Michael v Chief Constable of South Wales Police
[2015] UKSC 2

Summary

Joanna Michael lived in St Mellons, near the south coast of Wales. On August 5 2009, at 2.29 am, Joanna made a 999 call to the police. For some reason, the call was mis-routed and was picked up by a police phone mast in a neighbouring county, Gwent. Joanna told the Gwent police operator – a Ms Mason – who took the call that her former partner, Cyron Williams, had found her at her house in bed with another man, had assaulted her, taken the man away, and had said that he would be coming back to assault her again. At some point in the call, Joanna said that she thought her ex was going to kill her. Mason told Joanna that she would pass on the call to the South Wales Police, and that Joanna should keep the phone free as the police would want to call her back. Joanna said, 'All right, then' and hung up.

The call was logged as a 'Grade 1' call, requiring an 'immediate' response, which would mean the police getting to Joanna's front door by about 2.35 am. Mason passed on the details of the call to a Mr Gould, who was working in the South Wales control room, but seemingly failed to mention that Joanna had said that her ex was going to kill her. When Gould contacted the police on the ground about the case, he graded the case as 'Grade 2', requiring a 'priority' response, which meant that the police should get to Joanna's front door within 60 minutes. The result was that the police had still not arrived at Joanna's house at 2.43 am, when Joanna made another 999 call – again received by the Gwent police, rather than the local force. This time, screaming could be heard on the line, and her case was upgraded to one requiring an 'immediate' response. However, by the time the police arrived at Joanna's house at 2.51 am (22 minutes after Joanna's first call), they found that she had been murdered by Cyron Williams.

Williams was sentenced to life imprisonment for murder, with a minimum tariff of 20 years in prison. Mason faced disciplinary charges for gross misconduct, and Gould also faced disciplinary action. Joanna's family sued the defendant chief constable (1) in negligence, claiming that a duty of care had been owed to Joanna when she made her first 999 call; and (2) under the Human Rights Act 1998, claiming that Joanna's right to life under Art 2 of the ECHR had been violated as a result of the way her first 999 call had been handled.

The first instance judge – Judge Jarman QC – declined to strike out the family's claims, on the ground that deciding whether a duty of care had been owed to Joanna, and whether her Art 2 rights had been violated, depended on a number of findings of fact, including whether the police had 'assumed a responsibility' to Joanna, whether Mason had heard Joanna say that her ex was going to kill her, why Joanna's case was downgraded from requiring an 'immediate' response to a 'priority' response, whether the way the police dealt with 999 calls or complaints of domestic violence was defective, and whether the police knew or ought to have known that there was a real and immediate threat to Joanna's life.

The Court of Appeal (at [2012] EWCA Civ 981) applied what it called the 'non-actionability' rule in *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 to find that there was no realistic prospect of finding that a duty of care had been owed to Joanna in this case. The only exceptions they were prepared to accept to the 'non-actionability' rule were cases where (1) the police had not yet begun a criminal investigation; and (2) the police had 'assumed a responsibility' to someone. Neither case applied here: as soon as Joanna's call was received, a criminal investigation got underway (at [21], per Longmore LJ) and Mason's telling Joanna to keep the line free because the police would want to call her was 'more a routine expression of expectation that South Wales police force would call her [and] not an assurance that they would' ([22]). So far as the Art 2 claim was concerned, the Court of

Appeal held (Davis LJ dissenting on this point) that that claim should be allowed to go ahead, on the ground that determining whether Joanna's Art 2 rights had been violated would depend on findings of fact as to the police's state of knowledge as to how far Joanna was at risk of being killed or injured by her ex.

Joanna's family appealed to the UKSC on the duty of care point, and the defendant chief constable cross-appealed on the Art 2 point. The UKSC dismissed both appeals, by a 5:2 majority on the duty of care point (Lord Toulson delivering the leading judgment (with which Lords Neuberger, Mance, Reed and Hodge agreed), and Lord Kerr and Lady Hale dissenting), and unanimously on the Art 2 point. Virtually no attention was paid to the Art 2 point (it was dealt with by Lord Toulson at [139]): the UKSC seemed to think it was obvious that it would premature at this stage, before a full hearing of the facts, to determine whether Joanna's Art 2 rights were violated given that the inquiry into this issue turned so closely on what Mason heard when Joanna called her. It was the duty of care point that most exercised the UK Supreme Court Justices.

