Van Colle v Chief Constable of Hertfordshire Police, Smith v Chief Constable of Sussex [2008] UKHL 50, [2009] 1 AC 225 HL

Summary

Van Colle* v *Chief Constable of Hertfordshire Police

From September to December 1999, Giles Van Colle employed a Daniel Brougham to work at his optical firm, 'Southern Counties'. In December 1999, Brougham left the firm on bad terms, and was subsequently arrested, and charged with having stolen £500's worth of optical equipment from Southern Counties. On October 13, 2000, Brougham made a threatening call to Van Colle, warning him that there would be trouble for him, his parents and his business, if the charges against Brougham were not dropped. Van Colle reported the phone call to the police. At around the same time, another person whom Brougham had been charged with stealing property from had his car and business premises set on fire. These incidents were also reported to the police; investigators at the time seemed to take the view that the fires had started accidentally, and had not been started deliberately. On November 9, Van Colle received another threatening phone call. The police were informed of this on November 20, and arranged to meet Van Colle on November 23 to get a statement from him, after which they planned to arrest Brougham. The police never got to see Van Colle: Brougham shot him dead on November 22 as he left work.

The claimants – Van Colle's family – sued the police under the Human Rights Act 1998, claiming that the police had violated Van Colle's right to life under Art. 2 of the European Convention on Human Rights (ECHR), by failing to take reasonable steps to protect him from Brougham when they knew that Van Colle's life was in danger from Brougham. The claimants won at first instance, and in the Court of Appeal. The police appealed to the House of Lords. The House of Lords applied the decision of the European Court of Human Rights in *Osman* v *UK* (1998) 29 EHRR 245 that the police will violate A's rights under Art. 2 if they know or ought to know that there is a 'real and immediate risk' to an identified individual (A) from the criminal acts of a third party, and they fail to take reasonable steps within the scope of their powers that might be expected to avoid that risk (para [29], per Lord Bingham). However, the House of Lords went on to find that this test for liability for violating Art. 2 of the ECHR was not made out in this case. The police did not know, and had no reason to know, that Van Colle's life was in danger from Brougham. (See paras [39], per Lord Bingham; [67]-[68], per Lord Hope; [86], per Lord Phillips; [117]-[118], per Lord Brown.

Smith* v *Chief Constable of Sussex

The claimant, Stephen Smith, was attacked and seriously injured on March 10, 2003 by his former lover, Gareth Jeffrey. Before the attack, the claimant had warned the police that Jeffrey had threatened to kill him, but – so the claimant alleged – the police had done nothing to investigate the case, taking no notes of the threats that Smith claimed Jeffrey had made against him, and advising him that it would take a few weeks to investigate the case.

The claimant might have been able to sue the police under the Human Rights Act 1998 for violating his right to life under Art. 2 of the ECHR. However, by the time the claimant thought about suing the police for compensation for his injuries, it was too late for him to sue the police under the Human Rights Act 1998 – claims under that Act must normally be brought within a year of 'the date on which the act complained of took place' (s.7(5)(a)).

So the claimant sued the police in negligence, arguing that – on the facts as pleaded by the claimant – it was at least arguable that the police owed him a duty of care under the common law to take reasonable steps to protect him from being attacked by Jeffrey. The claimant's claim was struck out at first instance on the ground that police had not owed the claimant a duty of care. The Court of Appeal reinstated the claimant's claim, holding that it was strongly arguable that the police had owed the claimant a duty of care in this case: [2008] EWCA Civ 39. (See our casenote on this decision elsewhere on this website.) Sedley LJ remarked (at [27]) that, 'where...someone's life or safety has been so firmly placed in the hands of the police as to make it incumbent on them to take at least elementary steps to protect it, unexcused neglect to do so can sound in damages if harm of the material kind results'. Rimer LJ observed (at [45]) that 'where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it...It [would be] odd [if] our jurisprudence...acknowledge[d] two parallel, but potentially inconsistent, approaches to the same factual situation: (i) the common law position, which is said to excuse the police from any duty to do anything at all to assist someone such as Mr Smith, whose life they knew was being threatened by an identified third party, and (ii) the position under Article 2, under which they were arguably required to take positive, albeit proportionate, preventive measures to protect him.' Pill LJ argued (at [55]), 'In my view, it is appropriate to absorb the rights which Article 2 protects into the long-established action of negligence. A claim in negligence should, on appropriate facts, have regard to the duties imposed and standards required by Article 2 of the Convention...'

The police appealed to the House of Lords. The House of Lords held by a 4:1 majority that the claimant's claim in negligence should be struck out on the ground that the police did not owe the claimant a duty of care in this case. Lord Bingham dissented, arguing (at [44]) that English law should adopt what he called the 'liability principle' under which 'if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.'

However, the other Law Lords declined to adopt this principle on public policy grounds, arguing that:

(i) the prospect of liability in such a case would encourage the police to give high priority to investigating complaints of threats of violence to identified individuals (some of which may well be malicious) and downgrade other investigations where no identifiable individual is in danger of being harmed: see [76], per Lord Hope; and [132], per Lord Brown;

(ii) the prospect of liability in such a case would encourage the police to act 'defensively' in such cases, routinely arresting those who were accused of making threats against other people, in order to avoid the slightest risk that a failure to take less extreme measures might result in their being sued: [109], per Lord Carswell; and [132], per Lord Brown;

(iii) the vagueness of terms such as ‘apparently credible evidence’ and ‘specific and imminent threat’ mean that adopting Lord Bingham’s liability principle would inject an unacceptable level of uncertainty into the law: see [77], per Lord Hope; and [109], per Lord Carswell; and [129], per Lord Brown;

(iv) adopting Lord Bingham’s liability principle would be inconsistent with the decision of the House of Lords in *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 because it would open the door to the police being held liable whenever they had reasonable grounds to think that someone was threatened with criminal violence and they failed to take reasonable steps to deal with that threat: see [100], per Lord Phillips. Indeed, it is hard to see why the principle should not also apply in cases of threats of harm to property: see [128], per Lord Brown.

