Duty of care of public authorities in England, liability by omission, and Article 2 of the Human Rights Act

Zia Akhtar[1]

Abstract

The negligence of public officials, who make omissions, can lead to liability under English law under tortious principles. The courts in England have been reluctant to hold public authorities liable for breach of a duty of care and this includes the police, local Councils and hospital trusts. They are generally not liable on the grounds of omission, for breach of a duty of care and causation has, until now, has been narrowly interpreted by the courts. The duty of care has to satisfy an onerous test when there is an omission by the police and in *Michael v Chief Constable of South Wales Police*[2012] EWCA Civ 981 the Court of Appeal denied liability where there was prima facie negligence for a breach of duty towards a pre identified victim. The differentiation between the recognized victim and the stranger who is injured or suffers a fatality needs to be distinguished both in negligence, and under Article 2, Right to Life, in order to establish the extent of liability of public bodies. The question in this paper is whether the breach of a duty of care by public authorities is construed with more deference by the courts, and if the judges are more likely to construe liability under Article 2 of the Human Rights Act, when there is death has been caused by the negligence of the state.

Key words:

Negligence, Duty of Care, proximity, omissions, *Michael v Chief Constable of South Wales Police*[2012] EWCA Civ 981, Article 2, Right to life.

[1] LLB (Lon), LLM (Lon),Gray's Inn, Phd law (Coventry university).Research fellow Hasselt University.

Introduction

There is a general principle in the tort of negligence in English law that a person is under a duty of care to prevent harm occurring to another person under the good 'neighbourhood' principle of tort liability.[2] This does not apply if a source of danger is not created by him unless there is an assumption of responsibility to protect the other person from the risk of harm. There is also liability if the person has not carried out an act which prevents another being injured from that danger, and he has a certain level of control over the circumstances of risk. This is significant where the status of the person creates an obligation to protect the endangered person from the risk of harm and the duty of care of public officials, such as the police, local authority and medical personnel in circumstances where there is proximity. An examination is necessary when a breach under the principles of negligence and, concurrently, where an infringement under Article 2 of the Human Rights Act can also be pleaded in order to claim against the public authority for a breach of tort and an infringement of the Right to Life obligation.

The action in negligence against the occupier of a public office based on the allegation that they have misused or abused their power exists in the English courts. The finding of tort liability applies to public officials and makes them accountable in a litigation on the grounds of negligence. [3] This form of action against the police, local authority or hospital trusts for breach of a duty of care can arise where the individual member of the public suffers injury in the exercise of their public duty. [4]

There is also an action in misfeasance in tort that constitutes liability for misconduct in public office. This principle was examined in the McPherson Inquiry which was constituted after the murder of the black teenager Steven Lawrence in 1993 that led to a finding that the Metropolitan Police were guilty of "incompetence and institutional racism.[5] This resulted in a new trial of the

[2]In *Donoghue v Stevenson* [1932] A.C. 562 , it was defined as "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act:" Lord Atkin at p 581.

[3] A.M. Linden, "Tort Law as Ombudsman" (1973) 51 Can.Bar Rev. 155; Harlow and Rawlings, Law and Administration, ch. 17.

[4] E. Chamberlain, "Negligent Investigation: Tort Law as Police Ombudsman" in A. Robertson and T. Hang Wu (eds.), The Goals of Private Law (Oxford 2009), 283–310..

[5] The Macpherson Report was released in February 1999 its main recommendations were contained in Chapter 47 of the Report and the included that a Ministerial Priority be established for all Police Services to increase trust and confidence in policing amongst minority ethnic communities, using Performance Indicators, the overall aim being the elimination of racistprejudice and disadvantage and the demonstration of fairness in all aspects of policing.http://www.law.cf.ac.uk.tlru/Lawrence.pdf

defendants for homicide in 2011, and the eventual conviction of two men at the Old Bailey in 2012. [6]

In this paper there is an examination of the breach of the duty of care in negligence by public authorities including by the police, local authority and hospital trusts; liability for omissions and by comparison liability by commission; and it considers the human rights claims that arise when a public body fails to exercise its duty under Article 2, Right to Life and the consequence is a fatality. The Human Rights Act can be pleaded if public officials including the police are responsible for negligent failures to prevent foreseeable personal injury or death to victims. [7]Article 2 guarantees that the state is bound to carry out the duty to protect life which makes for a more persuasive argument to hold the public body responsible if the risk is foreseeable of harm coming to the victim. The courts have formulated a less stricter test when the human rights aspect of the duty is invoked then when the duty of care is based on the tort of negligence.

The road map of this paper is as follows: Part A examines the breach of duty of care and liability for omission with reference to established principles of tort law in common law courts; Part B considers the liability of public authorities that have breached their duty of care that has resulted in the death of the victim; Part C explores the Article 2, Right to Life, which creates an operational duty under which the public authority is bound by its duty of care with respect to the European Convention of Human Rights (ECHR) as adopted in the Human Rights Act; and Part D explores the imposition of a general and special duty of care by which the public authority may be prevented from escaping liability for omissions and neglecting its duty of care. The case law invoked is to distinguish the majority rulings from the dissenting statements to establish the criteria when the liability arises.

1/

Breach of duty and liability by omission

The common law principle in English law imposes a duty of care on members of the public not to cause harm to other members of the community who are in their close proximity. The breach of this duty has to satisfy the test of reasonableness and causation and that can only be successfully pleaded when there is sufficient proximity between the parties. The breach of the duty of care has to satisfy several elements before the tortfeasor can be held liable in negligence. The issue is the scope of the duty that has been formulated by the courts who have established the principles of breach of duty of care.