In his speech, Lord Toulson's starting point was that 'English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T)...the common law does not generally impose liability for omissions' (at [97]). This fundamental feature of English law led Lord Toulson to deprecate the very common academic habit of saying that the police enjoy some kind of 'immunity' from being sued in negligence when they fail to protect a victim of crime under the decision in *Hill*. As Lord Toulson pointed out (at [44]) 'An "immunity" is generally understood to be an exemption based on a defendant's status from liability imposed by the law on others' and that saying that the police enjoy an immunity from being sued in negligence when they fail to protect a victim of crime is 'unfortunate' (also at [44]):

> 'The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police... The question is 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.' ([115] – [116])

Under those 'ordinary...common law principles', Lord Toulson acknowledged that there are 'two well recognised types of situation in which the common law may impose liability for a careless omission' ([98]): (1) 'where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control'; (2) 'where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle'. (1) obviously did not apply here, as Cyron Williams was never under the control of the police, but there was an issue as to whether Mason had 'assumed a responsibility' to Joanna when she spoke to her on the phone. On that issue, Lord Toulson warned against the tendency 'for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially' (at [100]). Lord Toulson went on to say (at [138]) that he did not think that Mason could realistically be said to have 'assumed a responsibility' to Joanna: '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 as to how quickly they would respond.'

So Lord Toulson thought that there was no case, according to the 'ordinary...common law principles' governing when one person will owe another a duty of care to save them from harm for finding that the police here owed Joanna a duty of care to protect her from being

killed by Cyron Williams. However, Lord Toulson acknowledged (at [102]) that 'the categories of negligence are never closed...and it would be open to the court to create a new exception to the general rule about omissions'. He canvassed a number of different new exceptions that might be created, and dismissed all of them:

(1) *The* '*intervener's liability principle*':

> 'If the police are aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group...the police owe...that person a duty...to take reasonable care for their safety.' (at [18](1))

Two arguments were made by counsel for Joanna's family in favour of adopting this principle: (1) adopting this principle would encourage the police to intervene to protect victims of domestic violence; (2) adopting this principle would extend 'the common law...in harmony with the obligations of the police under articles 2 and 3 of the Convention' (at [117]). Lord Toulson rejected both of these arguments. On (1), there was no evidence 'that a change in the civil law would lead to a reduction of domestic violence or an improvement in its investigation' (at [121]). On (2), Lord Toulson reaffirmed the position taken by the majority of the House of Lords in *Van Colle* v *Chief Constable of Hertfordshire Police*, *Smith* v *Chief Constable of Sussex Police* [2009] 1 AC 225, that there is no

> 'legal basis for fashioning a duty of care limited in scope to 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.' (at [125])

> '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.' (at [130])

Lord Toulson also thought that the 'intervener's liability principle' was arbitrary in scope: 'it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace... It is also hard to see why it should be limited to particular potential victims.' ([119]-[120])

(2) '*Lord Bingham's liability principle*':

> 'if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety...B [will] owe...A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed...' (at [18](2), instancing Lord Bingham's judgment in *Van Colle/Smith*, at [44]).

Lord Toulson also thought that this principle was arbitrary in scope (at [129]): it was hard to see: why a duty should be owed where the threat is reported by A, but not where it is reported by someone else; why a duty should be owed when a threat is credible and imminent, but not where the threat is credible but not imminent; why a duty should be owed where the whereabouts of the third party are known, but not where they are not known; and why a duty should be owed where the threat was to A's life or physical safety, but not where the threat was to A's property. More fundamentally, he thought that if

> '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.' (at [130])

(3) *Lord Kerr's proximity principle*

In his dissenting judgment in *Michael*, Lord Kerr argued that the police should be held to owe a duty of care to a victim of crime if a sufficient relationship of proximity exists between them, and that such a relationship of proximity would exist if there is:

> '(i) a closeness of association between the claimant and the defendant, which can be created by information communicated to the defendant not 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 damage to himself.' (at [144])

Later on his judgment, Lord Kerr expanded on when (i) and (ii) would be established:

> 'It does not matter if the information is received from a source other than the intended victim. What is critical is that the police know of an imminent threat to a particular individual and that they have the means of preventing that threat and protecting the individual concerned.' (at [168])

Lord Toulson was skeptical that a principle that there would be a sufficient relationship of proximity between a claimant and a defendant if there was 'a closeness of association between the claimant and the defendant' made any sense: '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' (at [133]). Lord Toulson went on to say (at [137]) that if the necessary 'closeness of association' could *only* be found in the sort of situation set out in para [168] of Lord Kerr's judgment, then it was subject to all the objections that he had made at [129] to Lord Bingham's liability principle.

