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EMERGENCY SERVICES TO THE RESCUE, OR NOT, AGAIN.

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Introduction

In a previous issue of the Journal, I argued that the common law of negligence should recognise that the publicly funded emergency services have a duty to rescue.[1] It was suggested that the current liability regime which potentially imposes liability on ambulance trusts but exempts the police, fire, and coastguard services from any similar duty of professional rescue is unjust and makes little practical or doctrinal sense. The 'no duty' stance appears to have resulted from an unwarranted extension of the partial immunity granted to the police in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 when fighting crime to the very different context of fire crews and others when saving lives. Two recent Court of Appeal decisions were cited as indicating a welcome willingness to re-evaluate the limits of the core immunity in *Hill* and hence as undermining the supposed foundation of the 'no duty' rule as it applies to the emergency services when acting as rescuers.[2] Despite the House of Lords on a conjoined appeal having since reversed both decisions,[3] this outcome is not fatal to the continuing argument in favour of a duty of professional rescue, as we shall see. However, we must first briefly turn to consider their Lordships decision that, absent special circumstances, the police ordinarily have no common law duty to protect individuals from harm caused by the violent, criminal conduct of others, albeit there may be liability for a breach of the victim's human rights.

The *Van Colle* decision.

Giles Van Colle was shot dead by a former employee he had accused of theft. Reversing Cox J and the Court of Appeal, the House of Lords unanimously rejected a claim under the Human Rights Act 1998 alleging breach of the 'right to life' in Article 2 of the European Convention on Human Rights. No claim was made for common law negligence.

It is clear that in order to meet its obligations under Article 2, a signatory state and its agents (such as the police) may have to take positive steps to protect those whose life or physical safety is put at serious risk by the criminal behaviour of third parties. However, in *Osman v UK* (1998) 29 EHRR 245 the Human Rights Court in Strasbourg had held that a claimant must show that the authorities knew or ought to have known at the

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[1] See 'Emergency Services to the Rescue?' [2008] JPIL XXX

[2] *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39 and *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325.

[3] See *Chief Constable of the Hertfordshire Police v Van Colle and another*, and *Smith v Chief Constable of Sussex Police* [2008] UKHL 50.

relevant time of a real and immediate risk to the life of an identified individual, and that they had unreasonably failed to take such measures as might have been expected to avoid that risk - this is the '*Osman* test'. In deciding what could properly be expected, the Strasbourg Court [at 116] said that regard must be had to 'the difficulties involved in policing modern societies, the unpredictability of human conduct, the operational choices which must be made in terms of priorities and resources' and the need to avoid imposing 'an impossible or disproportionate burden on the authorities'.

After a particularly careful review of the evidence, the House unanimously held that the information reasonably available to the police prior to the shooting was not such as should have led them to conclude that they ought to act to protect Van Colle's life from a grave and immediate risk. Cox J was criticised for succumbing to hindsight rather than considering what the investigating officer did or should have known immediately before the shooting. Although two intimidating 'phone calls to drop the theft charge had earlier been sent, there had been no explicit threat of death or serious violence. Given that the accused had no recent history of violence, and had been charged with a relatively minor property offence which would probably not have attracted a custodial sentence, their Lordships concluded it was unlikely that the police should have concluded that Van Colle was in immediate danger of being attacked, much less murdered.

So, there was no breach on the facts. Lord Brown [at 115] noted that while neither gross negligence or reckless disregard are necessary, the *Osman* test is 'stringent' and 'not easily satisfied'. Lord Bingham [at 39] said 'the warning signs were very much less clear and obvious than those in *Osman'*, which had (surprisingly, perhaps) been found by the Strasbourg court inadequate to meet the test.[4]

Moreover, the courts below had been wrong to say that the police had a greater responsibility or that the *Osman* test was lower because the murdered victim was to be a witness; this conferred no specially protected status on him.

<u>The *Smith* decision</u>.

In *Smith,* a man had been attacked with a claw hammer and seriously injured by his former male partner. Smith had earlier complained to the police on several occasions about a large number of lurid and explicit death threats sent by 'phone, text and e-mail. Lord Carswell [at 107] noted, somewhat incredulously, that 'for some reason for which no explanation has been put forward they declined to look at the messages containing

[4] Lord Brown [at 115] said that *Osman's* 'comparatively extreme facts' indicated the stringency of the test. A majority of the Court of Appeal in *Osman v Ferguson* [1993] 4 All ER 344 (McCowan LJ and Simon Brown LJ, as he then was) had earlier held that there was sufficient proximity, though duty was unanimously rejected because of the policy considerations in *Hill*.

the threats, make an entry in their notebooks, take a statement from Mr Smith or complete a crime form'.