[6] *R v Dobson and Norris* (2011) EWCA Crim 1256

[7] Article 2(1) states: 1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.*

In *Caparo Industries plc v Dickman*[8] the House of Lords stated a tripartite test in establishing a duty of care when there was a breach of duty of care. Lord Bridges, in his ruling held for causation to be established there needs to be :

"*1) sufficient proximity in the relationship of the parties; 2) knowledge that in the absence of reasonable care the other party will be injured; and 3) it needs to be fair, just and reasonable for the defendant to owe duty*".[9]

His Lordship ruled :

"*What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity" or "neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other*."[10]

The breach of duty of care can also arise in circumstances where public officials such as police officers, local authority personnel, or medical staff are in contact with the public. The important criteria in a civil law claim in negligence against the police is the breach of duty of care that is owed to individual members of the public who suffer injuries as a result of its breach. This has been held to be a high threshold for breach of duty.

In *Hill v Chief Constable of West Yorkshire* [11]the mother of Jacqueline Hill, a murder victim of Peter Sutcliffe (the Yorkshire Ripper), who had committed 13 homicides and 8 attempted murders over a five year period sued the West Yorkshire police on the grounds that they had been negligent in their detection of Sutcliffe. The defendant applied to have the claim struck out on the grounds that there was no cause of action since no duty of care was owed by the police in the detection of crime. There were two considerations, firstly, if there had been a full investigation and it was prima facie to have been conducted in a proper manner and, secondly, that the three duties that the police was accused of being guilty of breaching could not be imposed on the officers who had to act in the public interest in investigating the commission of criminal offences. The appeal was allowed and the respondent's claims in common law negligence was dismissed.[12]

---

[8][1990] 2 AC 605 House of Lords

[9] at 617-618,

[10] At 618

[11][1989] AC 53

[12] At 27-29

Lord Keith ruled that in a civil action for damages the police officer would be liable in tort to a person who is injured as a direct result of his negligence or any act prohibited by statute or by common law. However, there was

"*no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one*."[13]

His Lordship outlined the public policy grounds in support of the non-liability of the police in negligence when investigating or suppressing crime.[14] The imposition of a duty of care was considered unlikely to improve the performance of police functions; secondly the policy ground was that negligence claims against the police are likely to raise issues concerning the conduct of a police investigation, including "matters of policy and discretion", which are unsuitable for determination by the courts; thirdly, there were also policy grounds in the imposition of negligence liability on the police as "that may lead them to exercise their primary function of investigating and suppressing crime defensively". [15]

The principle of a duty of care owed by the police to members of the public when effecting an arrest of a suspected offender has been reviewed in *Robinson v Chief Constable of West Yorkshire.*[16] The claim was for negligence against the West Yorkshire police who in effecting arrest of the suspect Williams had acted negligently and breached their duty of care by injuring Mrs. Robinson, a bystander, who was a frail old lady. At first instance it was held the court was bound by the decision in *Hill*, which provided the police immunity against claims in negligence. The Court of Appeal overruled the first instance judgment and held that because the cause of action did not fall within the exceptions outlined in the judgment of Lord Keith in the *Hill* case the police were liable for injury as they breached their duty of care.

Lord Reed held :

"*The case of Hill is not authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was*

---

[13] At 62E

[14] At 63

[15] Ibid

[16][2018] UKSC 4(Eng.) .

expressly confirmed. . . . In short, Mrs Robinson was injured as a result of being exposed to the very danger from which the officers had a duty of care to protect her".[17]

His Lordship emphasised that public authorities like individuals generally are "*under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of negligence*".[18] The judgment created ground for debates when some of the Supreme Court judges Lord Reed, Lord Hodge and Lady Hale resiled from the policy reasoning in *Hill* and recast that case as an omissions case, much to the dismay of other judges. Lord Reid held

"*What I think emerges from this examination of past authority is that it is not possible to state absolutely that policy considerations -------where the conduct of the police may perfectly well be analysed as positive, rather than simply as involving some form of omission*".[19]

Lord Hughes, in his ruling, stated that in *Hill* the House of Lords itself had definitely cast its decision as a policy case as to why the police did not owe murder victim Jacqueline Hill a duty of care, and that legal reasoning could not be rewritten to suit the modern preferences. His Lordship ruled

"*the ultimate reason why there is no duty of care towards victims, or suspects or witnesses imposed on police officers -----lies in the policy considerations ----in the clear conclusion…that the greater public good requires the absence of any duty of care*".[20]

Lord Mance held

"*It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations*" and that "*the courts ---in recognising the existence of any generalised duty in particular circumstances they are making policy choices, in which considerations such as proximity and fairness, justice and reasonableness must inhere*".[21] His Lordship emphasised that the key to the application of the above principle is to "ascertain whether or not a particular situation falls within an established category". [22]

The ruling states the definitive reasoning of the court in underpinning that ordinary principles of negligence that should apply to public authorities, implying that public policy considerations

---

[17] Para 75.

