JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 2/2009

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MRS. JUSTICE MCINTOSH, J.A. (Ag.)

BETWEEN	**THE ATTORNEY GENERAL**	**1ST APPELLANT**
AND	**DISTRICT CONS. THOMAS**	**2ND APPELLANT**
AND	**DISTRICT CONS. BURKE**	**3RD APPELLANT**
AND	**SHERYL DACRES**	**RESPONDENT**

Miss Lisa White and Mrs. Gail Mitchell for the Appellants instructed by the Director of State Proceedings;

Mr. Carlton Williams for the Respondent, instructed by Williams, McKoy and Palmer.

April 22 and 23; May 29 and July 30, 2009

PANTON, P.

I have read the reasons for judgment of my learned sister Norma McIntosh, J.A. (Ag.). I agree with her and have nothing to add.

MORRISON, J.A.

I too agree with the reasons for judgment that have been written by my learned sister and have nothing to add.

MCINTOSH, J.A. (Ag.):

1. This is an appeal from a decision in the Civil Division of the Resident Magistrate's Court for the Corporate area, delivered on the 21st of June, 2007. After hearing legal arguments, on the 22nd and 23rd of April, we committed ourselves to delivering our decision on the 29th of May, 2009 and, on that date, we allowed the appeal, set aside the judgment in the court below and entered judgment for the Appellants. Costs of the appeal, set at $15,000.00, were awarded to the Appellants, together with costs in the court below, which are to be taxed if not agreed. We now give our reasons for that decision.

A BRIEF BACKGROUND

2. The circumstances which led Miss Dacres to file suit in the Resident Magistrate's Court on the 17th of May, 2006, may be summarized as follows:

1. Miss Dacres was building a house on land situated at Waugh Hill in the parish of St. Andrew, with the permission of her step-father, Clarence Litchmore, whom she said she understood was its owner.

2. On December 4, 2005, while her house was yet unfinished, the 2nd and 3rd Appellants and another officer, one Corporal Bryan, arrived there in the company of one Frederick Rey Campbell who asserted that he was the owner of the land.

3. Thereafter, Mr. Campbell, armed with a sledge hammer, proceeded to knock down a section of a wall of the house and it is this damage for which Miss Dacres sought compensation.

The Plaintiff/Respondent's Claim

3. In her Particulars of Claim Miss Dacres alleged that damage was done to the left side of her house, from the outside to the inside, whereby "approximately ten (10) rows of blocks in a vertical position and four (4) rows in a horizontal position, were broken out." She further alleged that "the 2nd and 3rd Defendants, in the purported execution of their duty, maliciously and/or without reasonable and/or probable cause accompanied and, under their watch, caused a gentleman, unknown to the Plaintiff to use a sledge hammer to maliciously damage a side wall of the Plaintiff's dwelling house" resulting in loss and damage to her.

The Evidence

4. The Plaintiff/Respondent testified that on December 4, 2005, she saw a jeep drive up to her unfinished house. She was not living there at the time but was only a stone's throw away. Three police officers and a male civilian, who was unknown to her, came from the vehicle. One of the police officers – a Corporal – came over to where she was and spoke to her, telling her that the premises belonged to the civilian and she should vacate it.

5. Miss Dacres said she heard a knocking and saw one officer inside the unfinished building and one outside, looking on. The man who was knocking was using a sledge hammer which he took out of his van - "the one which all the men arrived in. They came there, yes, with the hammer." She asked the Corporal how they could stand

there and let him knock down the building whereupon the Corporal said "it's the gentleman's place, he is free to do what he will with it."

6. She spoke to the other officer and to the District Constable, asking what was happening and was told to speak to the gentleman, not to him. She tried speaking to the gentleman but he continued to knock down the building saying that he came there for one thing and one thing only. The police could have heard what he said and they did nothing.

7. She said "he used the sledge hammer to beat the wall several times; the police were encouraging him because they said is his place im free to do what him want to do. They did nothing to discourage him." When she sent for Mr. Litchmore they all left. She subsequently made a report to the police but to her knowledge no arrest had been made to date.

