

CASE COMMENTARY

WHO HAS FIRST CLAIM ON “THE LOYALTY OF THE LAW”?

Smith v Chief Constable of Sussex Police; [2008] UKHL; 50¹

*Carol Brennan**

Smith v Chief Constable of the Sussex Police (hereafter *Smith*) was heard by the House of Lords at the same time as *Chief Constable of the Hertfordshire Police v Van Colle and another* because they had two uniting factors. First, they both concerned the recurring question of the ambit of police liability in the situation described by Lord Bingham thus: “...if the police are alerted to a threat that D may kill or inflict violence on V, and the police take no action to prevent that occurrence, and D does kill or inflict violence on V, may V or his relatives obtain civil redress against the police, and if so, how and in what circumstances?”² Secondly, considering the cases together highlighted the wider issue of the relationship between decisions under the Human Rights Act 1998 (hereafter the HRA) and the development of the common law. The Law Lords embarked on a more extensive examination of these issues in *Smith* and thus that case will be the exclusive focus of this note. In addition, the study of *Smith* raises questions regarding proposals for law reform as well as about judicial perceptions of policy priorities.

FACTS

The action against the police in *Smith* was brought solely under common law negligence and was heard by the courts on the defendants’ striking-out motion, with the facts treated as proved.³ The claimant, Mr Smith, had been the partner of Gareth Jeffrey. When the relationship became violent, they separated but in January 2003 Jeffrey began a campaign of violent, abusive

* LLB (London School of Economics), MA Socio-Legal Studies, PhD, Barrister, Lecturer in Law, University of Buckingham.

¹ On appeal from [2007] EWCA Civ 325 and [2008] EWCA Civ 39.

² *Smith* [2008] UKHL 50, at para [1].

³ In the case heard jointly, *Van Colle*, limitation restrictions meant that the action was based upon HRA, s 8.

CASE COMMENTARY

and threatening messages. In February alone some 100 text messages were received, some of which were explicit, eg “U are dead”. On February 24th Mr Smith reported the situation to the Brighton police, who assigned two officers to the case. They immediately visited Mr Smith, who related the events to them. The police refused to look at the text messages Smith offered to show them, took no notes and no statement from Smith. They said that they would be tracing the calls and instructed Smith to attend the police station to fill in the paperwork, which he did the next day.

The death threats continued and the claimant went to London. He phoned Brighton to check on progress of the case and was told that tracing the calls would take four weeks. He then went to Savile Row Police Station to report the ongoing threats. They made a call to Brighton and were assured that the case was being dealt with. On his return to Brighton on March 2nd Smith told an inspector that he believed his life was in danger. He was told that the case was progressing well and Smith should phone 999 if he feared for his safety. No note was made of the meeting.

On March 10th Jeffrey attacked Mr Smith with a claw hammer, causing three skull fractures and associated long-term brain damage. Jeffrey was convicted of making threats to kill and causing grievous bodily harm and sentenced to ten years’ imprisonment.

THE BACKGROUND LAW

There are two basic elements of law relevant to this case. The first concerns the way that the tortious common law duty of care is established in novel situations. According to Lord Bridge in *Caparo Industries Plc v Dickman* (elaborating upon the neighbour principle of *Donoghue v Stevenson*), the requirements for imposing a duty are foreseeability, proximity and that it be fair just and reasonable.⁴ The extension of duties into contested or novel areas, such as that of police liability, should only be done incrementally and by analogy with existing duty situations. It has been pointed out that when invoking the third limb of *Caparo*, one is looking for positive reasons for recognising a new duty.⁵ The second element is that in the tort of negligence there is rarely a positive duty to act, in terms of protecting or warning, except where there are certain pre-existing relationships of control or the finding of an “assumption of responsibility”.⁶

⁴ [1990] 2 AC 605, at pp 617-18.

⁵ J Steele *Tort Law: Text, Cases and Materials* (Oxford: OUP, 2007).

⁶ *Carmarthenshire County Council v Lewis* [1955] AC 549 is an example of the former and concerned an accident caused by a pupil of the defendant education authority. See also the recent case of *Mitchell v Glasgow City Council* [2009] UKHL 11, below at n 56.

