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The Role of Civil Liability in Ensuring Police Responsibility for Failures to Act
after Michael and DSD

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When the police fail to act and harm results, a number of mechanisms may be used to hold both police forces and individual officers to account. These mechanisms may be found in criminal law (through prosecutions of the police or individual officers for offences such as misconduct in public office or violations of the Health and safety at Work etc. Act 1974), public law (for example, through inquests,¹ judicial review or investigations led by specialised bodies, such as the IPCC), or private law. It is the latter that this article proposes to focus on.

The private law mechanism that is best suited to holding the police accountable for their failures is a civil law claim for damages. However, the courts have been reluctant to impose liability in the tort of negligence for omissions, and have been particularly reluctant to find a duty of care on the police in omissions cases. This is considered in Part II. Therefore, the claim under section 8 of the Human Rights Act 1998, which is considered in Part III, has assumed great importance in the area.² Whilst this claim was initially relied upon in cases where the omissions of the police had led to the death of the Claimant, recent developments have led to an increased ability to claim for those Claimants who were injured by the actions of a criminal who was not apprehended due to police omissions.

This article argues that civil liability can play an important role in police accountability. Even if damages recoverable in claims against the police are limited, the ability for the

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¹ For an example where the police were directly involved in a death see <<http://dugganinquest.independent.gov.uk/>> (last visited 29th July 2015). See *Re McKerr* [2004] 1 WLR 807; *R. (on the application of Middleton) v West Somerset Coroner* [2004] 2 AC 182 and *R. (on the application of Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796 for the role of inquests in considering the broader role of state failures in deaths.

² Claire Mclvor, 'Getting defensive about police negligence: the Hill principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 *CUJ* 133.

courts to explore the actions of the police can contribute to bringing police failures to light. The systemic and operational failures of the police were exposed by the Court of Appeal in *DSD v Commissioner of Police of the Metropolis*,³ demonstrating that the civil claim can provide a vehicle through which police conduct can be evaluated. Similarly, in *Brooks v Commissioner of Police for the Metropolis*,⁴ the poor practice of the police in handling the friend of Stephen Lawrence after he witnessed the killing, was exposed in the judgement of the court, even though the police were not held liable for damages.⁵

I - The Problem of Police Accountability in Tort

Liability in Tort is premised on a wrong done by one to another. A duty, arising from either common law or statute, must be demonstrated to exist.⁶ In cases involving the police, and particularly cases concerned with police failures to act, the identification of a duty has proved challenging. This has been the case whether it is argued that the police owe a duty as an organisation, or are vicariously liable for the actions of individual officers. Duties have been simple to identify in cases involving intentional wrongdoing by the police (see for example *Browne v Commissioner of Police for the Metropolis*,⁷ a case of assault and battery). However, it has been much harder in cases of carelessness by the police. That the police as a whole, or as individuals, have fallen below the standard that one would like them to reach has often not been in doubt, and this has led to adverse findings in some of the public law mechanisms mentioned above. However,

³ *DSD v Commissioner of Police of the Metropolis* [2015] EWCA Civ 646.

⁴ *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495.

⁵ Note, however, that the failures of the police had been explored by a statutory inquiry led by Sir William McPherson (Sir William McPherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William McPherson of Cluny* (1999) Cm 4262-I, Chapter 5).

⁶ In the law of tort generally see W E Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (19th edn Sweet and Maxwell 2014) 1-003. In the tort of negligence the centrality of duty is acknowledged in the famous quotation by Lord Esher MR in *Le Lievre v Gould* [1893] 1 QB 491, 497: "A man is entitled to be as negligent as he pleases to the whole world if he owes no duty to them."

⁷ [2014] EWHC 3999 (QB).

identifying a tortious duty as a prerequisite to a claim in damages has proved more challenging, and this will be considered in more depth in Parts II and III.⁸

The classic case considered in this article is one where the police have (or could have) information regarding a dangerous individual and fail to take the proper steps to apprehend that individual. The case can either involve the knowledge of specific threats to the Claimant, or a more general awareness of the danger posed to members of the public, or a class of members of the public. The omission can be a failure to obtaining information regarding a suspect, the failure to properly process information that has been obtained, the failure to properly (or at all) carry out an operation to apprehend the suspect or the failure to detain a suspect after he or she has been apprehended. Following the failure the Claimant suffers injury or death at the hands of the dangerous individual. The police failure then becomes the focus of a claim (as well as, often, an investigation led by the IPCC and, in case of death, an inquest which includes consideration of the circumstances of the death, including the failures of public authorities to prevent the death⁹) and the possibility of police accountability through civil liability is raised.

It is not proposed that this article will examine police liability for their actions. This issue has proved easier for the courts to address, with a greater willingness to hold the police liable for failures to take care when acting. As Lord Keith noted in *Hill v Chief Constable of West Yorkshire* “there is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts...”¹⁰. For example, the police were held to be liable when they fired a CS gas canister into a shop containing, *inter alia*, flammable ammunition, whilst aware of the risk of fire, and without

⁸ See the comments of Lord Roger in *Brooks* para [38] that whilst “police officers investigating crime do not owe witnesses the supposed legal duties of care alleged by the respondent” they are “as a matter of professional ethics... expected to treat witnesses with appropriate courtesy and consideration, and may be open to disciplinary proceedings if they do not.”

⁹ See *R. (on the application of Middleton)*, above note 1.