8. In cross examination she said that two of the officers were with her while one was by the house. She denied that it was the police who stopped the sledge hammer wielding Mr. Campbell. To her understanding, the police encouraged him.

9. She called Mr. Litchmore, as her witness, to speak to ownership of the land. His evidence was that he was engaged by the owner of the land, one Ben Campbell, to look after the land, from about 1956. When Mr. Ben Campbell died no one came about it so he started to pay the taxes and as far as he is concerned the land now belongs to him. He gave his daughter-in-law (that is, Miss Dacres, also described as step daughter and

niece) permission to build on the land and it was his intention to give her that piece of the land.

10. The two named Appellants gave evidence to the effect that they were directed by their senior officer to accompany him to Waugh Hill where there was a disturbance. A complaint to this effect had been received from Mr. Rey Campbell. They arrived at the location in a service vehicle while Mr. Campbell arrived in his private vehicle. The latter spoke to Miss Dacres who became upset. Mr. Campbell also was upset. A knocking was heard and they (District Constables Bryan and Burke) went across the road where they saw Mr. Campbell with a sledge hammer hitting the wall of the building. District Constable Burke said he (D.C. Burke) told him to stop and then he returned to the other side of the road.

11. Mr. Campbell came out to the road and stood by his private motor vehicle as the Corporal spoke to the Respondent. Moments later, while the officers were trying to mediate, the knocking resumed. They went back across the road and saw Mr. Campbell, again with the sledge hammer in action. This time the hammer was taken from him and he was told that they came to settle a dispute, not to knock down a building. The Respondent was advised to take civil action.

12. District Constable Thomas said that the dispute was across the road from where the banging sounds were heard. When, in cross-examination, it was suggested to him that they had gone there that morning to hit down the building, he denied this and

added that he was not even told what the dispute was about - just that a dispute had been reported.

The Resident Magistrate's Judgment and Supporting Reasons

13. On the 21st of June, 2007 the learned Resident Magistrate gave judgment to the Plaintiff in the sum of one hundred and ten thousand six hundred and eighty eight dollars ($110,688.00) with costs set at $15,000.00 and gave written reasons for that judgment, which are summarized as follows:

1. In terms of the oral and documentary evidence given the court found the Plaintiff to be a credible witness; the two Defendants (now 2nd and 3rd Appellants) were not credible even though they were consistent in their evidence, the court being of the view that their evidence and their consistency were contrived. They were not believed in their evidence that they had travelled separately to Waugh Hill and that made the balance of their evidence "suspect."

2. It is clear from their evidence that they were in fact present and should and could have prevented the malicious destruction of property which took place. The evidence disclosed that the officers did not go to the location with the intention to initiate criminal proceedings under the Trespass Act, which is what they should have done.

3. Although they maintained that they went to mediate and try to settle a dispute, the evidence indicated that they mistakenly believed that Mr. Campbell had a right to destroy the Plaintiff's property because of his alleged rights of ownership.

4. The evidence is clear and undisputed that the Plaintiff erected the building and that it was destroyed in part by Mr. Campbell and in the presence of the Plaintiff and the 2nd and 3rd Defendants.

14. The learned Resident Magistrate had determined that an issue for her consideration was whether the policemen, officers of the state, with a statutory duty to serve and protect, acted in a manner which was/is culpable so as to merit condemnation and punishment. In that regard, she found that:

> 5. There is no doubt that the 2nd and 3rd defendants were in fact on duty and were present and on spot when the destruction or damage to property took place. They failed to act to protect the Plaintiff's property because they believed that the 'so-called' land owner was within his rights to destroy/damage her property. In failing to act they were in wilful neglect of their duty in the circumstances and in breach of their duty of care to the plaintiff as a member of the public who they are sworn to protect.