In *Smith* the harm was caused to the victims by a third party, not by the police who only failed to intervene. This area is further affected by the traditional reluctance of the law of tort to impose onerous duties on public bodies, such as police service authority.⁷

It well is accepted that there is a non-problematic side to the negligence liability of the police. This is in the area of what can be described as civil operational tasks. There is no question that police drivers have a duty of care to other road users; additionally in cases such as *Knightley v Johns*⁸ and *Rigby v Chief Constable of Northamptonshire*⁹ they have been held liable for damage caused by the negligent carrying out of traffic control and use of CS gas respectively. The exact scope of the category in which this duty exists is of course debated and its boundaries were tested in *Alexandrou v Manchester*¹⁰ and *Ancell v McDermott*.¹¹

Outside this relatively narrow range of duty situations there has existed what is effectively an immunity for the police, which has prevailed in the general area of crime prevention and investigation since the case of *Hill v Chief Constable of West Yorkshire*.¹² Here the House of Lords denied a claim brought by the mother of the last victim of the Yorkshire Ripper, the House of Lords set out an array of policy reasons for denying a duty of care by police to crime victims who alleged that had it not been for the negligence of the police in investigating the series of murders, her daughter would not have died. The facts failed to reveal the necessary level of proximity between Miss Hill and the police and, while this would have been sufficient to deny duty of care, the House of Lords adopted a “belt and braces” approach and additionally listed a number of policy factors which supported the denial. The most enduring of these will be discussed below. That the police should not owe a duty of care to potential victims when preventing and investigating crime was to be described as a “core principle” by Lord Steyn when *Hill* was reviewed and endorsed by the Lords almost two decades later in *Brooks v Commissioner of Police for the Metropolis*.¹³ Here they upheld the striking out of an action in which a friend of Stephen Lawrence had attempted to use negligence to challenge his treatment at the hands of the police, as a witness and victim of crime; arguably widening the immunity to exclude duties to witnesses as well.

⁷ Other key cases have involved local authority social service and planning departments, education, and emergency services.

⁸ [1982] 1 WLR 349.

⁹ [1985] 1 WLR 242.

¹⁰ [1993] 4 All ER 328.

¹¹ [1993] 4 All ER 355.

¹² [1989] AC 53.

¹³ [2005] UKHL 24 at para [30].

CASE COMMENTARY

In the years between *Hill* and *Brooks*, the element of human rights law imported a new perspective into the duty debate: first in the form of significant appeals to Strasbourg and subsequently with implementation of the HRA which incorporated actions based upon Convention rights and jurisprudence directly into English law.

The case of *Osman v Ferguson*¹⁴ featured facts with resonance for *Smith*. A schoolteacher who developed an obsession with a pupil stalked him, as well as his family and friends, made violent threats and a number of attacks against property. This conduct was reported to the police and despite assurances that there would be protection, the campaign culminated in two deaths and two woundings. A negligence claim against the police was struck out by the Court of Appeal on the basis of lack of duty of care, on the basis of the *Hill* “core principle”. There was, however, an appeal to the European Court of Human Rights. (hereafter ECtHR).¹⁵ In *Osman v United Kingdom*, there was held to have been a breach of art 6(1) “right to a court” in that the courts’ handling of the striking out procedure amounted to a blanket immunity in favour of the police.¹⁶ The important aspect was the view of the ECtHR “that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”¹⁷ This “*Osman* test” is discussed further below.

THE DECISION

Although the Lords unanimously agreed that the facts of the case are very persuasive, by a 4-1 majority they rejected Mr Smith’s appeal and reasserted the *Hill* “core principle”. Although there is some agreement that not all of the *Hill* policy reasons remain valid today, there were two which still predominate. Firstly, that the finding of a duty of care in negligence would result in “defensive policing” and secondly, that the pressure to respond to legal action by individuals would divert police resources away from the performance of their primary public duties.¹⁸

Lord Bingham supplies a strong dissent, motivated by a guiding principle which he has invoked in various duty of care debates: “the public policy

¹⁴ [1993] 4 All ER 344.

¹⁵ *Osman v United Kingdom* [1999] 1 FLR 193.

¹⁶ See *Z v UK* [2001] 2 FLR 612 where this decision was agreed to have been based upon a misconception about the meaning of duty of care and the function of the striking out procedure in domestic law.

¹⁷ At para [115].