¹⁰ *Hill v Chief Constable of West Yorkshire Police* [1988] 1 AC 53, 59.

appropriate firefighting equipment present.¹¹ Further, the police have been held liable for failures to act appropriately in their traffic management function.¹² In such cases the courts treat the police in the same way as any individual in the law of tort, and impose a duty on the basis of the duties established at common law, or, where the situation or the relationship between the parties is novel, the principles identified in *Donoghue v Stevenson*¹³ (where the claim relates to physical injury to a person or property) or *Caparo v Dickman*¹⁴ (where the acts of the police are alleged to have caused economic loss).¹⁵

However, there have been suggestions that even in cases involving police actions the status of the police means that it is not in the public interest to impose a duty of care. In *Robinson v West Yorkshire Police*,¹⁶ the police were held not to owe a duty of care to a bystander injured during a police operation. The claimant was knocked to the ground whilst the police were performing an arrest of a suspected drug dealer as a result of the violent struggle between the police and the accused. The Court of Appeal held that a duty of care should not be imposed in this situation, because to impose a duty would not be fair, just and reasonable.¹⁷ Lady Justice Hallett stated that “most claims against the police in negligence for their acts or omissions in the course of investigating and suppressing crime and apprehending offenders will fail the third stage of the Caparo test. It will not be fair just and reasonable to impose a duty.”¹⁸

¹¹ *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

¹² *Knightley v Johns* [1982] 1 WLR 349; *Gibson v Orr* 1999 SC 420.

¹³ [1932] AC 562

¹⁴ [1990] 2 AC 605.

¹⁵ Note that James Goudkamp, ‘A Revolution in Duty of Care’ (2015) 131 LQR 519 argues that *Michael* heralds the beginning of the end for *Caparo*. It is not proposed to engage with this argument in this article.

¹⁶ [2014] EWCA Civ 15

¹⁷ *Caparo* is, in this case, extended beyond its usual economic loss domain to include physical injuries, where a relationship of neighbourhood is usually sufficient (see Lord Lloyd (dissenting) in *The Nicholas H* [1996] AC 211, 230; “In physical damage cases proximity very often goes without saying. Where the facts cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair, just and reasonable. Otherwise there is a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all.”

¹⁸ *Ibid.* [46].

Robinson should be treated with caution. The decision was logically unnecessary, as the police were clearly not in breach of any duty that they owed, given the emergency nature of the situation and the social utility of arresting the drug dealer. The police would not be liable for the injuries suffered by the Claimant on entirely orthodox analysis. The shift to denying a duty of care should not be supported, and the courts should revert to the previous position in act cases,¹⁹ and hold that a duty of care exists. This would have the benefit of allowing the court to consider the police operation, and decide whether it fell below the standard expected, given the risk of harm and the cost (both financially and to the prevention of crime of taking precautions). This would allow the police account of the operation to be scrutinised at trial, even if the ultimate decision was that the police had not breached their duty (as would have been the case in *Robinson*). Whilst the courts might wish to deter defensive practices by giving clarity to police forces that a duty will not arise in performing arrest operations,²⁰ this would fail to appropriately incentivise operational planning and taking of care by the police.

In an omissions cases the courts have been even less willing to find a duty of care, and more willing to strike out a claim in negligence as disclosing no known cause of action. This article argues that the courts should make determinations about whether the police owe a duty on the basis of orthodox principles governing duties owed with respect to omissions and the acts of third parties, rather than special rules that apply to the police. It is suggested that this is the position following the decision of the Supreme Court in *Michael*.²¹ However, this approach would leave claimants unable to claim in negligence in cases where there is not a sufficient relationship between the Police and the perpetrator or the police and the Claimant. This means that the classic case will, more often than not, fail in negligence. Litigants must therefore seek another way to hold the police

¹⁹ See for example, *Rigby* above n11.

²⁰ Given that the police owed a duty under the Health and Safety at Work etc. Act 1974 section 3 to “conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety” it is submitted that there would be no further interference with operational command due to the existence of a duty in tort.

²¹ *Michael v Chief Constable of South Wales* [2015] 2 WLR 343.

accountable for their failures to act. The claim in the Human Rights Act 1998 ('HRA') for damages for public authorities' failure to respect the rights contained in schedule 1 of the Act is a useful vehicle in this respect. However, it has its weaknesses, and is less remedially generous 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.

II - Negligence Liability for Police Omissions

It is important to first consider the question of liability in light of the general principles of negligence law, which is to impose liability for omissions sparingly. This demonstrates that the position of public authorities can be considered without resorting to special immunities, with the police still not held liable for most loss caused by omissions. In the first subsection, therefore, the policy underlying the reluctance to impose liability for omissions in negligence more generally is considered.

In the second and third sub-sections we demonstrate that the courts have treated public authorities, and in particular the police, differently, and consider the circumstance in which the police have been held liable, considering *Hill*, *Brooks*, *Smith* and *Michael*.

The General Position of Liability for Omissions

Before considering the liability of the police in situations where they fail to act, it is necessary to consider the general position in relation to liability in two close interlinked areas; liability for omissions and liability for the acts of third parties. The omissions and third parties are linked doctrines because the act of a third party which causes the damage is alleged to result from an omission by the Defendant. Whilst it is possible to bring a claim for damage caused by a third party as a result of the act of the Defendant, these cases do not generally arise against the police. It is generally the position of the law of tort that neither an omission, nor the act of a third party, should form the basis of

a claim. The rationale for this stance was expressed in the speech of Lord Hoffmann in *Stovin v Wise*,²² where he offered moral, political and economic reasons for the reluctance to create duties in respect of omissions.²³ These arguments also apply to liability for the acts of third parties.

The moral argument suggested that the Defendants could be unjustly singled out amongst all those who could potentially have acted but didn't, probably on the basis of the depth of the Defendant's pocket. This objection is less likely to be applicable to public authorities than to members of the public accused of failure to act, as there is only one type of public authority with the power to investigate crime and apprehend criminals before harm is caused to future victims.²⁴ It is clear why the police are singled out, as their failure is likely to be a necessary precondition of the damage to the Claimant,²⁵ and therefore a cogent moral justification can be offered for imposing liability in respect of omissions.²⁶

The second objection is political. Lord Hoffmann expressed a libertarian objection to imposing liability for omissions, as this would require an individual to act in a particular way. This 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. However, the political objection applies to individuals rather than corporate bodies. The police are bound by the public law duties considered above to act in a particular way, and can be compelled to act by a mandatory order issued in judicial review

²² [1996] AC 923.