[18] Para 33

[19] Para 94

[20] Para 118

[21] Para 84

[22] Para 85

should not give any special immunity to the police or restrict the liability of public authorities in general. There was a lack of consensus between the judges of the Supreme Court in reviewing the appeal in Robinson, and the case does not create any new legal principle because it was a positive act that had caused the injury to the victim. This was in the process of the police effecting an arrest of two drug dealers who were making their escape in a busy street. This ruling was in a sequence of decisions that had long held that the police are liable in negligence for positive acts and liability will arise where they had created the danger and it has led to injury to the public.[23]

The negligence by the police may lead to the potential transfer of liability for the failure to prevent a particular offence and cause a mandatory order to be issued in judicial review proceedings.[24] The individual officers, in their official capacity, are also subject to compulsion by court orders issued against the force. Although, there may exist a general duty to take care to protect people from injuries caused by other risk sources it is more restrictive than a general duty in tort to take care and not to cause injury by negligent actions.[25]

Therefore the police are not protected from liability in a case involving the commission of an act, and if it leads to death or serious injury in negligence and legal challenges may be possible in a broader framework of finding liability. The issue of concern is the overwhelming denial of liability in negligence cases where public authorities are involved and in drawing out the distinction between positive duty to act and an omission to act by a public authority that leads to injury to the claimant.

[23]In *Knightley v Johns &Ors* [1982] 1 WLR 349 the Court of Appeal held the senior police officer's instructions to close the tunnel after an accident that led to a later collision with an oncoming vehicle of the claimant were negligent and broke the chain of causation. The claimant's decision in going through the tunnel was not negligent. Thus the claimant was entitled to full damages from the senior officer. In *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 the police were found liable for negligently firing a cs gas cannister into the plaintiff's shop, setting it on fire, in the course of an attempt to force out a dangerous psychopath who had broken into the premises.

[24]See Civil Procedure Rules rule 54.2, and see also http://www.publiclawproject.org.uk/data/resources/116/PLP_2006_Remedies_In_JR.pdf

[25] P.J. Fitzgerald, "Acting and Refraining" (1967) 27 Analysis 133, 139; J. Bennett, "Whatever the Consequences" (1966) 26 Analysis 83, 94–97.

2/

Operational duty of care and scope of liability

The liability by omission of the public authority has to be considered in the circumstances when the duty of care has been breached. The negligence liability has to be determined in the existing environment and the public services that are being offered and is a traditional aspect of the law of tort where negligence has arisen for product liability, misstatements and for services provided by the public authority. This is in discharge of their duty to the general public in the exercise of their statutory duties.

In *Stovin v Wise*,[26] the Norfolk County Council was the defendant in an action by the complainant who had suffered an injury after falling over on elevated land that was obstructing their view at a junction. There were three accidents that had occurred in the previous twelve years and the authority had consulted with the land owners and had agreed to carry out the required work but no action had been taken by the time of the serious injury. The claimant sought damages not only from the driver of the other vehicle, but also from the local authority in negligence.

The House of Lords acknowledged that the Highways Act 1980, s 79 did empower a local authority to remove obstructions but the statutory power did not give rise to a common law duty of care. It was considered that even if the work should have been carried out, a public law duty could not give rise to a common law claim for non-performance. If this was permitted then an onerous burden would be placed on the local authority's finances in respect of being permitted to exercise its discretion, especially since road users were already required to carry insurance. Their Lordships held that it was not fair, just or reasonable to impose a duty in these circumstances.

Lord Hoffmann held : "… *it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect*."[27] This would require an individual to act in a particular way and "*it would be contrary to the policy of the law, which is to leave individuals free to act as they wish with a space delimited by duties imposed by public and private law*".[28] His Lordship reaffirmed the general principle that the "common law does not impose liability for pure omissions". [29]

[26] [1996] A.C. 923

[27]At 943.

[28] At 943-944

[29] At 946

In *JD v East Berkshire Health NHS Trust & Others*[30]the parents of children brought actions against three separate health authorities which alleged that healthcare professionals were negligent in investigating alleged child abuse. The parents had been falsely and negligently accused of abusing their children and the issue was if the suffering of psychiatric injury to them was a foreseeable result of NHS trust making these statements and if such injury has in fact been suffered by the parent.

The House of Lords ruled that the doctors had a duty to question whether abuse had occurred, and having honestly formed a suspicion, to act in accordance with the guidance given. Lord Bingham giving the main judgment stated :

"*But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and in human terms very important problems be swept up by the convention I prefer evolution*". [31]

Lord Nicholls held :

" *Identifying the parameters of an expanding law of negligence is proving difficult, especially in fields involving the discharge of statutory functions by public authorities.' and 'Abandonment of the concept of a duty of care in English law, unless replaced by a control mechanism which recognises this limitation, is unlikely to clarify the law. That control mechanism has yet to be identified. And introducing this protracted period of uncertainty is unnecessary, because claims may now be brought directly against public authorities in respect of breaches of Convention rights*". '[32]

His Lordship stated further : "*… it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect*."[33] This would require an individual to act in a particular way and "*it would be contrary to the policy of the law, which is to leave individuals free to act as they wish with a*

[30] (2005) 2 AC 373

[31] Para 50

[32] Para 87

[33] At 943.

space delimited by duties imposed by public and private law".[34] His Lordship reaffirmed the general principle that the "common law does not impose liability for pure omissions". [35]

The Court has had to consider the test of Article 2 operational duty in circumstances where the health authority has control of a patient. The courts have already established that hospitals owe a duty to patients detained under the Mental Health Act (MHA) to prevent them from taking their own lives There was an issue of a seriously depressed woman who hanged herself a day after being allowed home from a mental health hospital, and her parents brought a claim against the NHS Trust to establish a breach of duty of care to protect the right to life of suicidal psychiatric patients, even if they are in hospital voluntarily, and had not been formally detained.

