chief Constable of Humberside Police* [2014] QB 411 where Lord Dyson MR said:

> "22. … The question [in the *Osman* case] was whether the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Mr Paget-Lewis. The individuals whose lives were at risk were "identified". The court did not have to explore the boundaries of the scope of the duty and did not purport to do so in paras 115 and 116 of its judgment. The subsequent jurisprudence to which I have referred shows that the European Court of Human Rights has not limited the scope of the article 2 duty to circumstances where there is or ought to be known a real and imminent risk to the lives of identified or identifiable individuals.
>
> 23. Leaving the case law on one side, I can find no reason in principle for so limiting the scope of the duty. Neither the judge nor Ms Barton suggested any reason for doing so. Such a limitation 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."

107. In his opening skeleton argument, adopted in closing, Mr Bowen referred to the obligation on the state to have adequate systems to protect the Article 2 and Article 3 rights of its citizens, an obligation now well established in relation to NHS hospitals (see *Rabone v Pennine NHS Trust* [2012] 2 AC 72 at paragraph 19) but equally applicable to the police. He submitted that there were systemic failings here in relation to the training of the relevant officers (and in particular DS Ellerby), in the supervision and management, in the allocation of resources and in the making of risk assessments. Whilst acknowledging that the HTCU had a backlog, he submitted that this could not justify the investigative failure and the delay because Article 3 is an absolute right and lack of resources cannot excuse violation of the Article 3 rights.

108. In relation to the case of HD/PD, Mr Bowen raised a specific issue arising out of the "*Osman* duty", namely the operational duty under Article 2 (but equally

arising under Article 3) to take positive steps reasonably available to protect an individual from a threat to life which is engaged as soon as the Defendant is aware of a real and immediate risk of violation. He pointed to the complaint in relation to OB on 26 February 2015: as a result of the earlier errors, the link between this and the Ellerby investigation was not made as it should have been which led to delay in the arrest of MP until 10 April 2015, giving the opportunity to MP to commit further sexual abuse of HD/PD during that intermediate period.

109. Finally, Mr Bowen relied on a more "General Duty to Society" to protect its citizens' Article 2 and 3 rights, relying on the decision of the ECtHR in *Bljakaj v Croatia* (Application no 74448) where a resentful and mentally disturbed husband had gone on a shooting spree, grievously wounding his wife and killing his wife's lawyer in divorce proceedings, before finally killing himself. The relatives of the lawyer brought a claim under Article 2, criticising the police for failing to take obvious steps to apprehend the husband before he killed the lawyer. The ECHR held:

> "108.....the positive obligations may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society…."

Hence, it is submitted that the defendant owed and breached a duty under Article 3 to take reasonable steps to protect society in general and young unidentified children in particular by failing to take reasonable measures after MP was identified as responsible for downloading the images in the HTCU Report which was available as from 20 May 2014.

The Submissions on behalf of the Defendant

110. For the Defendant, Mr Holdcroft accepted that the Defendant owed the Claimants a duty to conduct an investigation which was compliant with Article 3 ECHR, but only once there was an allegation of treatment contrary to Article 3. The downloading of indecent images does not constitute treatment contrary to Article 3, but sexual abuse of children does and he therefore submitted that the duty only arose on 9 April 2015 when the first such offence was reported. The investigation then carried out by DC Sweeney was, he submitted, fully compliant with the investigative and operational duties arising under Article 3 in that other victims were identified, the perpetrator (MP) was identified and the perpetrator was charged, placed before a court, convicted and punished. He submitted that there was no authority that the Defendant had been able to identify, whether from the domestic courts or from the ECtHR, which supported the notion that Article 3 could be engaged retrospectively to a point in time when no allegation of treatment contravening Article 3 had been made. He submitted that every submission made on behalf of the Claimants was made with the gift of hindsight and the correct approach is to put oneself in the position of DS Ellerby and the events as he saw them unfolding. Absent hindsight, no one thought that MP constituted a risk of contact offences with children prior to April 2015. Until Article 3 is triggered, which is not until a grave and serious harm to an identified victim has been reported, do any of the necessary measures to comply with an Article 3 compliant investigation arise.