²³ *Ibid.* 943-944.

²⁴ A version of this argument might be utilised to resist the imposition of liability for omissions in circumstances where multiple authorities have omitted to act, either where the authorities (including the police, social workers and the probation service) are part of a formal governance network (such as Multi-Agency Public Protection Arrangements), or where multiple agency are engaged (including, for example, medical professionals), and are working together informally or are not working together.

²⁵ This article does not seek to engage with the complex causation questions to which this might give rise.

²⁶ Of course, the initially 'picked' Defendant will have a right to seek a contribution from the others who owed the Claimant a duty of care in negligence under the Civil Liability (Contribution) Act 1978, but unless contribution is sought from all potential defendants those brought in at this stage will also have a 'why pick on me objection.'

proceedings.²⁷ Individual officers, in their official capacity, are also subject to compulsion by court orders issued against the force. Ensuring liberty to act is therefore not a compelling justification for limiting the duty to police acts, rather than omissions.

Linked to this is the contractual argument. If the Claimant wished the defendant to act he or she could have negotiated a contract with them which required them to act. In that case the Defendant would receive payment for the restriction on their freedom of choice. The possibility of contract that compel the Defendant to act has been averted to in some police cases, where property owners and the police have been identified as able to enter into contracts which extend the police's duty beyond those public duties that are identified in Part II above to include so-called "special police services."²⁸ (For example, the police may contract with the owner of property threatened by striking workers²⁹ or with a football club to provide officers inside the ground beyond those necessary to fulfil the public law duty.³⁰ However, such a contract is unlikely to be open to the member of the public killed or injured as a result of a police omission. Where the member of the public is a random victim, and is therefore unaware of any risk, he or she is unlikely to contract to receive a higher level of protection. Where the member of the public has been targeted the police are unlikely to enter into such a contract. Further, it is difficult for the police to contract not to act negligently. Whilst this may give the Claimant a remedy in the event of negligence, it is unlikely to prevent harm, particularly in the non-targeted cases. The possibility of contract, whilst real, therefore does not provide a reason not to impose liability for police omissions.

The third objection is economic. The basis of this objection is economic efficiency. Economic analysis of tort law suggests that the function of tort law should be to enable

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²⁸ See further Stephen Weatherill, 'Buying special police services' [1988] PL 106.

²⁹ *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270

³⁰ *Harris v Sheffield United Football Club Ltd* [1988] 1 QB 77, but see *Leeds United Football Club v The Chief Constable of West Yorkshire Police* [2014] QB 168 for the position as to the provision of police outside the ground.

externalities (costs imposed on third parties by the actions of the Defendant) to be internalised. Costs are internalised through the mechanism of damages. By allowing liability for omission the costs would not be placed on the original parties to the transaction, but would instead be placed on a different third party, meaning that the transaction would not be optimised. How this applies to a case of police omission is not this clear. Whilst the imposition of liability on the police will lead to costs being imposed on a stranger to the perpetrator of violence, it is often the case that the costs cannot be imposed on the perpetrator, as the perpetrator is likely to be an individual of little means, and uninsured for their criminal acts. Therefore, the costs will be borne by the victim (or, in fatal cases, the victim's family and dependants), and the costs cannot be internalised. Therefore, an analysis that prevents a duty because of a failure to ensure economic efficiency cannot ignore that the transaction is unlikely to be made economically efficient (by tortious liability or otherwise). Therefore other considerations must arise.

Further, Lord Hoffmann's rationales appear best suited to cases where the Defendant is a pure bystander. An example of such a case was given by the Privy Council in *Yuen Kun Yeu v Attorney-General of Hong Kong*, where Lord Keith made clear that no duty of care arose for "one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning."³¹ A case of police omissions may not be such a case. The police do play a more than incidental part in the loss due to their inaction. In a cases such as *Michael v Chief Constable of South Wales* the police do not simply fail to save a person walking off a cliff, or drowning in the sea. However, in other, they may be more remote than Lord Keith's hypothetical bystander. The case of *Hill v chief constable of west Yorkshire*, discussed below, might be such a case. However, it is necessary to consider situations where a person, such as a public authority, has either a special

³¹ [1988] A.C. 175, 192.

position or a greater level of involvement in the chain of events leading to the damage (or both) in more depth.

Public Authority Omissions

The general position of the courts has been to deny that a public authority owes a duty of care to an individual in case of omission.³² Wilberg identifies two policy objections to the imposition of duties on public authorities in respect of their omissions; the “defensive practice concern” and the “conflict of duties concern.”³³ The defensive practice concern holds that the imposition of a duty of care would lead to the public authority acting defensively and therefore failing to perform valuable functions, to the detriment of the public. The conflict of duties concern, also suggested by Booth and Squires,³⁴ suggests that a duty of care will not be imposed where “the claimed duty of care runs directly counter to a primary public duty.”³⁵ An example of such a conflict is a conflict between the duty of social services to children and a proposed duty of care to those accused of child abuse,³⁶ or the conflict between the duty to care home residents and a proposed duty of care to care home operators.³⁷

A third policy objection may also be offered. It is a variation of the economic argument which may be called the “limited resources concern.” Public authorities are funded through taxation and have a finite budget to spend. Imposing a duty of care on a local authority would require the courts to consider whether the public authorities chosen spending was the best way to deploy finite resources.³⁸ If resources are limited and duties freely imposed, an authority may be placed in a catch-22 situation, with Claimants subject to potential risks able to bring a claim if the risk eventuates, and a broad number of potential Claimants able to second guess resource allocation decisions.

³² See e.g. *Stovin v Wise*, above note 22; *Gorringe v Calderdale MBC* [2004] 1 WLR 1057; *Mitchell v Glasgow City Council* [2009] 1 AC 874.