In *Rabone -v-Pennine Care NHS Foundations Trust* [36] a mental health sufferer Melanie Rabone was admitted to hospital as an informal patient in April 2005 where she was assessed as a moderate to high suicide risk and a doctor noted that if she tried or demanded to leave then she should be assessed for detention under the MHA. When she requested home leave this was granted and the following day she committed suicide. The Trust accepted that the decision to allow home leave was negligent and that claim was settled in 2008. The Supreme Court had to consider a claim under Article 2 for damages for breach of an operational duty owed to a mentally ill hospital patient who had not been detained under the MHA when there was a 'real and immediate risk' to life.

The Supreme Court ruled that the NHS is under a duty to protect the right to life of suicidal psychiatric patients even if they are in hospital voluntarily. Lord Dyson in giving the leading judgment stated that "*the common law of negligence develops incrementally and it is not always possible to predict whether the court will hold that a duty of care is owed in a situation which has not been previously considered*". Furthermore, " the operational duty" and "its boundaries are still being explored by the ECtHR" and that "*the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist*".[37]

His Lordship stated that the standard demanded for the performance of the operational duty is one of reasonableness which brings in "*consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available*": (*Lord Carswell in re Officer L [2007] 1 WLR 2135, para 21*). In the present circumstances Lord Dyson held that the facts

"*required a consideration of respect for the personal autonomy of Melanie, but it was common ground that the decision to allow Melanie two days home leave was one that no reasonable psychiatric practitioner would have made. In these circumstances, it seems to me that recourse*

[34] At 943-944

[35] At 946

[36](2012) 2WLR 381, UK SC 2, 2 All ER 381

[37] Para 25

to the margin of appreciation is misplaced. The trust failed to do all that could reasonably have been expected to prevent the real and immediate risk of Melanie's suicide". [38]

Lady Hale in concurring also held that Article 2 imposed three separate duties which were firstly "*a negative obligation, not itself to take life except in the limited cases provided for in article 2(2)*", secondly " *a positive obligation to conduct a proper investigation into any death for which the State might bear some degree of responsibility*" and finally "*a positive obligation to protect life*" which was the omission in this instance. The requirement of the NHS was the need for "*having effective administrative and regulatory systems in place, designed to protect patients from professional incompetence resulting in death*" .[39]

The judicial activism in negligence liability cases is causing public authorities to be more accountable and this has been illustrated by the UK Supreme Court having considered the extent to which local authorities and their employees owe a common law duty to protect children from harm caused by third parties. This is in the context of the liability of social welfare services and public authorities more generally, and is an affirmation of the principle that public authorities are subject to the same general principles in the law of tort as private individuals.[40]

In *CN & GN v Poole BC* [41] the local authority had been under a common law duty to protect their tenants from harm after having placed them in accommodation adjacent to another family known to have persistently engaged in anti-social behaviour. The accommodation of the tenants, who were two boys (one of whom was severely disabled) and their mother suffered years of physical and mental abuse, at one point leading the older boy to run away from home leaving a suicide note. Their claim against the Council for negligence had been accepted in judicial review by the High Court but was then overturned by the Court of Appeal.

The Supreme Court held that a duty of care could be owed by local authorities when undertaking their social welfare functions. The Court confirmed the incremental approach of previous cases and established principles of law that distinguished between causing harm (making things worse) and failing to confer a benefit (not making things better) that "*better conveys the rationale of the distinction drawn in the authorities, and … because the distinction between acts and omissions seems to be found difficult to apply*".[42]

---

[38] Para 43

[39] Para 85

[40]Michael Bowman and Stephen Bailey, 'Negligence in the Realms of Public Law-A Positive Obligation to Rescue' [1984] PL 277 and Stephen Bailey and Michael Bowman, 'Public Authority Negligence Revisited' (2000) 59 CLJ 85.

[41][2019] UKSC 25

[42] Para 28

The public authorities had a responsibility in "an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care." [43] His Lordship held that this could arise by statute as in the present case

"*the nature of the statutory functions was not sufficient for an assumption of responsibility to arise; in particular that the council's investigating and monitoring of the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to* rely". [44]

Lord Reed held that the existence of statutory duties did not itself give rise to a common law duty owed to individuals, but that responsibility "*could be inferred from the facts of individual cases due to the manner in which public authorities behaved towards a claimant in a particular case*".[45] His Lordship considered the circumstances that are likely to be relevant in social welfare cases when "*an assumption of responsibility was likely to arise in case of: the provision of advice in respect of which it is reasonably foreseeable that the claimants would rely*".[46]

The Court did not deduce that there was any responsibility on the Council to discharge any functions in this matter and there was no breach of a duty of care. The scope of the duty was defined both in terms of any positive duty that had not been discharged, or any negative duty that they failed to not prevent harm and that caused damage to the claimants. The basic framework of when a duty of care arises for a public authority was preserved and the duty to take reasonable care was affirmed.

3/

Article 2 Right to Life and public law duty

The breach of duty to act in tort can often be accompanied by an application under the Human Rights Act (HRA) which can potentially affect the negligence claim for failure to prevent serious injury or death when it is pleaded as a separate cause of action in tort. It has been suggested, firstly, that the claim under the provisions of the HRA operates as an alternative remedy, circumventing the need to impose a duty of care at common law and both can be established.

---

[43] Para 80

[44] Para 81

[45] Para 82

[46] Para 87

Furthermore, it has been argued that the liability for pure omissions by public authorities under Article 2, Right to Life, has greater potential for success than the claim in negligence.