¹⁸ A third is that the more appropriate remedy is the use of the police internal disciplinary procedures, which featured in *Van Colle*.

consideration which has first claim on the loyalty of the law is that wrongs should be remedied.”¹⁹ He postulates what he calls a “liability principle”:

“...if a member of the public (A) furnishes a police officer (B) with 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, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.”²⁰

This liability principle is devised to cover the *Smith* situation but not to directly encroach upon the decisions both *Hill* and *Brooks* of which Lord Bingham specifically approves. He distinguishes them from *Smith* in that the first concerned an *ex post facto* inquiry into the conduct of a police investigation and the second concerned the treatment of witnesses and alleged victims of crime.

The majority opinions in *Smith*, however, found Lord Bingham’s liability principle would be difficult to apply in practice: what would be meant by an “apparently credible” or “a specific and imminent threat”? It is also too wide. Lord Hope notes that it would encompass threats to physical safety as well as life (although it is unclear how meaningful a distinction can be made between the two). It would appear, however, that the primary drawback is the threat it posed to the essence of the *Hill* policies. Both this aspect and Lord Bingham’s agreement with Pill LJ in the Court of Appeal that there is “strong case for developing the common law action for negligence in the light of Convention rights”²¹ will be discussed below.

COMMENT

The Hill “core principle”

The judicial approach to policy as a limiting factor in duty of care decisions, as it is embodied in the “fair, just and reasonable” component of the test for duty, is intrinsically fraught with subjectivity.²² Despite the *Caparo* exhortation to incremental development, unpredictability remains, and is perhaps exacerbated by the uncertain fit between the common law and human

¹⁹ At para [56]. He first voiced this position in *X v Bedfordshire County Council* [1995] 2 AC 633.

²⁰ At para [44].

²¹ At para [58].

²² For a detailed consideration see J Bell *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983).

CASE COMMENTARY

rights jurisprudence. Assertions as to the potential impact on professional practice and the financial implications of decisions are rarely accompanied by empirical evidence.²³

The capricious influence of policy was demonstrated in *Swinney v Chief Constable of Northumbria Police*²⁴ when it was concluded that there could be a duty of care towards police informers. In this case, which pushed the parameters of *Hill*, Hirst LJ said, “The public interest would be affronted were it to be the law that members of the public should be expected in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected.”²⁵ Here, the common good was perceived in terms of protecting the police, their informers, the public purse, and, ultimately the criminal justice system; rather than compensating ordinary citizens who were let down by them.

Lords Hope and Carswell in *Smith* confidently assert that “the interests of the wider community” (quoting Lord Steyn in *Brooks*) lie in adopting the policy stance of *Hill* and *Brooks* to the facts under consideration.²⁶ Disturbingly, at the same time, they elaborate their positions in relation to domestic violence more generally. Lord Hope notes that domestic cases “are brought to the attention of the police all too frequently” and then notes the impact on police work elsewhere on giving undue attention to each complaint.²⁷ Lord Carswell goes further: “One must recognise that police officers may quite properly be slow to engage themselves too closely in such domestic type matters, where they may suspect from experience the existence of a degree of hysteria or exaggeration on the part of either or both persons involved.”²⁸

It is well known that the problem in domestic violence cases is not over-reporting but rather under reporting.²⁹ Furthermore not only does some 23%

²³ This is specifically acknowledged by Lord Phillips at para [102] where he proposes a statutory solution to the duty problem which he hopes may be informed by the Law Commission’s Consultation Paper No 187 (see below at p 6). An exception to the lack of evidence which supports policy decisions is provided in *Smith* at para [111] by Lord Brown who quotes statistics on witness intimidation.

²⁴ [1997] QB 464.

²⁵ At p 487.

²⁶ At paras [75] and [106] respectively.

²⁷ At para [76].

²⁸ At para [107].

²⁹ The 1996 British Crime Survey found that of those who had been victimised in the previous year, only 17% had reported it to the police and half had not told anyone. *The British Crime Survey: England and Wales* (London: Home Office, 1996) cited at <http://www.homeoffice.gov.uk/rds/pdfs/hors191.pdf> at p vii. For further details on

of violent crime occur in domestic settings,³⁰ but, apropos *Smith*, the time of relationship breakdown is one of the most dangerous. Given the fact that every week an average of two women in Britain are killed by a partner or former partner and that one in four women and one in 6 men will suffer domestic abuse at some time in their lives, it is a disquieting interpretation of the public interest which leads the two Law Lords to their somewhat cynical position on the police response to the threats such as those in *Smith*.