³³ Hanna Wilberg, ‘Defensive practice or conflict of duties? Policy concerns in public authority negligence claims’ (2010) 126 LQR 420

³⁴ Cherie Booth and Dan Squires, *Negligence Liability of Public Authorities* (OUP 2006).

³⁵ Wilberg, above note 33, 422.

³⁶ *D v East Berkshire* [2005] 2 AC 373

³⁷ *Jain v Trent Strategic Health Authority* [2009] 1 AC 853.

³⁸ This seems to be a factor in the decision of the House of Lords in *Tomlinson v Congleton BC* [2004] 1 AC 46.

The Courts have shown themselves willing to impose duties in circumstances where the Defendants have a special relationship with either the Claimant or the Third Party. The classic example of such a duty is the duty of care imposed in *Home Office v Dorset Yacht*.³⁹ In that case the court held that a duty of care was owed by the Defendant in respect of damage caused during an escape from custody by individuals lawfully detained by them. The relationship between the Defendants and the borstal boys was sufficient to give rise to a duty of care.

Similarly, a public authority may be held liable in negligence if it can be demonstrated that they have assumed responsibility with regard to an individual.⁴⁰ Of course, assumption of responsibility is a misnomer; responsibility is not assumed, rather it is imposed by the court. A duty arises where the Claimant can demonstrate that they reasonably relied on the words or actions of the Defendant that they will act for their benefit. Assumption of responsibility as a touchstone of liability in police cases is discussed in *An Informer v Chief Constable*,⁴¹ and the misstatement cases which explore when such assumption arises can be a valuable touchstone in determining whether a duty exists.⁴² The words or actions must be directed to the Claimant in particular rather than to the public at large.⁴³

This was an alternative argument in *Michael*, where it was argued that the conduct of the police call handler was sufficient to give rise to a duty of care. However, whilst the courts have been willing to find duties on the basis to other police officers⁴⁴ and to informants,⁴⁵ they have rarely found an assumption of responsibility to members of the public on factual grounds, as it is challenging to show the necessary assumption. In *Michael* itself,

³⁹ [1970] AC 1004

⁴⁰ *Hedley Byrne v Heller* [1964] AC 465 and *White v Jones* [1995] 2 AC 207.

⁴¹ [2013] QB 579.

⁴² Cases such as *Hedley Byrne v Heller* [1964] AC 465.

⁴³ *Yuen Kun Yeu*, above note 31

⁴⁴ *Costello v Chief Constable of Northumbria* [1999] ICR 752.

⁴⁵ *An Informer v Chief Constable* [2013] QB 579, at least as to the physical wellbeing of the informant in that case, and see Simon McKay, 'Issues surrounding the duty of care owed to covert human intelligence sources' (2014) 2 *Covert Policing, Terrorism and Intelligence Law Review* 129.

the statement said to constitute the assumption was made by an operator employed by a different police force than the force that covered the area within which Ms Michael was geographically situated. Further, the statement itself was not sufficiently clear and unambiguous to amount to an assumption of responsibility upon which it was reasonable to rely.

Police Liability for Omissions

The decision in *Dorset Yacht* was applied by the House of Lords in *Hill v Chief Constable of West Yorkshire*.⁴⁶ The case arose out of the murder of the claimant's daughter by the Yorkshire Ripper, a notorious serial killer. It was claimed that the police had failed to properly investigate the previous killings carried out by the Ripper, and if they had the victim, who was the last person murdered by the Ripper, would have been apprehended and the victim would have survived. Lord Keith noted that Lord Diplock in *Dorset Yacht* had limited the duty in both time and space, holding that the duty extended only to those whose property could foreseeably be damaged in the immediate act of escape, and not to those who suffered harm during the period that the prisoner was free from lawful custody. Given this dicta, he held that the police should not be held liable for the damage caused by an unknown criminal to an unknown victim. The relationship between the police and the victim was not one of sufficient proximity. As Lord Toulson notes in *Michael*, this much is uncontroversial,⁴⁷ and it is clear that a random victim of crime must look somewhere other than the law of negligence.⁴⁸

However, Lord Keith went further, examining the special status of the police and considering whether policy justifications would be sufficient to displace any presumption of duty that arose under the first stage of the then duty test set out in *Anns v Merton*.⁴⁹ Lord Keith held that the imposition of a duty of care on the police could not be said to be

⁴⁶ Above note 10.

⁴⁷ *Michael*, above note 21, para [42].

⁴⁸ See part III below.

⁴⁹ [1978] AC 728.

in “the general public interest.” Lord Keith raises the defensive practice concern, arguing that “the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind,” and the limited resources concern, suggesting both that the courts would be required to question “what is the most advantageous way to deploy the available resources” and that imposition of liability would involve “significant diversion of police manpower and attention from their most important function, that of the suppression of crime.”⁵⁰ Therefore, he concluded that the police were “immune from an action of this kind.”⁵¹

The language of immunity has been criticised. It appears to suggest that the police are automatically protected from liability in a case involving a failure to act. This is certainly how the holding was interpreted by the ECHR in *Osman v UK*,⁵² where the immunity was held to be a breach of article 6, although the later decision of *Z v UK*⁵³ accepted that this was based on a misinterpretation of the concept of immunity. Lord Keith did not intend that there should be no duty of care owed by the police in any circumstances, simply that there were strong policy factors that pointed to a duty of care not existing in the case of police failures. This is the way that *Hill* has been interpreted in later cases.

The decision in *Hill* was applied in cases where the police were held not to owe a duty of care to the victims of murder by a violent, unstable, teacher who had specifically threatened violence,⁵⁴ and the CPS and Police were held not to owe a duty of care to those against whom they made a decision to prosecute.⁵⁵ Further, immunities, such as that accorded to barristers in *Rondel v Worsley*,⁵⁶ were successfully challenged before

⁵⁰ *Hill*, above note 10, 1506.