15. She clearly took guidance from certain criminal cases, dealing with wilful neglect, to which her attention was drawn by Counsel for the Plaintiff, -- **R v O'Connor and Errol Woods** (1992) 29 J.L.R. 157 and **R v Dytham** (1979) 3 W.L.R. 467, C.A. -- and found that the Plaintiff's submissions on the point were "particularly relevant." Based on the above reasons she gave judgment to the Plaintiff.

THE APPEAL

16. The Appellants challenged the decision of the learned Resident Magistrate in the eight grounds of appeal filed and argued. They are as follows:

> 1. The learned Resident Magistrate erred in failing to find that the ownership of the property was a relevant issue but it is clear from her ruling that she applied her mind to this issue when she

accepted the Plaintiff's version of the facts concerning the ownership of the property;

2. The learned Resident Magistrate erred in finding that the police believed that the so called land owner was within his rights to destroy or damage the Plaintiff's property;

3. That the learned Resident Magistrate erred in finding that the Police acted with willful neglect of their duty without first establishing that the elements of willful neglect existed and were made out. In any event, willful neglect is not a proper cause of action;

4. The learned Resident Magistrate erred in importing a criminal standard of culpability into civil proceedings;

5. The learned Resident Magistrate, having not found that the police Officers acted without reasonable and probable cause or acted maliciously ought to have found for the Defendants in the matter;

6. The learned Resident Magistrate misdirected herself on the law by considering and applying criminal cases;

7. There is no basis for the award of any damages, either Special or General;

8. The learned Resident Magistrate erred in finding the Crown liable to compensate the Plaintiff for damage caused by a third party.

Submissions Summarized:

Miss White, on behalf of the Appellants.

17. Wilful neglect is not a cause of action but a criminal charge. Lord Diplock's interpretation of the phrase "wilful neglect" in **R v Sheppard and another** (1980) 3 All E.R. 899, at pages 902 c-d, 903 h-j and 904 a-f, clearly demonstrates that wilful neglect is not a cause of action and certain Jamaican statutes such as the Constables (District) Act (sections 8 and 9), The Defence Act (sections 38, 53 and 56) and the

Justices of the Peace (Official Seals) Act (section 9 (3)), in dealing with neglect or wilful neglect, clearly relate to criminal offences.

18. Further, in applying a criminal standard of culpability to proceedings which were civil the Resident Magistrate misdirected herself on the law and went outside of her jurisdiction.

19. Ownership of the land was the singular determinative issue on which the whole matter turned and the Resident Magistrate should therefore have resolved that issue;

20. Negligence did not arise on the evidence but even if the court found that it arose, it did not apply as there was no tortious action alleged against the officers. Not only was there no proximate relationship between the police and Frederick Rey Campbell and no special duty owed to Miss Dacres by the police, it was also not reasonably foreseeable that if the police went to mediate a land dispute, one of the parties to the dispute would attempt to demolish the structure. There was also no evidence to support any finding that the police encouraged or instructed Frederick Rey Campbell to act as he did.

21. In order to impute liability for the actions of an independent third party a high degree of foreseeability as regards the action taken and the result (see **Lamb v Camden London BC** (1981) QB 625, per Waller L.J.) as well as control and a special or proximate relationship between the alleged tortfeasor and the person who suffered

the loss or damage, is required. (See **Cowan and Another v Chief Constable of Avon and Somerset** (2002) H.L.R. 44).

22. Although the Court of Appeal does not lightly interfere with findings of fact at first instance level, this is a proper case to do so. Counsel therefore urged the court to set aside the judgment of the learned Resident Magistrate and to enter judgment in favour of the Appellants.

Mr. Williams, on Behalf of the Respondent.

23. The Resident Magistrate did not have to be concerned about questions of ownership as Miss Dacres was in possession and had been building on the land for two years. By virtue of section 7 of The Trespass Act she was not to be treated as a trespasser. Mr. Campbell had no title and, even if he did, he would not be entitled to take possession in the manner attempted by him.