The two enduring justifications for *Hill's* "core principle" require further thought. Probably the most potent is that imposition of duty of care will have a deleterious effect on policing, in creating a "defensive frame of mind."³¹ No evidence is put forward to support this hypothesis. Given that the spectre of defensive practice arises in relation to all professions that are vulnerable to negligence claims, with medicine being the most prominent, it must be asked what is it about policing which sets it apart? When the issue is investigation and prevention of crime, the negative outcome envisaged would have implications for civil liberties in terms of increased surveillance, stop and search, arrest and even prosecution – impliedly on less than substantial grounds.³² In medicine, we know that defensiveness supposedly induced by negligence liability might lead to unnecessary expense or treatment – an impact on individuals and public resources different but not less profound than that hypothesised regarding policing. Lord Bingham believes that defensiveness, while a possible detriment in the *Hill*-type investigative situation, would not apply to the protective function covered by his "liability principle". He reiterates that all that is required of the police is what is reasonable in the circumstances. As with other professionals and callings, the enforcement of standards of care may be seen to lead to good practice. As Michael Jones said of social work, "The only 'defensive' strategy likely to succeed ... is for the professional to exercise reasonable care in reaching a judgment as to the appropriate course of action to take."³³

The second main plank of the *Hill* core is the concern that the existence of a duty of care would result in a significant diversion of police resources to fighting litigation. This must be a real and negative prospect although, again, its extent is not predicted by any empirical evidence. The potential amount of

best practice police response to domestic violence see guidelines from the Association of Chief of Police Officers: www.acpo.police.uk/asp/policies/data/Guidelines.

³⁰ *The British Crime Survey: England and Wales* (London: Home Office, 2000) cited in S Choudhry and J Herring "Domestic Violence and the Human Rights Act 1998: A New means of Legal Intervention?" (2006) PL 752-84 at 752.

³¹ *Smith* at para [30].

³² As itemised by Lord Brown at para [132].

³³ M Jones "Case Comment: Child Abuse: When the Professional Gets it Wrong" (2006) Med L Rev 264 at 265.

CASE COMMENTARY

litigation would, of course, be affected by how stringent were the requirements around the threshold of breach and this would emerge with case law. Lord Brown recognises that this argument is weakened by the fact that the police are now having to contest human rights litigation.³⁴ It must also be reiterated that police resources have long been required to meet ordinary “operational” negligence (and other legal) claims.

Three of the speeches made for the majority in *Smith* diminish the integrity of their position on duty of care by refusing to reject the obiter suggestion made in *Brooks* by Lords Steyn and Nicholls that the police could be civilly liable to victims of crime in extreme circumstances. This may have been intended to indicate that there is no longer a blanket immunity of the sort disapproved in *Osman v UK* and further undermined by the decision *Swinney*. Lord Brown cites as an example of what Lord Steyn called “outrageous negligence”³⁵ the case of *Edwards v United Kingdom*,³⁶ where a remand prisoner was beaten to death by his cell-mate, despite calls for help. At the same time, while doubting the utility of the concept described for limiting police liability in negligence, Lords Carswell and Phillips recognise the strength of the facts in *Smith* and concede that the case might be approaching the hypothetical extreme described in *Brooks*.

There are two scenarios which the courts have regarded as trumping the arguments against the finding of a duty of care in our type of case. The first consists in a finding of assumption of responsibility.³⁷ In *Smith*, Lord Bingham partially bases his dissent on the proximity between the police and the claimant, saying that their visit to him, followed by the giving of advice, constituted an assumption of responsibility for his safety.³⁸ Lord Brown also recognises the potency of assumption of responsibility when founded upon close relationships of quasi-employment and custody (in *Swinney* and *Edwards* respectively)³⁹ and implies that this outweighs the *Hill* core principle.⁴⁰ The second occurs when proximity is created when a defendant, in an ostensibly non-duty situation, acts so as to aggravate the claimant’s loss. *Capital & Counties Plc v Hampshire County Council*⁴¹ was a case in which a fire brigade was held to have assumed a duty of care to the owners of a

³⁴ At para [137]. *Van Colle* itself is an example of a human rights action.

³⁵ Para [34].

³⁶ *Edwards v United Kingdom* (2002) 35 EHRR 487.