⁵¹ *Ibid*

⁵² (1998) 29 EHRR 245.

⁵³ (2002) 34 EHRR 3.

⁵⁴ *Osman v Ferguson* [1993] 4 All ER 344.

⁵⁵ *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, CA.

⁵⁶ [1969] 1 AC 191.

the courts.⁵⁷ The position of *Hill* came to be challenged in two cases before the House of Lords, *Brooks*⁵⁸ and *Smith*.⁵⁹

Brooks was a claim brought by a friend of Stephen Lawrence who witnessed his murder and was subsequently accorded little or no support by the police, and indeed subjected to suspicion and bias judgment. This led him to suffer post-traumatic stress disorder. His claim in negligence reached the House of Lords, where it was rejected. Whilst *Hill* was seen as too broad, and the deference to the actions by the police a relic of a more trusting era,⁶⁰ police activities that were inextricably bound up with the investigation of crime should not give rise to a duty of care. It would not be fair just and reasonable to do so, except in cases of "outrageous negligence."⁶¹

Smith was a case concerning a Claimant who received persistent and threatening messages from an ex-partner threatening violence, including threats to kill. The police were informed of the messages, and of the home address of the sender. The police performed a desultory investigation, and did not examine the messages or take a statement. The Claimant was then attacked by the ex-partner, sustaining severe injuries. The Court held that no duty of care arose, despite the high level of connection between the police and the Claimant. It would not be fair just and reasonable to impose a duty of care, because if a duty were imposed on the police in circumstances where a threat was made there would be a "conflict of interest between the person threatened and the maker of the threat... [and] the police, subconsciously or not, would be inclined to err on the side of over-reaction" and "the desirability of safeguarding the police from legal proceedings which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating

⁵⁷ *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

⁵⁸ *Brooks*, above note 4.

⁵⁹ *Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex Police* [2009] 1 AC 225.

⁶⁰ *Brooks* para [28].

⁶¹ *Brooks* para [34].

crime."⁶² The facts of *Smith*, shocking though they are, do not meet the standard of outrageous negligence where a duty was said to arise by Lord Steyn in *Brooks*.⁶³

The decisions in *Brooks* and *Smith* are based firmly on the desire to avoid a conflict of duties. The duties that the proposed duty would conflict with are both the duty of the police to the public as a whole, and the duty of the police to members of the public individually, including the duty to the person accused of making threats. The police have a public law duty to "take all steps that appear to them necessary for keeping the peace, for preventing crime, or protecting property from criminal injury"⁶⁴ and to "enforce the law of the land."⁶⁵ It is clear from the speech of Lord Steyn in *Brooks* that he sees the primary duty of the police as "the preservation of the Queen's peace."⁶⁶ Further,

"the police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence... A retreat from... *Hill* would have detrimental effects for law enforcement... legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions.... would be impeded. It would... lead to an unduly defensive approach in combating crime."⁶⁷

Whilst the defensive practice concern is reflected in the last sentence, the problem of defensive practices are seen through the lens of the conflict of duties concern, and the focus of the court is on the defensive practice that would stem from a conflict of duties.⁶⁸

⁶² *Smith* [132]-[133] per Lord Brown.

⁶³ *Smith* [101] per Lord Phillips.

⁶⁴ *Glasbrook*, above note 29.

⁶⁵ *R v Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 Q.B. 118, CA, 136 per Lord Denning MR.

⁶⁶ *Brooks* para [30].

⁶⁷ *Brooks* para [30].

⁶⁸ Wilberg, above note 33.

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. Bowman and Bailey, considering public authorities more generally, have argued that such special treatment is wrong,⁶⁹ and that duties owed by public authorities should be considered on the basis of the ordinary negligence principles relating to omissions and liability for the acts of third parties.⁷⁰ *Michael* appears to take the law in this direction.

Michael was a claim brought by the estate and dependants of Joanna Michael, who was killed by her former partner. The former partner had visited Ms Michael's house and found her with her new partner. He hit Ms Michael and drove the other man home. Before he left he said that when he returned he would kill Ms Michael. At this point Ms Michael phone the police. Due to a miscommunication between the police call handling centres, the call was grade as requiring response within 60 minutes, rather than requiring an immediate response. 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 dealt with violence by the ex-partner towards Ms Michael, and the actions of both police forces were criticised heavily in an investigation conducted by the IPCC.

Ms Michael's estate and dependants brought claims in negligence and under the Human Rights Act 1998. The Supreme Court, in a 5-2 decision (Lord Kerr and Baroness Hale

⁶⁹ 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.

⁷⁰ They argue that any special consideration can be raised when considering the standard of care, so that the public authority will be able to adduce evidence of the socially useful function that they carry out in order that the standard of care will be lowered.

dissenting) struck out the claim in negligence whilst (unanimously) allowing the claim under the Human Rights Act to proceed to trial.

In the judgment of Lord Toulson, the foundation of the claim as a failure to prevent the act of a third party was recognised. He begins his consideration of whether the police owed a duty to Ms Michael with *Smith v Littlewoods*,⁷¹ and the proposition that English law does not generally impose a duty of care in respect of injury caused by the act of a third party.⁷² *Smith v Littlewoods* makes clear that in such a case there is insufficient proximity between the Defendant and the third party. Taking this general principle as a starting point, the judgment then questions whether there is anything in the facts of Ms Michael's case that means that a duty of care should be held to exist. Having reviewed the authorities, and considered the arguments of the appellant, the interveners and the dissenters, Lord Toulson holds that there is not. There is no duty of care because there is insufficient proximity between the Claimant and the police. Lord Toulson accepts that criticisms of statements "that the imposition of a duty of care would inevitably lead to an unduly defensive attitude by the police" have force,⁷³ particularly when they are not supported by evidence, but do not ultimately matter as the court is concerned with the question of proximity rather than whether it is fair, just and reasonable.

