

Supreme Court clarifies duty of care in negligence by police

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Personal Injury analysis: The Supreme Court's reiteration of the rule that the police owe no duty of care in negligence to protect victims from potential harm by third parties is examined by Nicholas Bowen QC, of Doughty Street Chambers.

Original news

Michael v Chief Constable of South Wales [2015] UKSC 2, [2015] All ER (D) 215 (Jan)

The family of a woman who had been murdered by her ex-boyfriend claimed damages from two police forces for negligence and for breaching their duty to protect life under the European Convention on Human Rights 1950, art 2 (ECHR). Shortly before she died, the victim had dialled 999. Her call went through to the first police force, which she informed that her former partner had just left her house but had threatened to return and kill her. The call was graded as requiring an immediate response by officers. The handler transferred the call to the second police force, which was responsible for the area where the victim lived. But the handler did not mention the threat to kill and the second force graded the call as requiring a response by officers within 60 minutes. The victim phoned the police again but the line went dead as she was being murdered. The police applied for the family's claims to be struck out or for summary judgment, but the judge at first instance refused. The Court of Appeal granted the police summary judgment on the negligence claim but held that the ECHR, art 2 claim should proceed to trial. The Supreme Court, by a majority, dismissed the family's appeal and unanimously dismissed the police forces' cross-appeal. The majority held that the police did not owe the victim a duty of care in negligence to protect her from harm caused by a third party. The court, however, went on to find that the ECHR, art 2 claim involved questions of fact that should be determined at trial.

What was the central question in this case?

The question was as it had been in *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] All ER (D) 287 (Apr) and *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2008] 3 All ER 977: whether the police should be held responsible for a negligent act or omission to control the danger posed by the criminal act of a third party. In *Michael*, the victim's death could have been prevented had the police competently graded and responded to her 999 call.

How did the majority determine that question and does the decision clarify the law?

The ratio is that the police owe no duty of care in negligence to take reasonable steps where it is alleged that they could have prevented death or personal injury caused by the conduct of a third party, but failed to do so. The justification for denying liability in a third-party case (the *Hill* 'immunity') had previously been either a lack of a proximate relationship between the police and the victim or the fact that liability was not consistent with public policy. The risk of defensive policing had been the main policy prop to the immunity post *Brooks* and *Smith*. It is not certain whether that remains the case as the reasoning of the majority turns on the long-standing rule in English civil law that the common law does not generally impose liability for pure omissions. The two exceptions to the omissions rule are cases of control and, under the principle in *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1963] 2 All ER 575, where the police have assumed responsibility to take positive action.

The court decided this was a case of pure omissions but it is not clear whether the denial of liability in future third-party cases will be restricted to cases involving pure omissions. It is also unclear whether the police can still rely upon policy factors to defeat negligence claims which are within the core of the rule in *Hill* (ie investi-

gation and suppression of crime) where the harm has been caused by a failure of care by the police as opposed to a third party.

It is important to note that the judgment surprisingly contains no analysis of the difference between an act and an omission and there is scope to argue about what constitutes a relationship of control for the purposes of the exception.

The public policy factors said to render the existence of a duty of care neither fair, just nor reasonable were extensively set out in *Hill*, but were substantially downplayed in *Brooks* and *Smith*--it was the (wholly unevicenced) fear of the police reacting defensively to the risk of tort liability that had persuaded the judges to support the continuation of the absence of a duty of care. This is picked up in *Michael* by Lord Kerr, dissenting, who described the true ratio of those cases and *Caparo Industries plc v Dickman* [1990] 1 All ER 568 as being 'that liability should not attach to the police unless there is a relationship of proximity and it is fair, just and reasonable to impose it'. We respectfully agree.

The justices have therefore taken a completely new route, relying on the rule against omissions rather than a lack of proximity or the previous suite of policy reasons.

What were the main arguments put before the Supreme Court and how were they dealt with?

The first negligence issue was whether as a matter of general principle the police can assume responsibility so as to give rise to a duty of care in negligence to arrive within a reasonable time when they answer a 999 call and whether there was an assumption of responsibility on the individual facts of this case.

The family's primary case was, as per the law applying to ambulance services, that a duty of care existed by reason of the acceptance and handling of the 999 call (see Lord Woolf in *Kent v Griffiths* [2001] QB 36, [2000] 2 All ER 474) and/or assurances given during the call entitled the victim to assume the police would come as a matter of urgency.

The majority found that an unequivocal assurance or representation that the police would attend urgently was needed to establish liability and that the case failed on the facts. Lord Kerr disagreed--a relationship of proximity was all that was required, and that was established on the facts.