In *Osman v United Kingdom*,[47]the death of the father of a school boy from an attack from his former teacher, who was infatuated with his pupil, and had shown violent tendencies was not anticipated by the police as carrying the forseeability of death or serious injury. The House of Lords held that it did not lead to finding of a breach of the duty of care by the police. The case was appealed to the European Court of Human Rights which held that for liability under Article 2 to arise

"*it must be established… 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*".[48]

The European Court of Human Rights confirmed the House of Lords decision but also established that the state owed a duty under Section 6 (1) which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The Court held that the duty

"*derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the Hill case*". [49]

The Court did not accept the Government's argument that the applicants could not rely on article 6 of the Convention given that the Court of Appeal in application of the exclusionary rule established by the House of Lords in the Hill case dismissed their civil action as showing no cause of action. It observed that the common law of the respondent state "*had long accorded a plaintiff the right to submit to a court a claim in negligence against a defendant and to request that court to find that the facts of the case disclosed a breach of a duty of care owed by the defendant to the plaintiff which had caused harm to the latter*".[50]

This implies that a victim of crime who has suffered personal injury can bring an action under the HRA, by virtue of ss. 6 and 7[51]against the police for failure to prevent the crime. For this to

[47] Osman v United Kingdom (2000) 29 EHRR 245.

[48]Ibid at 116

[49]Ibid at 139

[50] Ibid

[51]Section 7 (1)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—

(a)bring proceedings against the authority under this Act in the appropriate court or tribunal, or

succeed, the claimant needs to prove: (i) that the police knew or ought to have known at the time, (ii) that there was a real and immediate risk to the life of the victim of violence,[52] and (iii) that the police failed to take reasonable measures to avoid the risk. It could therefore be argued that the existence of a potential claim under the HRA has removed the need to impose a common law duty of care.

However, the application of the HRA has several disadvantages when compared to a claim under the tort of negligence.[53] The monetary compensation does not arise as of right and the damages tend to be lower than those in tort, and their assessment lacks clear guidance from the Strasbourg court.[54] Moreover, the limitation period for a HRA claim is only one year as compared with three years for tort. The Osman test sets a high threshold for the establishment of liability and is onerous to satisfy.[55]

Donal Nolan has argued that the liability of the police for tort actions should also include a human rights claim based on an "alternative remedy argument" not collapsing if the "*protection offered by the Convention is not co-extensive with the law of negligence at a substantive level*".[56] The first ground is that "*the distinction between acts and omissions is foundational to the law of negligence … and the undermining of that distinction may therefore be expected to produce a degree of incoherence*".[57]

The second reason is that moving away from the current position whereby public authorities obtain the benefit of the omissions principle, as private individuals do, would introduce an "*alien*

(b)rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

[52]Sarjantson v Chief Constable of Humberside Police [2013] EWCA Civ 1252; [2014] Q.B. 411, at [25].

[53] On the differences between the two claims, see DSD v Commissioner of Police of the Metropolis [2015] EWCA Civ 646, at [64]–[68].

[54] J. Steele, "Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?" [2008] C.L.J. 606; J. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 M.L.R. 750.

[55]As noted by Lord Carswell in In Re Officer L[2007] UKHL 36; [2007] 1 W.L.R. 21the real and immediate test is one that is "not readily satisfied", the threshold being "high." [98]

[56] D. Nolan, "Negligence and Human Rights Law: The Case for Separate Development" (2013) 76 M.L.R. 286, 317.

[57] Ibid, p. 304.

public/private distinction" into private law by requiring the courts to "*distinguish between public authorities and private individuals in cases where the alleged duty is an affirmative one. Furthermore, the distinction between positive and negative obligations is not as obvious as in human rights law*".[58]

Stelios Tofaris and Sandy Steel observe that this presumption "*relies upon the claim that private law does not, and ought not to, recognise the existence of legal rights that others save one from suffering physical injury*" and that "*the law would be more coherent if by that we mean more consistent with its underlying normative justifications if the acts/omissions distinction were construed less rigidly in relation to public authorities*".[59]

The significance of that distinction is only persuasive in its impact with regards to public authorities. The second argument is also problematic because "*the reasons offered for the omissions principle within private law apply less strongly to public authorities, then the distinction between public authorities and private individuals is one itself licensed by private law*". [60]

The divide between public authorities and private individuals in relation to omissions liability is based on the concept that the police are not held to be accountable based on their status. The public are expected to be vigilant based on the principle of the duty of care and negligence liability arises with the proof of damage caused. In nuisance there is liability if the act that causes the interference in another person's land and their peace and enjoyment is effected. [61]Where the defendant has not caused the nuisance, but merely permitted it to continue then he will be liable in negligence liability. [62] The strict liability in common law as in the rule in Rylands v Fletcher only arises where the defendant failed to take reasonable steps to abate the non natural use once he knew or ought to have known about its occurrence. [63]

This is a reflection of the rule that any risk of serious harm could be excised by the application of the extreme care, even if the creation of a general usage that leads to strict liability is not considered a matter of common usage. There is also consideration for the appropriateness of the activity given

[58]Ibid., pp. 304–05.

[59]Stelios Tofaris and Sandy Steel, Negligence liability for Omissions by the Police, The Cambridge Law Journal, Volume 75, Issue 1 (2016) pp 128-157

[60] Ibid

[61]Goldman v Hargrave [1967] A.C. 645.

[62]In Willis v Derwentside District Council, [2013] EWHC 738 (Ch) the council was liable in nuisance for gas escaping not only from its land, but also from gas merely passing through the property in underground pipes.