The reluctance of the Supreme Court to impose a duty of care on ordinary negligence principles in *Michael* was challenged by the dissenters, Lord Kerr and Baroness Hale. Whilst accepting the premise of the majority judgment, that the general law of negligence means that omissions and acts of third parties do not generally give rise to a duty of care they sought to argue that Claimants in the position of Ms Michael had a relationship of proximity sufficient to give rise to a duty of care. In Lord Kerr's judgment, where a member of the public has a "closeness of association... [which] must transcend the ordinary contact that a member of the public has with the police force in general" a

⁷¹ [1987] AC 241.

⁷² *Michael* para [97].

⁷³ *Michael* para [121].

duty of care can arise.⁷⁴ Establishing such a relationship is a question of fact. The court must, in Lord Kerr's view establish whether the police have been alerted to "the urgent need to take action that it within their power to take."⁷⁵ The scope of the duty is limited as the information must be specific, convey that serious harm is likely to befall a particular victim and that the threat is imminent.⁷⁶ The proposed duty would only extend to personal injury, and not to damage to property.⁷⁷

Lord Kerr's test was criticised by Lord Toulson as being logically inconsistent,⁷⁸ with, inter alia, a person threatened with shooting owed a duty of care, but the innocent bystander caught up in the shooting and injured or killed not owed such a duty. Lord Kerr rejects this criticism, arguing that the test of proximity is fact dependant, and that in the case of the bystander "the police have no notice of impending harm on which to act."⁷⁹ Lord Toulson's critique has force; it is hard to see the fairness in a doctrine that allows one victim of a perpetrator to claim but not another; and which allows a claim to be made if you are beaten up after the police have been informed of specific threats of violence but not if your house is burned down after specific threats of arson. However, the law is "a maze not a motorway"⁸⁰ and a line must be drawn somewhere. It may be that the broader view of proximity adopted by the dissenters does justice in more cases, even though it leaves some islands of unfairness.

Applying this test to the facts, Lord Kerr would have imposed a duty of care on the police, as the phone call by Ms Michael identified specifically that serious harm was likely to befall her in the near future, and the police had the power to take action to protect her. The duty would not depend "on the happenstance of the telephonist uttering words that can be construed as conveying an unmistakable undertaking that the police will

⁷⁴ *Michael* [167].

⁷⁵ *Michael* [168].

⁷⁶ *Michael* [168]-[169].

⁷⁷ *Michael* [172].

⁷⁸ *Michael* [137].

⁷⁹ *Michael* [170].

⁸⁰ Max Weaver, 'A Maze not a Motorway' (1970) 33 MLR 691.

prevent the feared attack." This formulation, which mirrors that required for an assumption of responsibility to arise, is rejected as too narrow.

Summary

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. The dissenter's test, which resembles the test propounded by Lord Bingham in *Smith*, would allow some Claimants to recover. However, its application is extremely fact dependant, with a need for a close examination of all the circumstances needed. It would change the results in *Michael*, perhaps would change the result in *Smith* (although imminence would be an issue), but perhaps not *Brooks* and definitely not *Hill*. Despite support for such a test by the dissenters, it seems unlikely that such a proximity test will be adopted in the near future.

Following *Michael*, it can be argued that the common law is simple. The special position of the police is not determinative of the existence of a duty of care. However, it will be rare for a duty of care to arise due to the reluctance of the courts to impose liability in respect of omissions and acts of third parties continues. Factual conundrums will arise, but the test of proximity is simple to spell out. However, it means that Claimants will continue to find it challenging to bring a successful claim against the police if they suffer loss as a result of a police omission and/or the act of a third party. Therefore they must seek an alternative remedy if they wish to bring their claim before a court. It is therefore necessary to turn to the remedy provided by section 8 of the Human Rights Act 1998.

III - Human Rights Liability for Liability in Damages

Where a public authority has violated the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), or at least those set out in schedule 1 of the Human Rights Act 1998 it is possible to bring a claim for

damages. Liability in damages under the Human Rights Act is created by section 8. Section 8 creates judicial remedies for violations of the rights set out in Schedule 1, and provides that a court “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”⁸¹ Section 8(3) provides that before awarding damages under section 8 it is necessary that the “court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.”

The rights set out in schedule 1 may have positive and negative aspects.⁸² Negative obligations require the state to refrain from acting in a way that infringes the right. Positive obligations are those which require member states to take action.⁸³ The imposition of positive obligations is seen as necessary to ensure the effectiveness of the rights set out in Convention.⁸⁴ On the other hand, the objection to the imposition of positive obligations are similar to the arguments against the imposition of liability for omissions in tort; that they have the potential to cause defensive practice, and are morally, politically and economically unjustified.⁸⁵ The content of the positive obligations under articles 2 and 3, and the extent to which states have to act, is explored below.

Damages under section 8 are at the discretion of the court, which has a power to award damages where this is necessary to afford satisfaction to the Claimant.⁸⁶ This can be contrasted with the claim in negligence where the court must award damages representing the loss that is caused, both factually and legally, by the breach. The claim under section 8 should not therefore be seen as a simple tort action,⁸⁷ and must be distinguished, both in substance and in form, from the claim in negligence.⁸⁸

⁸¹ On the damages claim generally see *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673.

⁸² For an account of the development of positive obligations see Alistair Mowbray, [The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights](#) (Hart, 2004).

⁸³ Drawing on the definition proposed by Judge Martens (dissenting) in *Gul v Switzerland* (1996) 22 EHRR 93, 118-119.

⁸⁴ Mowbray, above note 82, 4-6.

⁸⁵ Discussed above text to note 22ff.

⁸⁶ See Duncan Fairgrieve, ‘The Human Rights Act 1998, damages and tort law’ [2001] PL 695 and Richard Clayton QC, ‘Damage limitation: the courts and the Human Rights Act damages’ [2005] PL 429.

⁸⁷ Contra Lord Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: the Knight’s Move’ (2000) 116 LQR 380.