By a majority, the House nonetheless rejected Smith's claim for damages for common law negligence. Though the parties were 'proximate', the identity of the potential attacker and victim known, the attack reasonably foreseeable, and the failure to act grave, the police owed Smith no duty of care. Two policy considerations in particular were said to dictate this conclusion - the risk that the possibility of liability would result in 'defensive policing', and the unproductive diversion of scarce resources.[5] Accordingly, it was not, as the *Caparo* test requires, 'fair, just and reasonable' to impose a duty.[6] Thus, the supremacy of what their Lordships in *Smith* called the 'core principle' in *Hill* was re-asserted, namely, that absent special circumstances, the police when investigating or combating crime owe no duty to protect individuals from criminally violent behaviour by others. This was so notwithstanding that *Hill's* facts are plainly distinguishable. In *Smith*, the identity and whereabouts of the attacker and his victim were known to the police in advance.

Despite the numerous and glaring failures by the police and the claimant's morally strong case based on what Lord Brown [at 125] called 'really very strong facts', the majority nonetheless believed that the 'no duty' rule was necessary for the benefit of the wider general public whose interests would suffer if the police were to be distracted from fighting crime in a 'robust manner' by the threat of liability should they get things badly wrong. Lord Hope [at 75] openly recognised that a 'principle of public policy that applies generally may be seen to operate harshly in some cases…Those indeed are the cases where…the interests of the wider community must prevail over those of the individual'. Lord Carswell similarly [at 106] said that 'the price of the certainty of the rule and the freedom from liability afforded to police officers is that some citizens who have very good reason to complain…will not have a remedy in negligence'.

There was a strong, albeit unavailing dissent from Lord Bingham who favoured the recognition of a 'liability principle', derived from human rights jurisprudence. His Lordship said [at 44] that '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 prevent it being executed'. Lord Bingham asserted that this principle was not inconsistent with the ratio of either *Hill* or *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24.[7]

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[5] The possibility that the police might anyway face claims under the Human Rights Act did not persuade the majority that these policy arguments were undermined, [at 98, 99, 137].

[6] See *Caparo Industries plc v Dickman* [1990] 2 AC 605.

[7] According to Lord Hope in *Smith* [at 73] because not all four of the original policy arguments advanced in *Hill* 'can now be supported', *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24 must be treated as 'the more important authority'.

The majority did not agree. They rejected the 'liability principle' as unworkable, as tending to uncertainty, and as being likely to undermine the very protection which it was the purpose of the core 'no duty' rule in *Hill* to provide.[8]

Moreover, the majority saw no pressing need to develop the common law of negligence or align it with the rights in the European Convention.[9] The two claims have 'very different objectives'. The common law is 'designed to compensate losses', while Convention claims are 'intended to uphold minimum human rights standards and to vindicate those rights'.[10] Moreover, deserving victims nowadays have the option to claim directly under the Human Rights Act 1998. 'Any perceived shortfall' in the common law, said Lord Hope [at 82] can, in a suitable case falling within the *Osman* test, now be dealt with under that Act.[11] Whether Smith's case did so qualify did not need to be decided, though Lord Brown [at 135] said it might have been 'irresistible' had it been lodged in time (Smith missed the one year limitation period in s. 7(5) of the Act).

Whether this 'robust approach', which leaves the police on the spot free to decide how to react to threatened violence, actually is necessary to efficient policing and in the best interests of the community is, like its supporting policy arguments, uncorroborated by empirical evidence.[12] The manifest unfairness to individual victims is ameliorated only by the possibility that the Human Rights Act may supply a remedy.

<u>The Limits of the Immunity</u>.

It is important to note that the police have no *general* immunity and may be liable for their own negligent acts that directly harm another, for example, by causing a traffic accident through careless driving. The core 'no duty' rule applies only to cases where injury arises out of the manner in which the police (incompetently) investigate a crime with the result that a victim is attacked by a third party or otherwise suffers loss which might have been prevented. In contrast, there properly was liability in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (police failure to prevent a prisoner known to be vulnerable from committing suicide when in custody); *Knightley v Johns* [1982] 1 WLR 349 (senior officer mishandling aftermath of road accident so causing injury to police motorcyclist); *Rigby v Chief Constable of Northamptonshire*

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[8] See Lord Hope [at 77], Lord Phillips [at 100], Lord Carswell [at 109], and Lord Brown [at 128].
[9] Lord Bingham, dissenting, accepted [at 58] that whilst 'the existence of a Convention right cannot call for the instant manufacture of a corresponding common law right where none exists', this was a strong case for developing the negligence action in light of the Convention.
[10] *per* Lord Brown [at 138].
[11] See, to similar effect, Lord Rodger in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17 [at 64].
[12] Only Lord Phillips of the majority [at 98 and 102] acknowledged the difficulty of knowing whether restricting the duty of care in this way is, *in fact*, necessary and justified. For the others the dangers of not providing immunity are taken to be simply self-evident. Sadly, there is a dearth of empirical evidence about the effect of tortious liability rules generally.