³⁷ As discussed above, see n 4. This, of course, is a familiar concept used in determining duty of care in cases of pure economic loss.

³⁸ At para [60].

³⁹ See also *Costello v Chief Constable of Northumbria* [1999] 1 All ER 550 where the assumption of responsibility was based upon the employment relationship.

⁴⁰ At paras [120]-[120].

⁴¹ [1997] QB 1004.

premises when its members attended a fire and took the positive action of turning off a sprinkler system, thereby worsening the claimants' position when the fire restarted. This ruling ran to counter to a general bias against imposing duties in negligence upon the emergency services.⁴²

Arguably, for the claimant in *Smith*, his relationship with the police worsened his vulnerability. It is worth reflecting upon what measures for his own safety he might have taken, had he known the low level of care being exercised by the police. For instance he might have remained in London or gone into hiding. The facts in *Smith* can, of course, be distinguished from those in *Capital and Counties* due to the difficulty to identifying a particular determinative act comparable to the turning off of the sprinkler system, however some degree of proximity is present and it is to be regretted that the assumption of responsibility possibility was not more fruitfully explored.

Common Law vs Convention Rights

The courts have yet to reach any resolution on the fundamental question of whether an overlap between common law and Convention rights and duties provides an argument for deliberately developing the common law in conjunction with the Convention or a reason not to do so (that is, the argument that when there is already a Convention remedy a common law remedy would be redundant).⁴³

Lord Bingham has been a proponent of the former view, which he put forward in a line of cases with parallels to the police cases in testing the possible duty of care owed by local authority social workers and medical personnel to children and parents affected by care proceedings. He was alone among the Law Lords in *D v East Berkshire Community NHS Trust* in endorsing the ruling of the Court of Appeal that an immunity accorded to social workers in *X v Bedfordshire* could no longer stand, in the light of the HRA.⁴⁴

In *Smith* he says: "It seems to me clear, on the one hand, that the existence of a Convention right cannot call for instant manufacture of a corresponding

⁴² See the other three cases decided along with *Capital and Counties*, *ibid* and *OLL v Secretary of State for Transport* [1997] 3 All ER 897.

⁴³ HRA, s 2(1) imposes upon the courts, in their decision-making, to have regard to Strasbourg jurisprudence. This crucial debate has affected other areas of tort law such as privacy. See *Wainwright v Home Office* [2004] 2 AC 406, *Douglas v Hello! Ltd* [2001] QB 967 and *Campbell v MGN* [2004] UKHL 22. Detailed consideration of whether or not the Human Rights Act 1998 is a "tort statute" is beyond the scope of this case note, however both *Van Colle* and *Smith* clearly illustrate its implications and significance.

⁴⁴ [2003] EWCA Civ 1151 at para [50].

CASE COMMENTARY

common law right where none exists.”⁴⁵ However he goes on to summarise his position by referring to the Court of Appeal approach to *Smith*⁴⁶: “... I agree with Pill LJ in the present case that ‘there is a strong case for developing the common law action for negligence in the light of Convention rights’ and also with Rimer LJ that ‘where a common duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it’.”⁴⁷

Lord Hope believes that the common law should stand “on its own two feet side by side” with the HRA remedy⁴⁸ and Lord Phillips implicitly concurs. Lord Brown makes the strongest case for maintaining a distinction between the common law and rights under the Convention. Arts 2 and 3 of the ECHR and ss 6 and 7 HRA make it “simply unnecessary to develop the common law to provide a parallel cause of action...”⁴⁹ Furthermore he asserts that “Convention claims have very different objectives from civil actions” with the former being to uphold human rights standards and to vindicate rights while the latter concerned primarily with compensation.⁵⁰ It cannot be said that the alleged independence of the common law and HRA tort spheres forms part of the ratio of *Smith* and a tantalising debate unfortunately remains unresolved.⁵¹

Law Commission Consultation Paper No. 187

In his speech, Lord Phillips admits the difficulty courts have in finding a valid basis for their policy deliberations. For him, the question would be better dealt with by Parliament and to that end he commends the recent publication of the Law Commission’s Consultation Paper No. 187 “*Administrative Redress: Public Bodies and the Citizen*”.⁵² This Paper is the latest product of an ongoing review of current means of redress, both public and private for “individuals who have suffered loss as a result of seriously substandard administrative action.”⁵³ Acknowledging the pressures imposed on public resources by a situation of generally expanding state liability, the Paper makes proposals for reform of both judicial review and private actions in the civil

⁴⁵ At para [58].