[63]In Leakey and Orsv National Trust [1980] QB 485. Megaw, LJ held " the mere fact that there is a duty does not necessarily mean that in action constitutes a breach of that duty ".The duty is to do what is reasonable for him to do depending on circumstances, such as to "expend serious expenditure of money to eliminate or reduce the danger, attached to his means" At p 518

the utility of the landscape and its social value. In the liability for negligence where the public authority is the defendant the breach of duty threshold is higher and the notion of strict liability will not arise. The act that the authority could be responsible for is more likely to be negligence based on proof of damage.

It may be noted that the "*aim of tort law is to provide corrective justice while that of human rights law is to provide distributive justice and corrective justice is directed at rectifying an injustice between the doer and the sufferer of harm*".[64] The courts are under less compulsion to extend the liability in tort and are more restrained in their approach. There is no need to make justice transient and applicable to suit an abstract concept of any right that may be invoked if violated.

In *Van Collev Chief Constable of the Hertfordshire Police*[65] the claim was brought under the Human Rights Act 1998 Article 2 (Right to life) and the common law of negligence. The facts were that Van Colle employed Mr Brougham as a technician at his optical practice and three months into the employment the two had an argument resulting in a physical confrontation. After this, Mr Brougham never returned to work and 6 weeks later the police found items belonging to the optical practice, along with other stolen items at his home.

Brougham was arrested and charged with theft, after which he then started to harass Mr Van Colle to pressure him into not giving evidence. The harassment included burning his car and making death threats which Mr Van Colle reported to the police who arranged a meeting to take a statement with a view to arrest Brougham. The meeting never took place as Mr Brougham shot and killed Mr Van Colle on his way home from work. At his trial Mr Brougham was convicted of murder and. Mr Van Colle's parents brought an action against the police alleging violation of Article 2 and 8. The trial judge found for the claimant and awarded damages which was upheld by the Court of Appeal.

The House of Lords allowed the appeal because under Osman a positive obligation to prevent death arises for public authorities only where they were aware, or ought to have known, of the existence of a real and immediate risk to life. Whilst Van Colle was to be a witness and therefore within the class of persons to whom a duty to protect might arise, the offence for which he was a witness was of a minor nature and Mr Brougham did not have a history of violence. The threats were intimidating but not sufficiently serious to suggest that Mr Van Colle's life was endangered. Therefore, no obligation arose to take reasonable steps to prevent the killing and there was found to be no violation of Article 2.

Lord Brown held :

'*police are inevitably faced . . with a conflict of interest between the person threatened and the maker of the threat. If the police would be liable in damages to the former for not taking sufficiently strong action but not to the latter for acting too strongly, the police, subconsciously*

[64] F Du Bois, Human Rights and Tort liability of Public Authorities. LQR 127 (2011), Also see The Europeanisation of English Tort law, (Hart) 2014, p 164-169.

[65][2008] UKHL 50

or not, would be inclined to err on the side of over-reaction. I would regard this precisely as inducing in them a detrimentally defensive frame of mind.'[66]

Lord Carswell ruled that "*police officers may quite properly be slow to engage themselves too closely in … 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*".[67]

The judgment in this case has been ascribed by legal commentators to *"the political rhetoric of recent years that has been putting victim at the heart of the criminal justice system and has been particularly powerful in relation to the government's strategy for response to domestic violence*".[68] This reasoning has been followed in a sequence of cases that have placed the domestic disputes as a matter of priority for law enforcement and inferred a duty of care to arise from the circumstances of the case.

In *Smith v Chief Constable of Sussex Police*[69] the claimant Smith lived with his lover Gareth Jeffrey and after he ended his relationship Jeffrey assaulted him. Sometime later Smith moved away but maintained contact with Jeffrey and the latter wanted to resume the relationship but Smith did not. Jefferies then started sending abusive and threatening texts which included death threats after which Smith contacted the police several times in relation to the threats and informed them of the previous violence. Jeffrey eventually attacked Smith with a hammer causing him three fractures to the skull and brain damage. Smith brought an action against the police for their failure to provide adequate protection under negligence for the breach of a duty of care. The key issues were whether the facts of the case disclosed a reasonable cause of action and whether the police arguably owed a duty of care to Mr Smith that required them to arrest Mr Jeffrey in order to protect Mr Smith.

The police applied to have the case dismissed which was granted by the trial judge. The Court of Appeal however, reversed the decision and the police appealed which succeeded because no duty of care was owed by the police. Lord Pill stated :

" *I cannot consider it unacceptable that a court, bound by Section 6 of the 1998 Act, should judge a case such as the present by different standards depending on whether or not the claim is*

---

[66] At 132-133. Lord Phillips held that it was 'outrageously negligent' but not enough to bring it within the test laid in *Hill v Chief Constable of West Yorkshire*". At 101

[67] at [107]. Lord Hope made identical remarks at [76].

[68]Mandy Burton**,** Failing to Protect: Victims' Rights and Police Liability, The Modern Law Review, Vol. 72, No. 2 (Mar., 2009), pp. 283-295

[69](2008) EWCA Civ 39

specially brought under the Convention. The decision whether a duty of care exists in a particular situation should in a common law claim require consideration of Article 2 rights". [70]

The principle was affirmed that the common law of negligence should not be extended to comply with ECHR rights and a separate cause of action existed and should be pleaded in appropriate cases. The claim under the HRA against public authorities' failure to respect the rights contained in schedule 1 of the Act is a useful provision in this respect. It is less compensatory than liability in the tort of negligence. However, the combination of negligence and the HRA claim, allows the police to be held accountable by civil courts, and importantly allows those courts to explore the actions of the police and consider whether they have failed to appropriately protect members of the public.