24. A finding by the Resident Magistrate that there was wilful neglect did not take her out of her jurisdiction as wilful neglect is a breach of statutory duty (see section 13 of The Constabulary Force Act) and breaches of statutory duty come within the category of negligence. On the facts found by the trial judge, she could clearly have concluded that the officers were negligent, but she found wilful neglect because the evidence was so strong;

25. Criminal negligence attracts a higher standard and in referring the criminal cases to the trial judge, the intention was to put to the court that even though these

proceedings were not criminal, it was open to the court to apply this even stronger standard.

26. Damage by the sledge hammer must have been foreseen by the officers, who, on the Resident Magistrate's findings, went to the property with Mr. Campbell and his sledge hammer. Some discussion must have taken place beforehand. They clearly went for the purpose of hitting down the house so there was a relationship between them. They were local police and, in attending the location, speaking with her and hearing her plea as she appealed to them when the damage was being done, they created a proximate relationship with the Respondent.

27. Police officers should not have immunity if by their own positive action they create or exacerbate injury. (See **R v O'Connor and Woods** (1992) 29 JLR 151). If these police officers were not there the incident would probably not have happened as the Respondent would have been able to prevent it. These police officers aided and abetted what took place and the Resident Magistrate could have found that they damaged the property. They were negligent in their failure to protect or prevent damage to the plaintiff's house by Mr. Campbell and their act of aiding and abetting, supervising, being present, would have been negligent. An inference could clearly be drawn that they went to the property knowing what was likely to happen but that they did not care.

28. Although the word negligence may not have been used by the Resident Magistrate in her Reasons, the evidence supports that this was proved. She had the

opportunity to see and to assess the witnesses and there is nothing to suggest that there was anything manifestly wrong with her findings. It therefore should not be overturned.

ANALYSIS

29. Before turning to the real issue in this appeal it is perhaps best to dispose of some subsidiary issues which arose in Grounds 1 – 4 and 6.

Ownership

30. The Resident Magistrate had before her two conflicting claims to ownership of the property at the centre of the dispute – the viva voce evidence of Mr. Litchmore with its suggestion of adverse possession, on the one hand and the affidavit evidence of Mr. Campbell with its claim to a beneficial entitlement under a will, on the other hand. This will was not part of the material upon which she could properly act. There was therefore no evidence before her upon which she could have made any proper determination as to ownership.

31. What she did have was the unchallenged evidence of Miss Dacres that she was the person in possession for upwards of two years during which time she began to build her house with the permission of the person she thought was the owner of the land. There is no contention that the owner of land would be entitled to recover possession from a non-owner without recourse to the courts, by virtue of sections 6 and 7of The Trespass Act.

32. Miss Dacres was not to be regarded as a mere trespasser and any attempt to recover possession by the established owner would have required an order of the Court. In the circumstances which faced the learned trial judge, there was no one with a better claim to ownership of that unfinished building than Miss Dacres and we are not persuaded by Miss White's submission that the learned Resident Magistrate would have been assisted in determining this matter by resolving questions pertaining to ownership of the land.

33. The unchallenged evidence was that the structure belonging to Miss Dacres was damaged by Mr. Campbell. He admitted this in his affidavit evidence although he was of the belief that he had the right to act as he did.

Wilful Neglect and the Standard of Proof

34. Miss White's submissions on the criminal law concept of wilful neglect are well founded and Mr. Williams' submissions that wilful neglect is akin to a high degree of negligence or is an ingredient of negligence must be seen as an attempt to bring the trial judge's findings in line with the civil law concept of negligence as the proceedings were unquestionably civil in nature.

35. Mr. Williams accepted that the standard of proof applied by the Resident Magistrate was the higher criminal as opposed to the civil standard of proof, but, in our view, a determination of this appeal does not really require any or any lengthy discussion on the standard of proof applied by the Resident Magistrate as the

authorities show that though "the civil standard of proof always means more likely than not" and "the only higher degree of probability required by the law is the criminal standard" (see **Secretary of State for the Home Department v Rehman** (2001) UKHL 47; (2002) 1 All ER HL 122), there is no great gulf between proof in criminal and civil matters. Whereas in a criminal case the question to be asked is whether or not one is sure that an event occurred, in the civil case the question is whether or not one thinks it more likely than not that it did.