⁴⁶ [2007] EWCA Civ 325.

⁴⁷ At para [58].

⁴⁸ At para [82].

⁴⁹ At para [136].

⁵⁰ At para [138].

⁵¹ See, for instance, J Steele “Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?” (2008) CLJ 606.

⁵² http://www.lawcom.gov.uk/docs/cp187_web.pdf.

⁵³ *Ibid* at para [1.1].

courts. These proposals are markedly similar, and for the purposes of the discussion the focus will be upon the private law aspect, as that is what would replace the tort system under consideration in *Smith*.

The *Hill*-related species of action is an example which features prominently in the Law Commission's justification for the need for reform. The Paper refers to Lords' decision in *Van Colle* and *Smith*, which was awaited at the time: "Whichever way the issue is decided this time, the very fact that it is once again before the UK's highest court illustrates the uncertain and unsettled nature of this area of law."⁵⁴ The Law Commission proposes that a new statutory scheme be established based upon corrective justice principles and drawing upon the approach to damages of European Union law. For private law actions the new scheme would apply only to defendants who were public bodies engaged in "truly public" activity in which they are "conferring a benefit". There are seven other required elements of the "package"⁵⁵ but for the purposes of this case note the most relevant is that of establishing "serious fault" by the public body. Liability will not be imposed upon a public body unless its conduct has "fallen *far* below the standard expected in the circumstances." Speaking in tort terms, this shifts the focus from the question of duty of care to that of whether an existing duty has been breached. It is claimed that this is necessary to more appropriately balance "the interests of claimants with the competing demands made on public bodies." The Paper describes the factors which would be considered in the finding of a "significantly aggravated level of fault", which must "go beyond illegality or negligence". What is being proposed here is effectively raising the threshold for breach. This tactic of using a higher standard of care as a control mechanism, instead of duty of care, is one in which judicial indecision persists. It was specifically rejected by the House of Lords in *D v East Berkshire* and by the ECtHR in *Osman v UK*⁵⁶. In *Smith*, it has been seen above that Lords Carswell and Phillips were reluctant to endorse Lord Brown's suggestion that had this been an "extreme" case, (or "outrageous negligence", as described in *Brook*) a duty could be found. That also the finding of a duty of care by the police in *Swinney* undermines the convention that duty, not breach, should be the means of upholding the *Hill* "core principle" was unfortunately not commented upon or explored in *Smith*.

⁵⁴ At para [4.53].

⁵⁵ For example the reform of rules as to joint and several liability which currently burden the "deep pocket" defendants. In addition, the paper proposes the abolition of the torts of breach of statutory duty and misfeasance in public office.

⁵⁶ The possibility of varying standards of care depending on the nature of the potential victim was also disapproved by the House of Lords in *Van Colle*.

CONCLUSION

Smith illustrates what for many is an uncomfortable juxtaposition of actions under the HRA and common law tort. Cases testing the area of police liability to victims of crime, along the question of whether there might exist positive duties to protect or warn, continue to nag at the collective legal conscience and are not satisfactorily resolved in *Smith*. The decision in 2009 in *Mitchell v Glasgow City Council*⁵⁷ is evidence that these issues are not going to go away and will challenge the House of Lords repeatedly. Given the pressures on parliamentary time and the generally leisurely pace of law reform, it seems doubtful that the Consultation Paper, even assuming that its flaws can be addressed, will provide a convenient solution to the conundrum. Failing that, it is tempting to endorse Lord Bingham's mantra that wrongs should be remedied. This view is not "slightly meaningless", as asserted by Jane Wright,⁵⁸ but rather it indicates a clear conviction that the legal regime in this sector should be more generous to deserving claimants.

⁵⁷ Op cit at n 6. Here, the House of Lords rejected a claim (under both the common law and the HRA) that a local authority landlord should be under a duty to warn tenants of a death threat. It was noted, however, that the case might not have reached the Lords had the results in *Van Colle and Smith* been known (para [78]).

⁵⁸ J Wright 'The Retreat from *Osman: Z v United Kingdom* in the European Court of Human Rights and Beyond' in D Fairgrieve, M Andenas and J Bell eds *Tort Liability of Public Authorities in Comparative Perspective* (London: BICL, 2002) pp 79-80.