⁸⁸ *DSD*, above note 3, [65]

The Court of Appeal in *DSD* notes that there are important differences between the goal of the HRA and the goals of liability in the tort of negligence.⁸⁹ The tort of negligence is intended to provide corrective justice, compensating loss after it has been suffered, putting (insofar as is possible) the Claimant in the position that they would have been without suffering the injury. This is not the goal of the Human Rights Act. The Human Rights Act aims to ensure that public authorities afford a minimum standard of human rights protection to those within their sphere. The loss suffered by the claimant is not the centrepiece of the claim, instead the remedy is meant to be vindicatory.

This means that the measure of damages awarded under section 8 is unlikely to be as substantial as the damages awarded in negligence. Therefore, a claim in negligence will be preferable where possible, but the Human Rights Act claim will provide a vehicle through which the claim can be investigated even in circumstances where a negligence claim will fail. For example, in *Michael*, despite the rejection of the claim in negligence, the claim brought under the Human Rights Act, alleging that the police violated article 2 of the ECHR was allowed to proceed to trial, in order that it could be established whether the facts disclosed a breach of the duty under article 2. In particular, there was a conflict of evidence about what the call handler knew, and this was not suitable for resolution at the summary judgment stage.⁹⁰

Article 2

Where the Claimant dies a claim may be mounted on the basis that the police failed in their duty under article 2 of the European Convention on Human Rights. Article 2 provides that "everyone's right to life shall be protected by law." Whilst the article includes a negative element, making clear that the state should not intentionally take life, in certain limited circumstances, the state has a positive obligation to protect the life of a person.

⁸⁹ *DSD* [64] and see also *Greenfield* paras [3]-[4] per Lord Bingham.

⁹⁰ *Michael* [139].

Two types of state failure may give rise to liability under the positive limb of article 2. The first type of failure is systemic, where the state has failed to put in place the laws or procedures necessary to protect life. A state which did not have a legal prohibition on murder would clearly be in breach of article 2 on this basis. However, a more valuable tool is the limb of article 2 which imposes liability in individual cases, where the Claimant is at risk of death from the criminal actions of another, and the state fails to take action to prevent this. The European Court of Human Rights considered the circumstances in which such a claim could arise in *Osman v UK*.⁹¹ It was held that for liability for breach of 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."⁹² Further, it almost goes without saying that the breach by the police must have resulted in death. On the facts in *Osman*, there was held to be no violation of article 2.

After the implementation of the Human Rights Act, the House of Lords in *Van Colle*⁹³ applied the test from *Osman* in circumstances where the Claimant's son was killed by the accused against whom he was due to give evidence. Lord Hope noted that the test in *Osman* was expressed in "clear terms" the satisfaction of which depended on an application of the test to the facts of the case.⁹⁴ The key question is what the authorities knew (or should have known) at the time of the alleged breach, rather than examining the facts with the benefit of hindsight as "it is all too easy to interpret the events which preceded it in the light of [the tragic death] and not as they appeared at the time."⁹⁵ On the facts of *Van Colle* it was held that the Police could not have been expected to identify

⁹¹ Above note 52.

⁹² *Osman v UK*, above note 52, [116]

⁹³ *Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex Police* [2009] 1 AC 225.

⁹⁴ *Van Colle* [66] per Lord Hope.

⁹⁵ *Van Colle* [32] per Lord Bingham.

a real and immediate risk to the witnesses' life. The offences were minor, and the accused did not have a history of violence against witnesses. Therefore, there was not breach of Article 2. When the case went to Strasbourg the ECHR agreed as there could not be said to be "a decisive stage in the sequence of events leading up to the tragic shooting of Giles Van Colle when [the responsible police officer] knew or ought to have known of a real and immediate risk to the life of Giles Van Colle from [the perpetrator]."96

Satisfying the *Osman* test is a high bar. As noted by Lord Carswell in *In Re Officer L* the real and immediate test is one that is "not readily satisfied", the threshold being "high."⁹⁷ However, Article 2 has been held to be breached in some cases. The ECHR considered that the *Osman* test was satisfied in *Kontrová v Slovakia*,⁹⁸ where the police failed to respond appropriately to a situation involving threats to kill and physical violence between a husband and other members of his family, where the husband eventually shot his two children and committed suicide. The facts underpinning the claim are key, and the repeated interactions between the police and the family, leading to repeated opportunities to prevent the fatalities.

Article 3

Where the police omission does not result in a fatality, a claim for breach of article 2 is not available. However, a claim for breach of article 3 may be advanced by a victim of non-fatal violence resulting from the failure of police to apprehend the perpetrator of violent crime. Article 3 provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." Just as Article 2 includes a positive element, so too does Article 3. The positive obligation in Article 3 is set out by the Grand Chamber of

⁹⁶ *Van Colle v UK* (2013) 56 E.H.R.R. 23, [103].

⁹⁷ *In re Officer L* [2007] 1 WLR 2135 para [20] per Lord Carswell.

⁹⁸ [2007] Inquest L.R. 286.

the ECHR in *O’Keeffe v Ireland*.⁹⁹ The authorities must “conduct an effective official investigation in alleged ill treatment inflicted by private individuals which should, in principle, be capable of leading to the establishment of the facts and to the identification and punishment of those responsible.”¹⁰⁰

This test was considered by the Court of Appeal in *DSD*.¹⁰¹ In *DSD* the claimants were victims of a serial rapist, who committed over 100 rapes whilst acting as a taxi driver. The Metropolitan Police’s investigation into their reported rapes (and rapes reported by other victims) was exceptionally poor. They failed to provide proper training, they failed to properly supervise and manage officers, they failed to connect information about the reported rapes that could have led them to the rapist much earlier, they failed to have in place proper systems for handling victims and they failed to allocate appropriate resources to investigate the rapes. There were also a series of operational failures (failure to interview the suspect; failure conduct proper searches; failure to follow up CCTV and failure to properly record the reports by the Claimants as serious sexual offences) in the investigation of the rape reported by each of the Claimants.¹⁰²

It is important to note that a claim may only be brought where the Claimant suffers torture or inhuman or degrading treatment or punishment. There can be no claim under article 3 if the crime resulting from alleged police failures did not lead to personal injuries rising to this level. Further, it should be noted that, in contrast to the *Osman* test, which examines the failure to act on information, the test under article 3 focuses on the effectiveness of the investigation. Whilst it seems clear that an investigation which uncovers all pertinent information to apprehend a culprit but which fails to take action would be in breach of the investigative requirement, the procedural rather than

⁹⁹ (2014) 59 EHRR 15.