111. Thus, Mr Holdcroft submitted that the Claimants' submissions on victim status simply did not arise. Unless the Claimants were able to show that any of the duties arising under Article 3 arose before April 2015, they cannot show that they are "victims of an unlawful act" for the purposes of s.7(7) HRA or Article 34 ECHR. The fact that they subsequently suffered actual abuse amounting to treatment contrary to Article 3 and, once reported, the need to take reasonable steps to stop any further abuse and/or to investigate had been triggered did not, and could not, mean that an Article 3 duty was triggered before any such abuse had been reported.

112. Mr Holdcroft referred to the decision of the Supreme Court in *D v Commissioner of Police for the Metropolis* which, he said, is entirely supportive of the Defendant's stance. Thus, it took as its undisputed starting point that allegations of treatment contravening Article 3 (the serial rapes and sexual assaults by Worboys) had been made and therefore the obligations under Article 3 had been triggered. The issue in that case concerned the nature of those obligations and, specifically, whether the investigative obligation could be breached by mere "operational" as opposed to "systematic" failings. The Court held that "egregious" operational failings could suffice, thus upholding the decision of Green J, but it did not conclude or anywhere suggest that its ratio applied to allegations not involving treatment contrary to Article 3.

113. Mr Holdcroft submitted that, were the Claimants right, the Article 3 investigative obligation would arise in every case if it had even the smallest potential to develop into an investigation into treatment contrary to Article 3. This would place an intolerable burden on the police. He referred to the decision of the Court of Appeal in *D v Commissioner of Police for the Metropolis* [2016] QB 161 where it was said that even within Article 3 investigations, there is no single standard. He too referred to the judgment of Laws LJ at paragraph 45 and his reference to a sliding scale: see paragraph 103 above in this judgment. Mr Holdcroft submitted that a retrospective Article 3 duty of the kind suggested by Mr Bowen would be quite inconsistent with Laws LJ's sliding scale because the police would be unable to identify the appropriate standard with the consequence that the highest standard would always have to apply. The control mechanisms and the proper use of resources can only be calibrated if the police not only know that they are conducting an Article 3 investigation, but what kind of Article 3 investigation.

114. Following from the above, Mr Holdcroft submitted that the purpose of Article 3, as with Article 2, is to protect against a known risk. He referred to the decision of the ECtHR in *Osman v United Kingdom* (2000) 29 EHRR 245 where, referring to Article 2, the court stated that, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices that must be made in terms of priorities and resources, the obligation under the ECHR must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. It must be established to the Court's satisfaction that the authorities "knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." Mr Holdcroft emphasised the words "known at the time". He submitted that, from the

Strasbourg authorities, the protection arises from two converging angles: first where there is an individual known to be dangerous as in *Bljakaj v Croatia* (Appn 74448/12) or *Sarjantson v Chief Constable of Humberside* [2014] Q.B. 411, or where there is a victim such as a vulnerable child who is known to be at risk. He submitted that the boundary of the "jigsaw of protection" involves the identification of either (i) where the real risk is coming from or (ii) to whom the real risk is directed. In this case, MP was not recognised to pose a real and immediate risk to any child and there was nothing to suggest, until April 2015, that these Claimants were at risk from him.

115. Mr Bowen QC had submitted, in the alternative, that the Article 3 obligation was triggered by the rights of the children depicted in the images downloaded to the laptop computer seized by DS Ellerby in December 2012 and that the Claimants in this case could be beneficiaries of an Article 3 investigation which should have been triggered by the rights of the children in the images. Mr Holdcroft challenged this: it was no part of the Claimants' case that the identity of the children in the images should have been established or that anything should have been done to protect those children, in probable recognition of the fact that such a task would have been impossible. The reality of the situation was that it was not possible for the police to identify any of these Claimants as being at risk of real and immediate serious harm from MP before the contact offence was reported in April 2015.

116. In addition, Mr Holdcroft referred to the decision of the Court of Appeal (Criminal Division) in *R v Terrell* [2008] 2 Cr. App. R. (S) 49, where the Appellant had downloaded indecent images of children and it had been held that a sentence of imprisonment for public protection was required by the provisions of sections 224-229 of the Criminal Justice Act 2003. The Crown had contended that there could be a sufficient direct connection between simply downloading indecent images and serious harm to a child for those provisions to be satisfied. Although this was a sentencing decision, Mr Holdcroft referred to a passage in the judgment of Ousley J, giving the judgment of the court, at paragraph 18 where he referred to what Rose LJ had said in *Lang* [2005] EWCA Crim 2864:

> "repetitive violent or sexual offending at a relatively low level without serious harm does not of itself give rise to a significant risk of serious harm in the future. There may, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, does not give rise to significant risk of serious harm."

