Michael v South Wales Police Supreme Court Decision

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Headlines

- By a 5:2 majority, the Supreme Court affirms the Court of Appeal decision in Michael.
- Police did not owe Miss Michael a duty of care.
- The HRA claim should be allowed to proceed.
- Majority judgment – Lord Toulson
- Minority – Lady Hale and Lord Kerr

Lord Toulson (Majority)

[44] An "immunity" is generally understood to be an exemption based on a defendant's status from a liability imposed by the law on others, as in the case of sovereign immunity. Lord Keith's use of the phrase was, with hindsight, not only unnecessary but unfortunate. It gave rise to misunderstanding, not least at Strasbourg. In Osman v United Kingdom (1998) 29 EHRR 245 the Strasbourg court held that the exclusion of liability in negligence in a case concerning acts or omissions of the police in the investigation and prevention of crime amounted to a restriction on access to the court in violation of article 6. This perception caused consternation to English lawyers. In Z v United Kingdom (2001) 34 EHRR 97 the Grand Chamber accepted that its reasoning on this issue in Osman was based on a misunderstanding of the law of negligence; and it acknowledged that it is not incompatible with article 6 for a court to determine on a summary application that a duty of care under the substantive law of negligence does not arise on an assumed state of facts.

Lord Toulson (Majority)

[29]-[70] Reviews case law on possible police liability

[71]-[81] Considers other emergency services.

[82]-[94] Considers comparative case law.

[97]ff applies basic negligence principles (including other public authority cases).

[122]ff Human Rights and Tort

Lord Toulson (Majority)

[103] ‘From time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly.’

Lord Toulson (Majority)

[114] ‘It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.’

Lord Toulson (Majority)

[116] ‘The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.’

Lord Toulson (Majority)

[118]ff rejects special exception argued for in favour of domestic violence cases.

Lord Toulson (Majority)

[122] ‘The only consequence of which one can be sure is that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two’

Lord Toulson (Majority): Human Rights and Tort: [122]ff

[125] 'The suggested development of the law of negligence is not necessary to comply with articles 2 and 3. On orthodox common law principles I cannot see a legal basis for fashioning a duty of care limited in scope to that of articles 2 and 3, or for gold plating the claimant's Convention rights by providing compensation on a different basis from the claim under the Human Rights Act 1998. Nor do I see a principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the Convention'

Lord Toulson (Majority)

[130] 'If it is thought that there should be public compensation for victims of certain types of crime, above that which is provided under the criminal injuries compensation scheme, in cases of pure omission by the police to perform their duty for the prevention of violence, it should be for Parliament to determine whether there should be such a scheme and, if so, what should be its scope as to the types of crime, types of loss and any financial limits. By introducing the Human Rights Act 1998 a cause of action has been created in the limited circumstances where the police have acted in breach of articles 2 and 3 (or article 8). There are good reasons why the positive obligations of the state under those articles are limited. The creation of such a statutory cause of action does not itself provide a sufficient reason for the common law to duplicate or extend it.'

Lord Toulson v Lord Kerr

[133] 'Lord Kerr notes that this suggested principle might at first sight appear similar to Lord Bingham's liability principle, but he observes that his principle, unlike Lord Bingham's, has the ingredient of proximity built into it as part of what has to be established. This is in my respectful opinion a serious flaw. Whereas Lord Bingham identified the factors which he considered should give rise to duty of care in law, Lord Kerr's proposition requires it to be established that the relationship has sufficient closeness (proximity) to amount to proximity. In this respect it is circular. It leaves the question of closeness or proximity open ended. It amounts to saying that there is a relationship of proximity if the relationship is sufficiently close for there to be proximity'

Lord Toulson v Lord Kerr

[137] 'Lord Kerr's narrower liability principle closely resembles Lord Bingham's liability principle, which was rejected by a majority of the House of Lords. It presents most of the problems to which I have referred, such as why a duty should be owed to the intended victim of a drive-by shooting but not to an injured bystander; why the threat should have to be imminent; and why the victim of a threatened arson attack should be owed a duty of protection against consequential personal injury, but not the burning down of his home. Lord Kerr rightly says (at para 181) that the police have been empowered to protect the public from harm. They have indeed a duty to keep the peace and to protect property, which applies to all potential victims of crime. Lord Kerr does not subscribe to the interveners' liability principle, and I cannot see a proper basis for holding there is a private law duty of care within the terms of Lord Kerr's narrower alternative.'