¹⁰⁰ *O’Keeffe* para [172].

¹⁰¹ *DSD*, above note 3.

¹⁰² These are discussed in detail in the first instance judgment of Green J. See *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) paras [244]-[313].

substantive focus of the obligation raises challenges in determining when the article 3 obligation is breached.

The Court of Appeal approved the comments of Green J at first instance and held that "A failure to perform an individual act that really could have been performed will not trigger liability [for violation of Article 3] if: (a) notwithstanding that omission the investigation viewed in the round did in fact lead to the arrest of the suspect within a reasonable time; or (b) the investigation (even absent a prosecution) may still be said to encompass a series of reasonable and efficient steps. This is an important point since the Strasbourg case law repeatedly emphasises that the police must be accorded a broad margin of appreciation in the choice of means of investigation."¹⁰³ The test is therefore a factual one; was the investigation, taken as a whole, a reasonable and efficient one, even if there were a few part of the investigation that was not reasonable and efficient. Similarly to the *Osman* test the conclusion should not be altered by hindsight.

It seems clear that the test focuses on the means and not the end. It is the investigation that matters, not the prosecution of an individual. The successful prosecution of the culprit, as eventually happened in *DSD*, does not mean that the duty to conduct an effective investigation has been satisfied.¹⁰⁴ Even a more timely prosecution does not prevent a finding of breach. Conversely, a failure to successfully prosecute does not necessarily demonstrate breach. In *DSD* clearly the effective investigation requirement was clearly not satisfied in the light of the litany of systemic and operational failures. Therefore the claim succeeded. In contrast, in *Koraou v Greater Manchester Police*, a case heard alongside *DSD*, the investigation was held to have been reasonable and efficient despite some failures by the police.

One final matter should be considered. The obligation in under article 3 does not arise in all cases. In *DSD* the Court of Appeal held that "not every allegation of ill-treatment

¹⁰³ *DSD* [69]

¹⁰⁴ *DSD* para [56].

which meets the Article 3 threshold calls for a full criminal investigation.”¹⁰⁵ Cases where the harms is caused by negligence or where the victim does not want an investigation are suggested as examples. As Laws LJ notes, the second example clearly cannot be determinative, as the allegation against a single individual may be illustrative of harm to many more, and in such cases an investigation should be mounted. However, the Court of Appeal held that, notwithstanding the fact specific nature of the question of whether an investigation was necessary in some cases, a proper investigation is a “mandatory requirement... in a typical or paradigm case of serious violence.”¹⁰⁶ Applying this to the facts, the rapes at issue in *DSD* were cases where a proper investigation should have been conducted.¹⁰⁷

Conclusions

It is difficult for Claimants to bring a claim against the police in negligence because they often struggle to demonstrate sufficient proximity of relationship on the facts. Following *Michael*, establishing this proximity is the central consideration for Claimants. It requires close examination of the factual relationship between the Claimant and the police, and the police and the perpetrator. Whilst the dissenters in *Michael* provided a broader duty, which would have resulted in liability in that case, the lines that are drawn by Lord Kerr’s principle are perhaps less clear than those identified by the majority. So whilst justice for Claimants is, in some senses, better served by the dissenters (although a majority of Claimants that suffer loss due to police failures will remain unable to claim) legal certainty is better served by the majority.

The restricted ambit of the claim in negligence increases the importance of the availability of the claim under the Human Rights Act. Whilst claims under both article 2 and article 3 are challenging, they provide an avenue through which Claimants can seek

¹⁰⁵ DSD para [61].

¹⁰⁶ DSD para [63].

¹⁰⁷ DSD para [64].

to challenge the actions and inactions of the police. By allowing claims, such as the claims in *Michael* and *DSD* to come to trial, the Human Rights Act claim is a mechanism through which the courts are able to adjudicate on police practices and judge whether they are reasonable.

By vindicating the rights of those harmed by police omissions, the claim under the Human Rights Act allows the courts to influence future police practice, and to award a measure of compensation for loss, even though damages are more limited than those awarded in tort. The Human Rights Act claim fills a gap, allowing a claim to be brought where negligence would not. It must be questioned whether the imposition of human rights liability has the potential to lead to the negative consequences that inform the reluctance to impose a duty of care in negligence. Whilst it is possible that a Human Rights Act duty would “inhibit a robust approach in assessing a person as a possible suspect, witness or victim” and lead to defensive policing,¹⁰⁸ the standard of care is low, with the police expected to act to effectively investigate a claim. Provided that the investigation could, in principle, expose the facts of the crime and lead to a prosecution it will be effective. In all cases this should tally with the goal of the police in conducting an investigation. As seen above, the Claimant failed in both *Osman* and *Van Colle*, and the margin of discretion awarded to the state in *DSD* is wide (although the failures were so awful that the test was satisfied). If the police act in accordance with their own procedures they should not fear liability under the Human Rights Act, although education as to the standard of care required would perhaps be useful to prevent defensive practice through fear of liability. The HRA claim is a valuable addition to the Claimant’s armoury, and provides an important avenue, along with those in public and criminal law, for ensuring police accountability.

¹⁰⁸ *Brooks* para [30], quoted above at text to note 67.