[1985] 1 WLR 1242 (police use of CS gas canisters without having fire fighting equipment on hand to tackle any resulting fire).[13]

Furthermore, the following decisions, which resulted in liability *despite* involving allegations of negligence in the management or investigation of crime, appear to have been accepted in *Smith* as having been rightly decided: *Swinney v Chief Constable of Northumbria* [1997] QB 464 (duty to protect the identity of an informer); *Costello v Chief Constable of Northumbria* [1999] 1 All ER 550 (duty on inspector to help a female constable when attacked in his presence by a prisoner).[14] Seemingly, the justification for duty in these cases rests, in part, at least, on a 'voluntary assumption of responsibility' towards the victim.

<u>The Immunity and the Duty to Rescue</u>.

The strong re-affirmation in *Smith* of the 'core immunity' is relevant to the separate question whether there should be a duty of professional rescue. The near immunity enjoyed by the police when fighting crime has, in the past, somewhat illogically, been treated as being at the root of the decisions to excuse the public emergency services (other than ambulance trusts) from any private law duty to go to the aid of those they know to be in need of immediate help.[15] Thus the conclusion in *Capital and Counties* that fire brigades have no duty to fight fires because there is no sufficient 'proximity' was said to follow from *Alexandrou v Oxford* [1993] 4 All ER 328 which, despite being concerned with the conduct of the police when investigating a break-in, was unconvincingly declared to be 'indistinguishable'.[16]

In practice, and contrary to the popular media image, fighting crime accounts for only a relatively small proportion (maybe less than a quarter) of police time.[17] This common misperception about the nature of policing lends itself easily to treating all police work

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[13] In *Hill*, Lord Keith, at p 59, cited both *Knightley* and *Rigby* as established cases of police negligence.

[14] See too *R v Dytham* [1979] QB 722, cited in *Smith* [at 120] as an example where there might have been a civil liability to pay damages. A constable was prosecuted for a deliberate failure to intervene to prevent a violent assault in his presence. In *Van Colle v CC of Hertfordshire* [2007] EWCA Civ 325, Sedley LJ [at 31] adverted to the possibility of founding police liability on the distinction between deliberate misfeasance and mere inadvertance.

[15] See *Capital and Counties plc v Hampshire County Council* [1997] QB 1004 (fire brigade), *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897 (coastguard). In addition, there are cases excusing the police when *not* engaged on crime prevention activities, see *Ancell v McDermott* [1993] 4 All ER 355 (diesel spillage on highway), *Clough v Bussan* [1990] 1 All ER 431(malfunctioning traffic signals).Cf. the duty on ambulances to attend and treat casualties in *Kent v Griffiths* [2001] QB 36. Significantly, no question marks were raised in *Smith* about the correctness of the decision in *Kent*.

[16] This was so despite the Court of Appeal accepting that fighting fires and fighting crime are not analogous activities and that policy considerations were not determinative, which left 'proximity' unfeasibly having to bear the whole weight of the 'no duty' decision. *Kent v Griffiths* escaped *Alexandrou* by confining it to its own facts.

[17] See P. Francis et al, *Policing Futures* (Macmillan Press, 1997) at 91. The core notion of 'investigating and suppressing crime' to which the immunity attaches is crucially vague, which may partly explain some of the uncertainties. In *Smith*, it was only indirectly addressed via the notion of 'defensive policing' [at 132] which, much like 'defensive medicine', is itself also unclear.

as if it is a single undifferentiated whole, as well as to ignoring the varied range of responsibilities undertaken by the uniformed branch including their important social services and civil protective functions. It also lends itself to an uncritical extension of the core *Hill* immunity to other quite unrelated activities, such as rescue, whether by the police or other professionals. In *Gibson v Orr* (1999) SC 420, Lord Hamilton *was* prepared to differentiate between police tasks, declining an invitation to equate the investigation of crime with the civilian function of safeguarding the public against a known traffic hazard. He held that when the police took responsibility for warning road users of the danger posed by a partially collapsed bridge, there was no immunity in Scots law when that responsibility was prematurely abandoned without leaving any cones or other warning signs with the result that an unsuspecting motorist drove onto the bridge and went into the river with fatal results.[18] There was 'proximity' once the police took control of the situation. This decision, like *Swinney* and *Costello*, might be seen as giving rise to a duty exceptionally because it is an 'assumption of responsibility' case.[19] However, Lord Hamilton doubted the utility of this idea where there is a risk of injury or death and no active reliance by the party at physical risk. Moreover, Lord Slynn has warned us that it may be 'misleading' to talk of 'assumption' as if it necessarily involves a knowing and deliberate acceptance of responsibility by a professional. It may simply signify 'that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is imposed by the law'.[20]