36. In **Hornal v Neubergher Products Ltd.** (1957) 1 Q.B.247 it was held that:

> *"In a civil action where fraud or other matter which is or may be a crime is alleged .... The standard of proof to be applied is that applicable in civil actions, generally, namely, proof on the balance of probability and not the higher standard of proof beyond all reasonable doubt required in criminal matters but there is no absolute standard of proof and no great gulf between proof in criminal and civil matters for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject matter". (Emphasis added)*
>
> *"The more serious the allegations the higher degree of probability that is required but it need not, in a civil case reach the very high standard required by the criminal law".*

37. This reflected the words of Denning LJ, (as he then was) who, in the earlier case of **Bater v Bater** (1951) 66 TLR PT2 589; (1950) 2 All ER 458 said:

> *"It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt but there may be*

> *degrees of proof within that standard. In civil cases the case may be proved by a preponderance of probability but there may be degrees of probability within that standard".*

38. We have long approved and followed these authorities in our jurisdiction but considerations of the applicable standard in this matter, which was clearly the civil standard, leave the real issue unresolved. Suffice it to say that the learned Resident Magistrate was plainly wrong in arriving at a determination in the matter based on the criminal law concept of wilful neglect.

The Substantive Issue

39. We turn now to the real issue in this case, namely, whether the Appellants could be held liable for damage caused by a third party over whom they had no control. Essentially that was the complaint in Ground 8. The Resident Magistrate reasoned that, by their failure to act to prevent the damage which occurred, the officers were not only in wilful neglect but also in breach of their statutory duty of care to protect and serve which was a duty owed to the Plaintiff.

40. Although the trial judge did not use the term negligence in her reasoning she clearly had it in her contemplation and may even have been mindful of the words of Carey, J.A. in **Ebanks v Crooks** (1996) 52 W.I.R. 315 at page 319, that:

> *"Negligence in point of law is not an act but a failure to act; to be more precise, it is the breach of a duty of care imposed by law...,"*

when she reasoned that their failure to act amounted to a breach of the duty of care which she found that they owed to Miss Dacres. It is perhaps for that reason that she

made no finding based upon the pleadings that the officers had acted maliciously and without reasonable and probable cause as that pleading would not have been necessary. (This is the complaint in Ground 5. But see **Ebanks v Crooks**). In any event, when she attributed liability to the Defendants for the actions of Mr. Campbell she would thereby have taken the matter into the arena of negligence. What then fell to be determined was whether, in law, there existed such a duty of care.

THE LAW

41. Both sides correctly agree on the basic principles of law to be applied when considering whether a duty of care exists in the particular circumstances of each case. May, L.J., summarized these principles in his judgment in **Costello v Chief Constable of Northumbria** (1999) 1 All ER 550, C.A., as follows:

> *"The main lines of any modern analysis of duties of care are well known and may be shortly summarized. If a person causes direct physical injury to another person or his property a duty of care is readily found (other than in exceptional circumstances).... Cases where a defendant is said to be liable for physical injury caused by a third party ... often require greater analysis. In such cases ... the three criteria for the imposition of a duty of care are the foreseeability of damage, a sufficiently close relationship between the plaintiff and the defendant and that it should be just and reasonable to impose the duty contended for."*

This case is readily recognized as one requiring that greater analysis and, in that exercise, a look at some decided cases provides much useful insight as to how the courts have applied the criteria in deciding whether or not a duty of care has been established.

42. In **Hill v Chief Constable of West Yorkshire** (1988) 2 W.L.R. 1049, the question had arisen as to whether the police in the course of carrying out their function of suppressing crime owed a duty of care to a member of the public who suffered injury through the activities of a criminal. It was held that no duty existed because there were no special characteristics which would establish a relationship between the victim of the crime and the police that would give rise to a duty of care.