Obviously, Lord Kerr disagreed with Lord Toulson's criticisms. On the circularity point, he argued that determining whether there was a sufficient relationship of proximity between a claimant and a defendant involved 'balancing...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' (at [147], quoting Richardson J in *South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282, 306) and that the degree of relationship between the claimant and defendant would obviously be relevant in undertaking that 'pragmatic' (at [146]) balancing exercise. So, for example, the lack of relationship between the police and Jacqueline Hill in the *Hill* case meant that there was not a sufficient relationship of proximity between the police and Jacqueline Hill to justify finding a duty of care in *Hill* (at [147]). On the point that Lord Kerr's proximity principle (filtered through the kind of considerations mentioned in [168]) was arbitrary, Lord Kerr argued that a narrower principle might produce arbitrary results – for instance, if it was argued that the police in *Michael* could only be liable if they had expressly assured Joanna that they were on their way, then it would follow no duty of care would be owed where they had given her the false impression that they were on their way (at [165]). Lord Kerr went on to observe that the lines drawn by his proximity principle provided 'a workable basis on which [the police] may properly be held responsible without imposing on them an impossible burden' (at [171]) and that so far as the criticism of limiting his principle of proximity to threats to life or safety was concerned 'It is entirely right and principled that the law should accord a greater level of importance to the protection of the lives and physical well-being of individuals than it does to their property' (at [172]).

Lord Toulson, in turn, took sharp exception to Lord Kerr's suggestion that the approach adopted by the majority to determining whether or not a duty of care was owed in *Michael* might produce arbitrary results. At [135], he observed that in the hypothetical considered by Lord Kerr at [165] – where the police did not assure Joanna that they were on their way, but gave the misleading impression that they were – a duty of care *would* have been owed to Joanna 'under the *Hedley Byrne* principle'.

Lady Hale agreed with Lord Kerr's judgment, arguing that the necessary proximity (for a duty of care to be owed under the *Caparo* test)

> 'is supplied if the police know or ought to know of an imminent threat of death or personal injury to a particular individual which they have the means to prevent. Once that proximity is established, it is fair, just and reasonable to expect them to take reasonable care to prevent the harm.' ([197])

But why it would be 'fair, just and reasonable' to find a duty of care just because the police knew that Joanna was in danger? In dealing with this point, Lady Hale drew on a paper written by Stelios Tofaris and Sandy Steel called 'Liability in negligence for failure to prevent crime: time to rethink' and published on SSRN as part of the University of Cambridge Research Paper Series (no 39/2014). On page 18 of that paper, Tofaris and Steel observe that

> 'A person faced with the threat of violence is permitted by law to take reasonable measures of self-protection, but beyond that her only option is to inform the police. In essence, other than reasonably protecting herself, the law obliges her to entrust her physical safety in the police.' (quoted by Lady Hale, at [197])

Comments

(1) *Two approaches to finding a duty of care in public body omissions cases*. The caselaw up until now, and the academic literature, has revealed two basic approaches to determining whether a duty of care was owed in a case where a public body has failed to save someone from harm.

The first approach we can call the *Diceyan* approach, after Albert Venn Dicey, who argued in his *The Law of the Constitution* that one of the fundamental aspects of the rule of law is that the same rules of law should apply everyone, regardless of their status or position in society. On this approach, we determine whether a public body owed a claimant a duty of care to save them from harm by asking – would a private person, equivalently situated, have owed the claimant a duty of care to save them from harm? If not, then no duty of care can have been owed by the public body. This approach is most closely associated with Lord Hoffmann who, speaking extra-judicially, said:

> unless [a] statute creates an immunity from suit, expressly or by necessary implication, a public body owes a duty of care in such circumstances, and only in such circumstances, as a private body would have owed a duty. There are two sides to this coin. On the one side, if a public body does something which, if undertaken by a private body, would have created a duty of care, it will owe a similar duty of care. On the other side, the fact that a public body has statutory powers to do something, or even a public law duty, does not create a duty of care in circumstances in which a private body would have owed no such duty.
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> public bodies owe no duty of care by virtue only of the fact that they have statutory powers or public law duties. An actual relationship with the claimant, such as would give rise to a duty of care on the part of a private body, is required. The effect is to take out of the law of negligence