At paragraph 28, Ouseley J then continued:

> "The link between the offending act of downloading these indecent images and the possible harm which might be done to children is too remote to satisfy the requirement that it be this appellant's re-offending which causes the serious harm. At worst there would be an indirect and small contribution to a harm which might or might not occur, depending on whether further photographs were taken in part as a result of the appellant's contribution to the market, or depending on whether a child found out about the uses to which they were put as a result. The imprisonment for

> public protection provisions of the Criminal Justice Act do not apply in the circumstances here, where simply as a matter of generalisation, a small, uncertain and indirect contribution to harm may be made by a repeat of this offender's offending. No significant risk of serious harm of the requisite gravity, occasioned by a repetition of the offending in this case by this offender can reasonably be said to exist."

Mr Holdcroft submitted that this case has analogous application to the present case. Prior to April 2015, on the basis of what was known about MP, there was no evidence that he posed a real risk of a contact offence with a child such as to trigger the duty under Article 3.

Discussion

117. In my judgment, as both parties recognise, the starting point for any consideration of the scope of the duty arising under Article 3 must be the decision of the Supreme Court in *D v Commissioner of Police for the Metropolis* [2019] AC 196. The principal issue in the Supreme Court was whether purely operational failures would suffice to establish a claim that an investigation carried out pursuant to the Article 3 duty infringed the duty to investigate or whether it was necessary to show that the failures were systemic. The Court affirmed, upholding the decisions of Green J and the Court of Appeal, that serious operational failures would suffice provided that they were "egregious and significant and not merely simple errors or isolated omissions". The exemption from liability of the police at common law did not extend to claims advanced under the ECHR and the HRA since they involved different bases of liability and policy. The Court held that, on the basis of the serious catalogue of failures by the police in investigating Worboys' criminal conduct, Green J had been correct to award compensation under the HRA, such compensation being geared principally to the "upholding of standards concerning the discharge of the state's duty to conduct proper investigations into criminal conduct which fell foul of article 3." The words "investigations into criminal conduct which fell foul of article 3" are important and significant: it is the fact that the conduct fell foul of Article 3 that informs the enquiry into the standard of investigation and in my judgment the whole rationale falls like a house of cards if the Article 3 duty is extended retrospectively to an investigation into criminal conduct which did not fall foul of Article 3. In this respect, I accept the arguments of Mr Holdcroft and reject those of Mr Bowen. This rationale and the basis for the imposition of the duty is a thread which runs through the judgements of the majority. Thus, for example, at paragraph 6, Lord Kerr, setting out the principal issue, said: "it is accepted that HRA imposes a general duty to investigate ill-treatment amounting to a violation of article 3 of ECHR."

118. Furthermore, as Mr Holdcroft submitted, and I accept, the extension of the Article 3 investigative duty retrospectively to investigations which started out as investigations into (relatively) minor crime would have major implications for the way policing priorities are identified and resources are allocated. This would drive a coach and horses through the "Osman" principle (see paragraph 114 above) that the ECHR must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human

conduct and the operational choices that must be made in terms of priorities and resources.

119. In rejecting Mr Bowen's submissions and pathway, I am conscious that, because of the parallel decision in negligence, these Claimants are left without a remedy (except any compensation they may have received from the Criminal Injuries Compensation Authority) and, in his submission, Article 3 is emptied of its potency and force, despite what was said by the ECtHR in *Z & Others v United Kingdom* 34 EHRR 3 at paragraph 73 (see paragraph 99 above). However, that this is not correct is, as it seems to me, shown by the decision in *D v Commissioner of Police for the Metropolis* and the extension of the duty to operational failures which are sufficiently serious and egregious. This shows that there is a wide range of failures, both operational and systemic, which will fall within Article 3: but it must surely be the premise for such liability that the investigation in question is into conduct which is, and is known by the police to be, conduct engaging Article 3. Thus, my decision does not represent a retreat from the requirement "to take such preventative operational measures that, judged reasonably, might be expected to avoid the risk" as expressed by Harris, O'Boyle and Warbrick (see paragraph 105 above): that requirement remains in all its potency, but the risk must be identified at the time.