Lord Keith of Kinkel, in his judgment, said:

> *"The question of law that is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals such as would result in liability in damages on the ground of negligence to anyone who suffers such injury by reason of breach of that duty".*

He continued:

> *"There is no question that a police officer, like anyone else may be liable in tort to a person who is injured as a direct result of his acts or omissions. So, he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution and also for negligence".*

43. He considered the case of **Home Office v Dorset Yacht Co. Ltd.**, (1970) 2 All ER 294, in which there were special characteristics which led to the imposition of liability. In fact, we agree with Keene LJ, who, in **Cowan and Another v Chief Constable for Avon and Somerset Constabulary** (2002) H.L.R. 44 (considered below), regarded **Dorset** as the starting point for any consideration of liability for failure to prevent others from causing injury or damage to a claimant.

44. In that case some Borstal boys, with records of previous escapes, were in the custody of prison officers on Brownsea Island in the locality where some yachts were moored. Some of the boys escaped and boarded a yacht subsequently damaging it. The House of Lords held that where the alleged breach of duty relates to the tortfeasor's failure to prevent the actions of a third party, the person suffering damage must establish that a special relationship of proximity existed between him and the tortfeasor.

45. Their Lordships held that a special relationship existed on the one hand between the prison officers and the boys who were in their custody and, on the other hand, between the prison officers and the owner of the yachts moored nearby. The prison officers had brought the boys into the locality where the yachts were moored and so had created a situation of potential danger for the owners of those yachts.

46. Lord Keith of Kinkel in **Yuen Kun- yeu v A-G of Hong Kong** (1988) A.C. 175 at 192 emphasized that in the **Dorset** case:

> *"A close and direct relationship of proximity existed between the officers and the owners of the yachts sufficient to require the former as a matter of law, to take reasonable care to prevent the boys from interfering with the yachts and damaging them".*

47. It was foreseeable that the boys might have sought to escape and would make use of a yacht in so doing, hence liability was established. On the other hand, there

were no special characteristics establishing a special relationship in the **Hill** case and the House of Lords held that no duty of care was owed by the police to the claimant.

48. Mr. Williams sought to urge this court to conclude that a proximate relationship had been created between the named Appellants, (being local police) and the Respondent, when the officers attended the location, met with Miss Dacres, spoke with her and heard her plea. The officers had brought Mr. Campbell and his sledge hammer with them and damage was done, "under their watch," so could it not be argued that they had created a situation of potential danger in the same way that the prison officers in **Dorset** had taken the Borstal boys to the locality where the yachts were moored?

49. In **Cowan and another v Chief Constable for Avon and Somerset Constabulary** (supra), the issue arose as to whether the police officers who attended the Appellant's home at his request, as a result of a threatened eviction, had assumed a responsibility towards him, a member of the public, to prevent his eviction and thereby created a special relationship between themselves on the one hand and him on the other. Keene LJ felt himself unable to accept that the mere presence of the officers at the scene was in the circumstances of the case sufficient to give rise to the necessary special relationship. This factor alone, he said, would not suffice to create a duty of care on the part of the police.

50. His Lordship quoted with approval the words of Beldam, LJ in **Ancell and Ancell v McDermott** (1993) 4 All E.R. 355, where at page 365e-f he had this to say about

cases where liability derives from a failure to prevent others from causing loss or damage:

> *"It is exceptional to find in the law a duty to control another's actions to prevent harm to strangers and where they are found they arise from special relationships".*

Without such a special relationship, Lord Justice Keene was of the view that the courts will be most unlikely to recognize a duty of care in such situations for omission to act.