4/

Circumventing the duty by a policy framework

The general law relating to breach of duty of care in respect of omissions by the police has been overshadowed by the status of police as a public authority, and, furthermore, as a public body with duties to investigate and prevent crime. The justification of omissions based on the defensive practice, the conflict of duties and the limited resource concerns has led to the courts holding that it would not be fair, just and reasonable to impose a duty on the police. This has often been to the detriment of the member of public even in circumstances where there has been an omission to act in a preventive manner.

In *Michael v Chief Constable of South Wales Police*[71], there was a claim brought by the estate and dependants of Joanna Michael, who was killed by her former partner. He had visited Ms Michael's house and found her with her new partner and he assaulted her and drove the other man home, but before leaving he stated that when he returned he would kill Ms Michael. At this point Ms Michael phoned the police but due to a miscommunication between the police call handling centres, the communication was graded as low priority for a response within 60 minutes, rather than as urgent. By the time the police arrived Ms Michael was dead, stabbed by her ex-partner, who was subsequently convicted of her murder. This was not the first time the police had been informed of violence by her ex-partner towards Ms Michael, and the actions of both police forces were criticised severely in an investigation conducted by the IPCC.

The claim was predicated on negligence and under the breach of the Article 2, Right to life under the HRA. The matter reached the Supreme Court, which decided by a 5-2 majority (Lord Kerr

[70] Lord Justice Pill at 57
[71] Michael v Chief Constable of South Wales Police [2012] EWCA Civ 981; [2012] H.R.L.R. 30, at [22].

and Baroness Hale dissenting) that the action in negligence against the police was dismissed, but allowed the claim under the HRA to proceed to trial by dismissing the cross appeal of the police. This case is regarded as seminal in its importance to the law of negligence of public authorities and their liability under the Article 2, Right to life.

In his leading judgment Lord Toulson, held that the claim was based on a failure to prevent the act of a third party and considered whether the police owed a duty under Article 2 with reference to *Smith v Littlewoods (1987) AC 241* and in negligence liability. His Lordship held that English law does "not generally impose a duty of care in respect of injury caused by the act of a third party".[72] The principle derived is that there is insufficient proximity between the defendant and the police for the duty of care to arise in negligence liability.

His Lordship stated that "*The fundamental reason the police are not liable for negligently failing to expeditiously respond to an emergency call with the result that a person is murdered, in circumstances where they did not assume responsibility to do so, is because of the general principle that the common law does not impose liability for pure omissions"*.[73] Although this principle has been "worked out for the most part in cases involving private litigants … [it is] equally applicable where D is a public body".[74]

Moreover, "If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house?" [75]This distinguishes the victim's claim against a perpetrator to claim in one instance, but not in another circumstances which would allow a breach to be raised if the victim has been assaulted after the police have been informed of specific threats of violence, but not if their house is burned down after specific threats of non-arson.

Lord Toulson considered that in instances of omission the "*imposition of a duty of care would inevitably lead to an unduly defensive attitude by the police" and lead to constraints based on their resources and the need to provide them the operational independence. The question was not whether the police should have some special immunity in such circumstances, but in fact whether an exception should be made to the ordinary application of common law principles in order to impose liability".*[76]

The liability under Article 2 would arise in this instance where it would depend on the response to several outstanding questions of fact. These were, namely, whether the call handler ought to

[72] At 97

[73] At [101].

[74]Ibid.

[75] At 119
[76] At 121

have heard Ms Michael state that her ex-partner was threatening to kill her and, if not, whether she should have asked Ms Michael to repeat herself having failed to hear clearly; alternatively, whether even without the threat to murder the initial phone call would have been enough for a reasonable person to conclude that there was a real and immediate threat to her life meriting nothing less than an immediate response.

Lord Kerr in his dissenting judgment stated that he would have allowed the appeal as there was sufficient proximity to the victim and the police. His Lordship enacted a four stage approach to proximity which accepted that there would be liability in negligence

"*...provided it is fair, just and reasonable that a duty should arise, police will be liable where they have failed to prevent foreseeable injury to an individual which they could have prevented, and there is a sufficient proximity of relationship between them and the injured person.*[77]

His Lordship expounded that the necessary proximity exists if the police knew or ought to have known of an imminent threat of death or personal injury to a particular individual which they had the means to prevent. Lord Kerr stated "*The defendant is a person or agency who might reasonably be expected to provide protection in those circumstances and that he should be able to protect the intended victim without unnecessary danger to himself".*[78]

His Lordship also set out a clear distinction between damage to property and damage to life:

"It is entirely right and principled that the law should accord a greater level of importance to the protection of the lives and physical well-being of individuals than it does to their property."[79]

Lord Kerr further distinguished the public from the police in applying the general common law principle that members of the "*public are not required to protect others from third party harm. This protection of autonomy does not extend to the police force whose essential and critical duty it is to provide precisely that type of protection*". [80]

Lady Hale concurred with Lord Kerr's analysis. In her view the policy reasons that are stated to preclude a duty in a case such as this are diminished by the existence of claims under the HRA and that the police already owe a positive duty of care in public law to protect members of the public from harm caused by third parties. Her ladyship stated:

"*The necessary proximity is supplied if the police know or ought to know of an imminent threat of death or personal injury to a particular individual which they have the means to prevent.*

---

[77] At 149

[78] At 171

[79] At 172

[80] At 181

Once that proximity is established, it is fair, just and reasonable to expect them to take reasonable care to prevent the harm".[81] In Lady Hale's view the "*formulation offered by Lord Kerr would be sufficient to enable this claim to go to trial at common law as well as under the Human Rights Act 1998*". [82]

The implication is that the policy reasons for precluding a duty of care on the part of the police have now been exhausted and Article 2 is the improved alternative for claimants, and this can be established with reference to the important reasoning of *Robinson* which recasts *Hill* as a 'pure omission' case. The dissenting judgments in *Michael* are also significant, as 'providing a broader duty which would have resulted in liability', and this requires the discussion of the criteria for that expanded duty that both Lord Kerr and Lady Hale proposed in *Michael*. This expanded duty which termed the 'liability principle' was explicitly directed towards a pre-identified victim who is faced with 'a specific and imminent threat to his or her life or physical safety' as Joanna Michael was, and not the 'stranger on the street' which Jacqueline Hill represented.