Lord Toulson: No Assumption of Responsibility

[138] 'Mr Bowen submitted that what was said by the Gwent call handler who received Ms Michael's 999 call was arguably sufficient to give rise to an assumption of responsibility on the Hedley Byrne principle as amplified in Spring v Guardian Assurance Plc. I agree with the Court of Appeal that the argument is not tenable. The only assurance which the call handler gave to Ms Michael was that she would pass on the call to the South Wales Police. She gave no promise how quickly they would respond. She told Ms Michael that they would want to call her back and asked her to keep her phone free, but this did not amount to advising or instructing her to remain in her house, as was suggested. Ms Michael's call was made on her mobile phone. Nor did the call handler's inquiry whether Ms Michael could lock the house amount to advising or instructing her to remain there. The case is very different from Kent v Griffiths where the call handler gave misleading assurances that an ambulance would be arriving shortly.'

Lord Kerr (Minority)

[144] 'What "proximity of relationship" connotes has, perhaps understandably, not been precisely defined. It appears to me that it should consist of these elements: (i) a closeness of association between the claimant and the defendant, which can be created by information communicated to the defendant but need not necessarily come into existence in that way; (ii) the information should convey to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken; (iii) the defendant is a person or agency who might reasonably be expected to provide protection in those circumstances; and (iv) he should be able to provide for the intended victim's protection without unnecessary danger to himself. This might, at first sight, appear to approximate to the 'liability principle' articulated by Lord Bingham in Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police [2009] AC 225. For reasons that I will give later, I consider that there is a distinct difference between the two.'

Lord Kerr (Minority)

[147] 'Proximity may in many cases add little to the concept of foreseeability but at root it reflects what Richardson J described in South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282, 306, as "a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility" which is exactly what has been the aim of the test for liability which I have proposed. For all, therefore, that the test of proximity may be described as circular, it still has a useful role to play. It is clear, for instance, that it was not present in the Hill case. There was, obviously, no proximity between the police and a member of the public killed by a criminal whose whereabouts were unknown and who, apparently, randomly picked out his victim from the female population.

Lord Kerr (Minority)

[149] ‘Nothing that was said in Brooks, therefore, detracts from the proposition that, 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.’

Lord Kerr (Minority)

[160] 'in deciding what is "fair, just and reasonable", courts are called on to make judgments that are informed by what they consider to be preponderant policy considerations. Some assessment has to be made of what a judge considers the public interest to be; what detriment would be caused to that interest if liability were held to exist; and what harm would be done to claimants if they are denied a remedy for the loss that they have suffered. These calculations are not conducted according to fixed principle. They will frequently, if not indeed usually, be made without empirical evidence. For the most part, they will be instinctual reactions to any given set of circumstances.

[161] Similar value judgments are required for decisions on proximity.'

Lord Kerr (Minority)

[160] 'One is driven therefore to the conclusion that the question whether there is a sufficient relationship of proximity must be primarily dependent on the particular facts of an individual case. It is for this reason that the test which I have suggested at para 144 above is loosely drawn. Any more closely defined test runs the risk of producing anomalous outcomes such as that instanced in the preceding paragraph. Unlike Lord Bingham's liability principle, however, the ingredient of proximity is not omitted or assumed. It must still be established. And, of course, the question must also be addressed whether there are particular policy reasons militating against the imposition of liability in a specific case'

Lord Kerr (Minority)

[175] ‘In my view, the time has come to recognise the legal duty of the police force to take action to protect a particular individual whose life or safety is, to the knowledge of the police, threatened by someone whose actions the police are able to restrain. I am not convinced that this requires a development of the common law but, if it does, I am sanguine about that prospect. Certainly, I do not believe that rules relating to liability for omissions should inhibit the law’s development to this point’

Lord Kerr (Minority)

[186] 'Set against the poverty - or complete absence - of evidence to support the claims of dire consequences should liability for police negligence be recognised is the fundamental principle that legal wrongs should be remedied. Sir Thomas Bingham MR in X (Minors) v Bedfordshire County Council [1995] 2 AC 633 said that the rule of public policy which has first claim on the loyalty of the law was that wrongs should be remedied. And as Lord Dyson said in Jones v Kaney [2011] 2 AC 398, at para 113: "The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional …"'

Lady Hale DPSC

[198] 'However, in developing the law it is wise to proceed on a case by case basis, and 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. It is difficult indeed to see how recognising the possibility of such claims could make the task of policing any more difficult than it already is. It might conceivably, however, lead to some much-needed improvements in their response to threats of serious domestic abuse. This continues to be a source of concern to Her Majesty's Inspectorate of Constabulary: … I very much regret to say that some of the attitudes which have led to the inadequacies revealed in that report may also have crept into the policy considerations discussed in Smith (by Lord Carswell at para 107 and Lord Hope at para 76). If the imposition of liability in negligence can help to counter such attitudes, so much the better. But the principles suggested here should apply to all specific threats of imminent injury to individuals which the police are in a position to prevent, whatever their source.