51. He also considered **Costello v Chief Constable of Northumbria** (supra), where a woman police officer was injured while escorting a woman prisoner to her cell. She had been accompanied by an Inspector who was detailed to assist her but did nothing to assist. She succeeded in an action for damages, the court holding that a duty of care was owed to her as her injuries were foreseeable and the Inspector had assumed a responsibility to help her, if required. The Inspector was in breach of that duty and the Chief Constable was vicariously liable. Keene, LJ quoted with approval the words of May, LJ, at page 557g where he said that:

> *"Duties of care are also analysed by asking whether the defendant assumed responsibility to the plaintiff to guard against the particular damage".*

52. In his judgment, it was only if a particular responsibility towards an individual arises, establishing a sufficiently close relationship, that a duty of care may be owed to that individual. Where police officers were concerned, his Lordship expressed the view that some assistance on the issue of responsibility may be obtained from considering

the purpose behind the attendance of the police. What if anything were they assuming responsibility for?

53. **Swinney v Chief Constable of Northumbria Police Force** (1997) Q.B.464 C.A. was also considered in **Cowan.** The plaintiff, a member of the public had given information to the police about the identity of a person implicated in the unlawful killing of a police officer. The information was recorded in writing by the police and the informant was named in the document which found its way into the hands of the person implicated who then proceeded to threaten the plaintiff and her husband with violence. In striking out proceedings the English Court of Appeal held that it was arguable that a special relationship existed between the informant and the police because the police had assumed a special responsibility of confidentiality to her. Later, when the matter came up for trial, it was conceded that a duty of care did exist.

54. It is to be noted that in **Costello** as in **Swinney** the existence of a duty of care owed by the police force to the individual was founded upon the assumption of responsibility by a police officer and the consequent close or special relationship between the police officer and the plaintiff.

55. Finally, it is clear on an examination of the necessary criteria, that the courts have accepted that public policy is a relevant factor when determining whether it is fair just and reasonable to impose a duty of care (see **Anns v Merton L.B.C.** (1978) A.C. 728, HL and **Barrett v Enfield L.B.C.** (2002) 2 A.C. 550 HL).

56. Ward LJ in **Swinney** stated (at pages 486H – 487A) that in so far as matters of public policy come into consideration, particularly under the concept of what is just and reasonable, there is the well established public interest in not fettering or influencing the police in operational matters by the spectre of litigation.

57. May, L.J. summed up what he referred to as relevant strands drawn from the cases. We wish to highlight the following:

> *"For public policy reasons, the police are under no general duty of care to members of the public for their activities in the investigation and suppression of crime (**Hill**). But this is not an absolute blanket immunity and circumstances may exceptionally arise when the police assume a responsibility giving rise to a duty of care to a particular member of the public (**Hill** and **Swinney**)".*

Applying the Criteria to the Circumstances of the Case on Appeal

58. Apart from a passing reference to a statutory duty of care owed to the Plaintiff as a member of the public the Resident Magistrate did not disclose in her Reasons how she applied the relevant law in order to arrive at her conclusion that a duty of care existed. We must therefore look to see whether, in light of the authorities, there is support for such a conclusion.

59. There is nothing in the reasoning of the Resident Magistrate which indicates a finding that the officers knew of the existence of the sledge hammer before seeing it in the hand of Mr. Campbell. Although she found that they had all travelled together, there was no evidence as to where in the vehicle the sledge hammer was so that it

could be inferred that they must have seen it. Miss Dacres in her evidence said that Mr. Campbell took it from the van in which they had travelled and that they had come there with the hammer, but, although the Resident Magistrate found Miss Dacres to be a credible witness there was no reference to this aspect of the evidence in her reasoning.

60. The undisputed evidence indicated that there was a discussion between the parties before the knocking/banging was heard and if indeed the Resident Magistrate accepted that they had come with the hammer, as the Plaintiff asserted, it certainly is reasonable to expect that that would be a factor in the Reasons for her decision. That factor would have been a basis for inferring that the officers must have foreseen that some damage would have occurred and may even have had that on their agenda, as Mr. Williams seemed to suggest.