The second negligence issue was whether any potential liability for a delayed police response to a 999 call was non-actionable because of the *Hill* immunity. The family argued that *Hill* immunity did not stop the claim as in truth it was an 'investigation' immunity to protect the police in cases truly analogous to *Hill*, but it had been developed way beyond its true limits, giving the police far more protection than the House of Lords had ever envisaged.

The third negligence issue was whether the police were under a duty to avoid making matters worse when answering and responding to a 999 call. The family relied on *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004, [1997] 2 All ER 865 to argue that a duty of care was owed as the police made the victim's position worse. They contended that if the police had indicated a speedy response would not be forthcoming, the victim would have fled the scene.

Did the court consider alternatives to the approach in Hill?

The family's final position was that if all else was rejected, the court should abolish the *Hill* immunity because it could no longer be supported on grounds of public policy and was disproportionate.

The court set out two options for replacing the rule in *Hill*.

The first option would be that the police owed a duty of care if they were aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group.

This was very similar to the test suggested by Lord Phillips in *Smith*, but it was rejected by the majority because, among other things, it was hard to see why the duty should be confined to physical injury or death or to particular victims and not others and it contained a threshold for liability lower than the test under ECHR, art 2.

The second option, which was Lord Bingham's liability principle in *Smith*, would be that the police owed a duty of care where a member of the public gives them apparently credible evidence that a third party, whose identity and whereabouts are known, presents a specific and imminent threat to his life or physical safety.

That option was also rejected because it would be unsatisfactory to draw dividing lines according to such matters as who reported the threat and its imminence.

The family's approach was that the court had a range of options, one of which was Lord Bingham's liability principle, and that it should depart from *Smith* but it was not necessary to depart from *Hill*, merely to redefine it as the House of Lords had originally intended. They argued for a narrower liability rule but this was also rejected. It was a combination of Lord Bingham's approach and that suggested in the New Zealand case of *Couch v Attorney-General* [2008] 3 NZLR 725. The rule would be that the police would have a duty to take such action as was necessary in the circumstances to protect an individual or member of an identifiable class if that person was at serious and special risk of physical harm, where 'special' meant that the person was particularly vulnerable to the risk.

What was the minority's view on whether the police owed the victim a duty of care?

Lord Kerr would have allowed the appeal as there was proximity sufficient to create a duty on the police in negligence where:

- o 1 there is a closeness of association between the claimant and the defendant, such as when information is communicated to the defendant
- o 2 the information conveys to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken
- o 3 the defendant might reasonably be expected to provide protection in those circumstances
- o 4 the defendant should be able to provide for the intended victim's protection without unnecessary danger to himself

Lord Kerr considered that, on the facts, the relationship between the police and the victim was sufficiently proximate. The fundamental principle that legal wrongs should be remedied outweighed the complete absence of evidence to support the claims of dire consequences if liability was imposed.

Lady Hale also dissented and supported the analysis of Lord Kerr. In her view, the policy reasons said to preclude a duty in a case such as this are diminished by the fact that the police already owe a common law, positive duty in public law to protect members of the public from harm caused by third parties, as well as by the existence of claims under the Human Rights Act 1998.

How does the decision fit in generally with the development of the law of negligence?

It was made clear from an early stage of the argument that the justices had little appetite for exploring the arguments based on an assumption of responsibility, 'making things worse' or narrowing *Hill*. This was despite permission having been granted on these issues. Both the majority and the dissenting judgments declined to clarify the law in these areas, there being different rules for different emergency services. This is unfortunate as it is unclear what is required as a gateway to establish a duty of care and many academics consider the law to be in a confused state--this judgment adds to the uncertainty.

There is virtually no analysis save for where Lord Toulson stated:

'There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court.'

Lord Kerr agreed that the concept 'is in many instances a misnomer because this is in fact a duty imposed by the court'. The law is clearly established at the highest level that express words are sufficient but not necessary. The family argued that there should be consistency and no special rule in police cases.

Why did the court allow the ECHR, art 2 claim to proceed to trial?

The human rights issues in the cross appeal were whether, on the facts, it should have been appreciated by either police force that there was a real and immediate risk to the victim's life and whether it was necessary to synthesise or aggregate the knowledge of the forces for the purposes of assessing whether each knew or ought to have known that there was such a risk.

The question of real and immediate risk (and, by implication, the aggregation argument) was treated as a matter of fact for investigation at a trial.

Nicholas Bowen QC appeared with Dr Duncan Fairgrieve and Jude Bunting for the family in this case.

Interviewed by Robert Matthews.

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