The argument that the particular problem of domestic violence merited this type of extraordinary approach of a duty of care was rejected by the majority on the basis that duty of care by the police be owed only to victims of a particular type of breach of the peace and not others. In this instance the defendant was neither in a position of control over the ex-partner, nor had there been on the facts any assumption of responsibility towards the claimant (i.e. in the form of an assurance given about the time of response). The claim in negligence was dismissed by the majority because if it was not found to have been a breach of a duty of care because if extended to more than only particular identified victims outside domestic violence that would have unforeseeable consequences.

Richard Hyde examines the transformation after Michael of the elements of liability: "*Before Michael, therefore, the general law relating to duties of care in respect of omissions has been overwhelmed by the position of the police as a public authority, and, furthermore, as a public body with public law duties to investigate and prevent crime. The defensive practice concern, the conflict of duties concern and the limited resources concern led to the courts holding that it would not be fair, just and reasonable to impose a duty on the police. The focus on proximity in the judgment in Michael should be commended. It means that the policy arguments are not determinative, and instead the focus is on the factual relationship between the police and the claimant.* [83]

It is onerous for claimants to bring a claim against the police in negligence because of the need to demonstrate sufficient proximity on the facts. After the decision in Michael, establishing this proximity is still the main requirement in proving causation and needs a close examination of the

---

[81] At 197

[82] At 198

[83]Richard Hyde, The Role of Civil Liability in Ensuring Police Responsibility for Failures to Act after Michael and DSD, European Journal of Current Legal Issues, Vol 16 (1) (2016)http://webjcli.org/article/view/443/619

factual relationship between the claimant and the police, and furthermore, between the police and the perpetrator. The dissenting judgments in Michael provided a broader duty, which would have resulted in liability providing a greater scope for legal certainty in the latter's examination of the liability, although less claimants would be successful in their claims.

However, the common law principle was affirmed in the case that the special position of the police is determinative of the existence of a duty of care. This means that it will be rare for a duty of care to arise because of the reluctance of the courts to impose liability in respect of omissions and acts of third parties. The claimants will continue to find it onerous to bring a successful claim against the police if they suffer loss as a result of an omission and/or the act of a third party.

Although, the claims under both Article 2, Right to Life, and Article 3, Freedom from Torture, stipulate conditions that provide a means to challenge the actions and inactions of the police the HRA claim is a mechanism through which the courts are able to adjudicate on police practices and evaluate whether they are reasonable. This allows the courts to influence potential police procedures and to award a measure of damages for loss, even though damages are more limited than those awarded in tort. It is possible that a HRA duty could stifle a proactive approach in carrying out a duty to investigate a possible suspect and may lead to defensive policing, However, the standard of care is not high and the wide margin of appreciation allows police to act only effectively to investigate a claim. [84]

Conclusion

The courts impose liability more narrowly in respect of omissions by the tortfeasor who is a public authority and there are injures to third parties. This has been confirmed in instances where the police, local authority, or a health authority has been negligent in carrying out their duties, such as investigation of a unlawful death. The imposition of civil liability for negligence against the public authority contributes to corrective justice and damages are recoverable in tortious claims. This reasoning has prevailed in circumstances when an innocent bystander has been injured from an omission on the part of police, such an injuring a third party when executing an arrest.

[84] In *Commissioner of Police of the Metropolis* [Appellant] v DSD and ans. [Respondent] (2018) UKSC11 2015EWCA Civ 646 the Supreme Court held "where the European Court of Human Rights has left a matter to States' margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area ". Lord Mance at 153

Article 2 is the improved alternative for claimants when pleaded with a negligence claim and this reasoning is compatible with the judgment in *Robinson* which recasts *Hill* as a 'pure omission' case. The ruling in *Michael* is of considerable impact and the dissenting judgments which have established a criteria for when liability could arise provide a broader duty that will have resulted in liability. This expanded duty under the 'liability principle' is explicitly directed towards a pre-identified victim who is faced with 'a specific and imminent threat to his life or physical safety' as Joanna Michael was, and not the 'stranger on the street' which Jacqueline Hill represented in the *Hill* ruling. The criteria, and the differentiation between the pre-identified victim and the stranger, both in negligence and under Art 2, is the grounds upon which the court should make its judgment.

The implication that the Right to Life is significant and affirms that the police can be liable when there is a case involving an omission if it leads to death or serious injury, and the legal challenges may be possible in a broader framework of finding liability. This includes consequences such as death caused by omission when an action in negligence can be accompanied by a claim under the HRA. The Article 2 claim is premised on the breach of the operational duty of care that depends on the standards that have been laid down for public authorities. The courts are moving incrementally to establish liability for breach based on breach of duty of care and there is an argument for extending the statute and common law remedies to those who suffer injury from omission by public authorities.