120. The pathway relied on by Mr Bowen is effectively to hang the Article 3 investigative duty on the peg of "but-for" causation: he argues that if the eventual harm to the victims represents a violation of Article 3 rights, and if the earlier investigation could have avoided that harm, then the investigation is, by definition, an Article 3 investigation (see paragraph 104 above and the reference to Article 3 being "animated"). However, if that were correct, then liability would attach even if the violation of Article 3 was not reasonably foreseeable or indeed foreseeable at all. Whilst I am conscious that the tests of causation and reasonable foreseeability are not necessarily the same under Strasbourg jurisprudence as in English law, and I must be careful to remind myself that, in considering breach of Article 3, I am in the arena of the law and jurisprudence emanating from the ECtHR, I cannot detect in any of the European decisions to which I have been referred that the ECtHR has ever formulated the test in the way proposed by Mr Bowen. I have no doubt that, if Mr Bowen were right, it would at some stage have been so formulated, whether in Strasbourg or in this country, but it has not. It would, as Mr Holdcroft submitted, place an intolerable and, indeed, unjust burden on the police.

121. Addressing, therefore, issues (i) to (v) which the parties formulated for decision in this case (see paragraph 91 above), my conclusions are as follows:

(i) Are the claimant's victims for the purposes of section 7 HRA? Yes, as their Article 3 rights have clearly been violated by the treatment to which they were subjected at the hands of MP. However, for the purposes of section 7 HRA, they are not victims of the Defendant in this case by virtue of the failings in respect of the enquiry into the images on the laptop computer seized in December 2012.

(ii) Is the threshold for 'seriousness' under Article 3 determined in relation to a) the ultimate abuse suffered by the claimants or b) in relation to the possession of child pornography on the computer seized in 2012 or c) or in relation to the children depicted in those images. Is the threshold met?

The threshold for "seriousness" under Article 3 is determined in relation to the ultimate abuse suffered by the Claimants: that is the subject-matter of this claim, that is what they complain about. The threshold is clearly met.

(iii) If c) 'in relation to the children depicted in the images', can the claimants rely on those children's Article 3 rights to demand an Article 3 compliant investigation from the time the laptop was seized?
This question does not arise by virtue of my response to issue (ii). But even if the images on the computer seized in December 2012 had met the required threshold, which in my judgment they did not, that would not have availed these Claimants because no Article 3 duty would have been triggered in relation to them: they cannot "piggy-back" on the rights of the children depicted in the images.

(iv) Should the court be concerned with failures in the overall investigation into MP (starting with Ellerby on 21/12/12 and ending with Sweeney's take over on 19/8/15) or in two separate investigations (Ellerby's and Sweeney's)?
As I stated earlier, it is this question which is at the heart of the dispute in this case. In my judgment, as submitted by Mr Holdcroft, the court is only concerned with the investigation by DC Sweeney, as this was the only Article 3 investigation. DS Ellerby's investigation was never an Article 3 investigation, and it was not, and could not be, transformed into one by MP's subsequent sexual abuse of these children, nor by the amalgamation of the two enquiries in July 2015. The decision that the Article 3 duty was only "animated" in April 2015 also carries a rejection of Mr Bowen's alternative argument in relation to HD/PD (see paragraph 108 above).

(v) Is it necessary to establish a breach of Article 3 that the OB and HD/PD children were not capable of being identified at the time a) the computer was seized in 2012 or b) the time the computer was, or should have been, examined and reported upon?
As arises from the decision of the Supreme Court in *D v Commissioner of Police for the Metropolis* it is clear that a future, as yet unidentified victim, indeed a person who is not yet a victim at all, can benefit from a breach of Article 3 in respect of the rights of another person: D could benefit from the police's breach of V's Article 3 rights in respect of their investigation into Worboys' offences. Accordingly, I accept Mr Bowen's submissions in this regard by reference to, for example, *Sarjantson* (see paragraph 106 above). The premise, though, is that the earlier investigation has to have been an Article 3 investigation: that is why D succeeded in that case but the Claimants here must fail. No Article 3 investigation was triggered by the enquiry into the images on the laptop computer.

<u>Conclusion and Decision</u>

122. For the reasons stated in paragraphs 64 to 83 above, the claims in negligence must fail. Equally, for the reasons stated in paragraphs 65 to 121 above, the Claimants cannot succeed either in relation to the breach of their Article 3 rights

pursuant to the HRA and ECHR. The claims are therefore dismissed and there will be judgment for the Defendant.