> most questions of whether a public body has made the right decisions about how it should exercise its powers, that is to say, questions of administration. [1]

The second approach we can call the *policy* approach. Under this approach, the courts *will* find that in a situation where a claimant was in foreseeable danger and a public body was in a good position to save her from harm, the public body *will* have owed her a duty of care to save her from harm *unless* there is some reason of public policy why it would be undesirable to find that the public body was subject to such a duty of care. The policy approach, of course, underlay Lord Wilberforce's judgment in *Anns* v *Merton LBC* [1978] AC 728, but survived the modern-day disavowal of *Anns*. It survived in:

(1) The repeated academic and judicial habit of saying that the decision of the House of Lords in *Hill* created an 'immunity' for the police from being sued in negligence for failures investigating crime. The language of 'immunity' makes no sense under the Diceyan approach, where the police are subject to the same rules on when one person will owe another a duty of care to save someone from harm that everyone else is subject to. But it does make sense under the policy approach, which assumes that the police *should* be held liable for failing to save victims of crime unless some good reason can be found for denying that they owed a duty of care.

(2) The repeated invocation of Sir Thomas Bingham MR's (as he then was) statement in *X* v *Bedfordshire CC* [1995] 2 AC 633, 663 that

> it would require very potent considerations of public policy, which do not in my view exist here, to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied.

When applied to public body omissions cases, invocation of this *dictum* created a prejudice in favour of finding that a public body owed a duty of care unless some consideration of public policy weighed against finding a duty of care. On the Diceyan approach, Bingham's *dictum* makes no sense whatsoever: the whole issue in a public body omissions case is whether the public body has done anything wrong (that is, breached a duty of care owed to the claimant). But on the policy approach, it makes perfect sense – it is to be assumed that a public body owed a duty of care (and therefore did something wrong in failing to save the claimant from harm) unless there are public policy reasons for refusing to find that a duty of care was owed.

The following table separates out the cases on public body omissions liability according to whether they can be seen broadly to have adopted a Diceyan approach to determining whether a public body owed a claimant a duty of care to save them from harm or whether can be seen broadly to have adopted a policy approach to this issue.

Diceyan approach	*Policy approach*
East Suffolk Rivers Catchment Board v *Kent* (1941) (river authority that takes on the job of repairing a sea wall owes no duty to repair the wall expeditiously to farmer whose land will be flooded until the sea wall is properly repaired)	*Anns* v *Merton LBC* (1978) (local authority that decides to inspect foundations of building has duty to inspect them with reasonable skill and care)

[1] Hoffmann, 'Reforming the law of public authority negligence' (2009) *Bar Council Law Reform Lecture*, paras 6 and 15.

Yuen Kun Yeu v *Att-Gen for Hong Kong* (1988) (Commissioner maintaining register of deposit-taking banks does not have a duty of care to ensure that only well-run banks are on register) *Hill* v *Chief Constable of West Yorkshire* (1989) (no duty of care on police in investigating crimes)	*X* v *Bedfordshire CC* (1995) (no duty of care on local authorities to save children from being abused because important they should be left free to decide how to deal with such cases without threat of being sued hanging over them)
Capital & Counties plc v *Hampshire CC* (1997) (no duty of care to fight fires effectively or even turn up to fight them after having accepted 999 call) *Stovin* v *Wise* (1996) (no duty of care on highway authority to flatten roadside bank of earth that obscured line of vision at junction)	*Hussain* v *Lancaster CC* (2000) (no duty of care on local authority to prevent tenants racially harassing claimant as proving fault on the part of the local authority would involve courts in intractable issues) *Kent* v *Griffiths* (2001) (duty of care on ambulance service that has accepted 999 call to pick up and take patient to hospital reasonably quickly)
Gorringe v *Calderdale MBC* (2004) (no duty of care on highway authority to tell motorists to slow down at bend in the road)	*D* v *East Berkshire NHS Trust* (CA) (2004) (finding of no duty of care in *X* v *Bedfordshire CC* overturned as prospect of being sued under Human Rights Act 1998 now means decisions about whether to what to do with at-risk children are always being made under cloud of potential litigation) *Van Colle* v *Chief Constable of Hertfordshire Police*, *Smith* v *Chief Constable of Sussex Police* (2009) (no duty of care on police to protect man against being attacked by ex-lover as finding such a duty of care would unduly bias police towards prioritising cases where an identified person claimed they might be the victim of violence over other cases)
Furnell v *Flaherty* (2013) (no duty of care on Heath Protection Agency or district council to protect visitors to animal petting zoo against outbreak of e.coli disease)	*Smith* v *Ministry of Defence* (2014) (policy concerns about courts dictating to military how much it should spend on safety equipment and training do not make it unarguable that military owed duty of care to soldiers injured due to alleged lack of proper armour or training)