61. Again, although she reasoned that the Plaintiff was a credible witness, the Resident Magistrate did not seem to have accepted her evidence that the action of Mr. Campbell was under the supervision of the officers, who encouraged him, because she based her finding that they were liable, on their failure to act. She made no finding that they participated in any way. What she found was that they could and should have prevented Mr. Campbell's action. This was not a finding that they were aiders and abetters and, by extension, even principals in what occurred.

62. In **P Perl (Exporters) Ltd. v Camden London Borough Council** (supra), Waller, LJ, agreeing with Oliver, LJ in **Lamb v Camden London BC** (supra), said at page 166f:

> *"... the foreseeability required to impose a liability for the acts of some independent third parties requires a very high degree of foreseeability".*

This is particularly so, it seems to us, when seeking to impute liability to police officers for the actions of third parties who act independently and on their own volition.

63. The learned trial judge seemed to be suggesting in her Reasons that the evidence of the Appellants about their purpose in attending the location was somehow affected by the evidence of their mistaken belief that "Mr. Campbell had a right to destroy the Plaintiff's property because of his alleged rights of ownership." However, she made no finding that they did not go to mediate and, we do not accept that any such belief would have been a bar to mediation efforts. There may well have been a greater call for mediation efforts in those circumstances.

64. Having not expressly made a finding that they did not go to mediate and try to settle the dispute, that factor must be considered when looking at the purpose for their visit and whether they had assumed any responsibility to the Respondent to prevent the third party, Mr. Frederic Rey Campbell from doing damage to her unfinished house.

65. If their purpose was indeed to mediate, can it be said that the Appellants in this case ought reasonably to have had it in their contemplation that the third party would have left the mediation effort and proceed to do damage to the plaintiff's structure, while they were doing the very thing for which their presence had been requested? The submissions by the Appellants' Counsel that they could not have foreseen this are

well founded. The action of Mr. Campbell was not foreseeable and even if by some slender thread some element of foreseeability could be gleaned, there was nothing, on the evidence or in the trial judge's Reasons, which could elevate it to the high degree required.

66. While the issue of whether there was a special relationship is to be determined objectively, nothing said or done by the officers indicated that they were assuming a responsibility to prevent damage to the Respondent's property and had created any special proximate relationship between them. When she heard the banging and enquired what was happening, she was told by one officer to speak to Mr. Campbell, not to them, so they had clearly not assumed any responsibility towards her to prevent the actions of Mr. Campbell. There were no exceptional circumstances in which the police officers had assumed responsibility not to expose her to the destructive action of Mr. Campbell. In attending the location with Mr. Campbell they had not created a situation of potential danger giving rise to any special characteristics from which a duty of care towards the Respondent could have arisen.

67. Neither were there any public policy considerations which could justify imposing a duty of care on the police officers. We adopt the following words of Keene, LJ, in **Cowan and another** (supra), as being applicable here:

> *"In English law the decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against*

> *the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered".*

Lord Templeman agreeing with the judgment of Lord Keith of Kinkel in **Hill,** said:

> *"The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties".*

68. As we see it, the Resident Magistrate's decision is to be approached as a decision based on a finding of negligence and, when the criteria from the authorities are applied to the circumstances of the case, the conclusion must certainly be that they have not been met. The learned Resident Magistrate did not show in her reasoning that she had considered them and the evidence did not disclose that there was any basis for her to conclude that a duty of care had been established.

69. Police officers are often requested by individual citizens to be present in situations where a party expects that he or she may encounter resistance of one kind or another – in effect, to keep the peace - and no doubt their presence normally accomplishes that purpose. They have an obligation to the public at large, to keep the peace. It would therefore not be in the public interest to impute any liability to them when in so doing a third party over whom they have no control, on his or her own volition, does damage to a claimant. Public policy, in our view, does not require that such liability should attach to officers who seek to assist in circumstances such as in the present case.

70. The learned Resident Magistrate's conclusion was flawed, as, in law, there was no duty of care owed to the Respondent by the Appellants. Accordingly, we allowed the appeal and set aside the judgment of the court below with costs both here and below, as indicated herein.