Lord Hope in *Smith* [at 79] referred approvingly to *Gibson v Orr* saying that it 'deserves to be read carefully'.[21] His Lordship noted Lord Hamilton's refusal in *Gibson* to find any close analogy between the police 'investigating and suppressing crime', as in *Hill*, and the exercise of 'of their civil function of performing civil operational tasks concerned with human safety on the public roads'.[22] No immunity attached to this latter activity, at least where there is no inherent conflict with instructions from superior officers or with duties owed to other persons. Lord Hope also noted [at 80] the doubts

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[18] Similarly, see *Boyd v Schacht* [1976] 1 SCR 53 where the police were found liable when, having been called to investigate a traffic accident, they left a dangerous culvert inadequately signed or guarded so that a vehicle later drove into it. While the Ontario Court of Appeal founded the duty on the common law and statutory duties of the police to protect the public, the majority of the Canadian Supreme Court focused on their statutory duty.

[19] Contrast *Ancell* and *Clough*, n 15, where English courts refused to impose liability on the police who it was alleged had negligently *failed* to take charge of potential road hazards or to warn of their existence. Yet rather than basing themselves on the absence of any assumption of responsibility, the courts affected to detect no distinction between protecting road users and investigating crime. They also fell back on the conventional distinction between non-feasance and misfeasance so that, absent a special relationship, there was no duty on the police to warn or aid a stranger, which wrongly equates their position with that of the ordinary citizen.

[20] See *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 654. 'Assumption of responsibility' has rightly been criticised as being an unreliable indicator of liability. See P dePrez, 'Proportionality, symmetry and competing public policy arguments: the police force and civil immunity' (1999) 15 PN 217 at 225.

[21] *Gibson v Orr* was also cited, though not referred to, in *Brooks v Commissioner of the Metropolis.*

[22] In *Smith*, Lord Brown [at 130] said that it would be artificial to classify what the police had done in that case as the exercise of a 'protective function' rather than 'investigating crime', which suggests that in appropriate circumstances such a distinction might properly be drawn.

expressed by Lord Hamilton concerning the correctness of the decisions in *Ancell v McDermott*, *Clough v Bussan*, and even *Alexandrou v Oxford*. Reference was also made in *Gibson v Orr* to another Scots case, *Duff v Highland and Islands Fire Board* (1995) SLT 1362, where it was doubted, *obiter*, whether the operational decisions of fire fighters are immune from challenge.[23]

Accordingly, it is submitted that it can no longer be the law in England or Scotland that the public rescue services have no duty to rescue *because* the police are immune when undertaking the completely different task of fighting crime. *Smith's* case must be taken as compelling confirmation that *Hill's* 'core immunity' can only apply to the police and only when they are investigating or suppressing crime.

I suggested in my earlier article that the basic building blocks for constructing a theory of negligence liability were already in existence, and that a duty of professional rescue should be held to exist whenever a relevant authority[24] knows or reasonably ought to know that a vulnerable, identified or identifiable person is at real and immediate risk of serious physical harm, injury or illness.[25] On this basis, members of the emergency services would not be free, for example, to leave a sick person they know to be lying collapsed in the street and pass by on the other side, unlike the ordinary citizen who should continue to be free to choose whether or not to act as the Good Samaritan did.

Whether the courts will be prepared to recognise such a duty is, of course, highly uncertain. They may prefer to leave an unassisted casualty to pursue any claim under the Human Rights Act or even await the possible introduction of some statutory remedy.[26] However, were they to accept this invitation it does not, of course, follow that the emergency services would thereby be duty bound to attempt every rescue or that every failure would necessarily be an unreasonable breach of duty. It is to be expected that courts considering the question of breach would be especially sensitive to the nature of the emergency, the risks it presents to the rescuers, their professed skills and operational choices, and any constraints which competing priorities and limited time or resources impose. The burden the duty imposes should not be disproportionate and claimants should be expected to prove breach with convincing clarity. Developments are awaited.

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[23] Cf. *Capital and Counties plc v Hampshire County Council*, n 15. In *Smith*, Lord Bingham [at 55] reserved his opinion about the correctness of *Capital and Counties*.

[24] 'Relevant authority' means here the police, fire and rescue, and the coastguard services.

[25] Cf. Lord Bingham's 'liability principle' in *Van Colle* [at 44] cited earlier, see n 7 and text, which is similarly derived from human rights jurisprudence.

[26] See Lord Phillips' reference in *Smith* [at 102] to the Law Commission paper, No. 187, 'Administrative Redress: Public Bodies and the Citizen', which discusses the question whether losses caused by the exercise or failure to exercise state powers should be compensated.