As you can see, the recent trend in the caselaw has been to adopt the policy approach to determining whether or not a duty of care was owed in a public body omissions case. That this has been the trend in the caselaw has been obscured by the fact that the courts have, by and large, still been reaching *Diceyan* results using the policy approach and only finding that public bodies owed duties of care in omissions cases when a private person, equivalently situated, would also owe a duty of care. For example, in the *Van Colle/Smith* case, the House of Lords refused to find that the police owed the claimant in *Smith* a duty of care to protect

him from an ex-lover on the policy grounds that finding a duty of care in this case would undesirably encourage the police to prioritise cases where identifiable people were at risk of harm over other cases and to act defensively in cases where an identifiable person was at risk of harm. In a note on the *Van Colle/Smith* case, I lamented this resort to policy considerations to decline to find a duty of care on the part of the police in *Smith*, arguing that the vagaries of judgments about policy meant that 'the reasons advanced by the majority Law Lords in *Smith* in support of their decision will...ultimately result in its overruling.'

Had Lord Kerr and Lady Hale had their way, then the decision in *Michael* would have made my prophecy come true. As Lord Kerr observed (at [161]): 'Put bluntly, what one group of judges felt was the correct policy answer in 2009, should not bind another group of judges even as little as five years later.' And Lady Hale's judgment provides a classic example of the policy approach at work, beginning her judgment (at [189]) by saying:

> 'In what circumstances can the police owe a duty of care to protect an individual member of the public from harm caused by a third party? There are said to be two objections to imposing such a duty.'

No need to make any case *for* finding that the police owed Joanna Michael a duty of care: it's straight onto the objections!

But Lord Kerr and Lady Hale did not have their way. Instead, the decision in *Michael* represents the most stunning, clear – and, to be honest, completely unexpected – reaffirmation of the Diceyan approach to finding whether or not a duty of care was owed to Joanna Michael that the most ardent fan of that approach could wish for. It has now been settled for a generation that the proper approach to finding a duty of care in a public body omissions case is to ask – would a private person, equivalently situated, have owed a duty of care to save the claimant from harm? Unless the case can be brought under one of the established categories of case where a private individual will owe another a duty of care to save a claimant from harm – and, with respect to Lord Toulson, these cases are not limited to control cases, or assumption of responsibility cases, but also include cases where a defendant has put the claimant in danger of suffering harm, and cases where the defendant has interfered with the claimant or other people saving the claimant from harm – then a public body will not owe the claimant a duty of care to save her from harm. And it is now not cases like *Hill* or *Capital & Counties plc* v *Hampshire CC* [1997] QB 1004 that are under pressure, but rather the cases that applied the policy approach to *find* a duty of care in a public body omissions case where such a duty of care would not have been owed by an equivalently situated private individual that are under pressure. The two cases in particular that need revisiting are *Kent* v *Griffiths* [2001] QB 36 and *D* v *East Berkshire NHS Trust* [2005] 2 AC 373. In *Michael*, Lord Toulson seemed to think (at [138]) that *Kent* v *Griffiths* could be explained by reference to the principle in *Hedley Byrne* on the basis that 'the call handler gave misleading assurances that an ambulance would be arriving shortly' (at [138]). But there are limitations to this analysis – in particular, it does not work where the claimant who is calling for an ambulance has no choice but to wait for an ambulance and therefore the assurances as to how soon the ambulance will be arriving make no difference to her. As for *D* v *East Berkshire NHS Trust*, although Robert Stevens has, in reacting to the decision in *Michael*, already argued that *D* is not a true omissions case (as the cases involved the positive act of taking children out of their homes), *D* is widely interpreted as holding that a duty of care will be owed by the social services to children whom the social services know or ought to know are at risk of being physically or sexual abused at home and who are *not* taken out of the home. That reading of *D* now needs to be revisited in light of the decision in *Michael*.

(2) *Why Dicey?* But, it may be asked, why should we apply the same rules to public bodies as we do to private persons? As Tofaris and Steel point out in their valuable paper, none of the considerations that make us hostile to finding that private persons owe other people a duty to save them from harm – a concern not to undermine individual liberty, a concern not to expose people to uncertain and indeterminate liabilities, a concern to leave people some room to 'do the right thing' of their own accord, a concern not to fasten liability for someone else's misfortune on a defendant who may not have been any more to blame for what happened than a large number of other people who were equally in a position to help but are now untraceable – actually apply to public bodies that are charged with saving people from harm and have failed to do so. So why treat public bodies the same as private persons? Lord Toulson's answer was as follows:

> 'it is one thing for a public authority to provide a service at the public expense, and quite another to require the public to pay compensation when a failure to provide the service has resulted in a loss. Apart from possible cases involving reliance on a representation by the authority, the same loss would have been suffered if the service had not been provided in the first place, and to require payment of compensation would impose an additional burden on public funds' (at [110], summarising the reasoning of Lord Hoffmann in *Stovin* v *Wise* [1996] AC 923)
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> '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.' ([114])

I think I would make the point slightly differently: it is simply wrong, and potentially corrupting, for a legal system to treat people who try to do good worse than people who do not try to do good. If the state gets into the business of setting up a police force, it is hard to see why the state should – in legal terms – make itself worse off as a result of doing that, than it would have been had it not got into that business. The same point applies to people who choose to serve the public by working as policemen, fire fighters, or ambulance workers – why should they be in a worse position legally than people who have made the more selfish choice to go into some other, more self-serving profession? This, I think, is the strongest argument in favour of adopting the Diceyan approach to determining whether a duty of care was owed in a public body omissions case, and one which anyone who still advocates the policy approach (and there will be plenty of academics who do) has to refute.

(3) *The case for finding a duty of care in Michael*. Having said that, there were arguments, based on the 'ordinary common law principles' invoked by Lord Toulson in favour of finding a duty of care in *Michael*, or at least in favour of deferring the issue until a full hearing when the facts of the case could be fully established (so far as they could be, of course).

The first possible argument for finding a duty of care in *Michael* was 'assumption of responsibility'. The case for finding a duty of care on such a basis was weakened by the fact that Mason, the Gwent police call handler, never told Joanna Michael that the police would be with her imminently, and there was no real reason to think that Joanna Michael was misled into thinking that the police would be with her soon, with the result that she felt that she did not need to go to a neighbour, or simply get out of the house. But the UKSC was taking a bit of a chance by making these findings without the benefit of a full hearing. Perhaps the need to lay down a strong line in *Michael* on the future of liabilities of public bodies in omissions cases justified doing this, but I do feel some unease at this aspect of the decision, particularly as there was evidence that Joanna's neighbours could hear what was going on, and were concerned enough that they called the police themselves (though their calls were mis-routed to the Gwent police as well).

The second possible argument is one that builds on the point made by Tofaris and Steel in their paper, about the limits the state places on people's abilities to protect themselves, and which was quoted by Lady Hale in her judgment. It is an argument that has been given added force by the Charlie Hebdo killings in Paris. The argument begins from the well-established point that if someone interferes with your protecting yourself from harm, then they will owe you a duty to take reasonable steps to help save you from that harm themselves (for cases on this, see McBride & Bagshaw, *Tort Law*, 4th ed, 228-231). The UK state effectively forbids people from owning guns to protect themselves. Had Joanna Michael owned a gun she might have been able to protect herself from being attacked by Cyron Williams. Is that enough to establish a case for saying that the UK state owed Joanna a duty of care to protect her from harm which it knew she was in danger of suffering and that it had disabled her from effectively protecting herself against? There are two weaknesses in this argument. First, there is no reason to think that if Joanna Michael had been allowed to own a gun that she would have armed herself to protect herself from people like Cyron Williams. Secondly, the principle that people who try to do good should not be legally worse off because of that may have some purchase here as well – if the UK state, in an effort to reduce general levels of violence, forbids everyone from owning guns, it is not clear that it should because of that suddenly incur special legal duties that no one else is subject to.

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