As to the argument, which appealed to the Court of Appeal, that the common law of negligence should develop so as to provide a remedy where someone’s human rights under the ECHR had been violated, Lord Bingham expressed himself sympathetic to the argument (at [58]): ‘one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law...’ However, the other Law Lords who addressed the issue disagreed:

(i) Lord Hope (with whom Lord Carswell agreed: [104]) said (at [82]) that the common law ‘should be allowed to stand on its own feet side by side with the alternative remedy [under the Human Rights Act 1998].’ He was unsure (at [81]) that allowing civil claims against the police in cases such as *Smith* was an effective way of ensuring police efficiency; and even if the common law was deficient in not allowing claims in cases such as *Smith*, the Human Rights Act 1998 was there to fill the gap.

(ii) Lord Brown observed (at [138]) that claims under the ECHR (now, Human Rights Act 1998) and civil actions perform different functions: civil actions are intended to compensate for loss, while Convention claims are designed to ‘uphold minimum human rights standards and to vindicate those rights’. He went on to say (at [139]) that there was ‘no sound reason’ why the common law should provide a matching claim where a claim under the Human Rights Act 1998 was available: doing so would ‘neither add to the vindication of the right nor be likely to deter the police from the action or inaction which risks violating it in the first place.’

Comments

The House of Lords reached the right decision in both of these cases. As *Van Colle* was a decision on the facts, no further comment is required. But something more needs to be said about the House of Lords’ decision in the *Smith* case.

The House of Lords reached the right decision in the *Smith* case – no duty of care owed – but their reasoning in reaching that conclusion was lamentable. By basing their decision so completely on considerations of public policy, the four majority Law Lords have opened the door to future courts overruling *Smith* on the ground that the majority got it wrong in deciding that it would be contrary to public policy to find liability in cases such as *Smith*. After all, as Lord Phillips observed (at [102]): ‘issues of policy...are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties.’

If *Smith* were to be overruled on the basis that the majority's view of what the public interest required was incorrect, that would be regrettable, to say the least. The reason is that there are sound reasons of principle, unnoticed and unmentioned by the majority in *Smith*, why no claim in negligence should be made available in cases like *Smith*. These reasons of principle will be very familiar to readers of McBride & Bagshaw: to impose liability for the police's failure to act in a case like *Smith* would be to treat good people worse than bad people. A stranger who heard Smith being attacked by Jeffrey and who failed to call the police would not be held liable under the common law for his non-action. Why, then, should the police be held liable for failing to protect Smith from Jeffrey? Why should the law treat those who dedicate themselves to protecting the public worse than it does those who choose not to go into public service, but spend their time serving their own selfish interests? There is no good answer to this question.

Apparently, it cannot be said often enough: the reasons of public policy why Lord Keith (with the agreement of three other Law Lords) declined to find liability in *Hill* were an afterthought and not the main reason for his decision in *Hill*. The main reason for his decision was that there was no sufficient relationship of 'proximity' between Jacqueline Hill and the police to displace the basic rule of 'no liability for omissions' that forms the starting point of the common law's approach to cases where one person has failed to save another from harm. This fundamental point is consistently overlooked by academics, who treat Lord Keith's decision in *Hill* as though it simply consisted of two paragraphs, saying 'No liability here because contrary to public policy.' And it was overlooked by the majority Law Lords in *Smith* who were instead happy to say things such as 'As so often in this field, public policy has been at the heart of the consideration of whether a duty of care exists' (per Lord Phillips, at [89]). No it is not – but the belief that it is makes it very likely that in future an unprincipled and unjustified liability will be imposed on the police in cases like *Smith*.

Already, the cracks are showing. It was argued in this case that even if there might be sound reasons of public policy why the police should not be held liable in case like *Smith*, those reasons no longer applied as the police could now be sued in cases like *Smith* under the Human Rights Act 1998. If there is no longer any 'immunity' from being sued in cases like *Smith*, the argument went, why shouldn't we find a duty of care in such cases? This argument – identical to the one which persuaded the Court of Appeal in *D* v *East Berkshire Community NHS Health Trust* [2004] QB 558, and subsequently the House of Lords ([2005] 2 AC 373), to discard the 'immunity' from being sued that the House of Lords had granted the social services in *X* v *Bedfordshire CC* [1995] 2 AC 633 – did not succeed in *Smith*. But the reasons advanced by the majority Law Lords for rejecting this argument were extremely unconvincing and it is not likely that future courts will be impressed.

Moreover, future courts (and the barristers appearing before them) can be expected to make great play of Lord Hopes statement (at [79], and expressly endorsed by Lord Carswell at [109]) that: 'operational decisions taken by the police can give rise to civil liability without compromising the public interest in the investigation and suppression crime.' Three things should be noted about this statement.

First of all, both of the authorities instanced by Lord Hope in support of this statement involved acts, not omissions. In *Knightley* v *Johns* [1982] 1 WLR 349, a police officer instructed a police motorcyclist to ride down a tunnel against the flow of traffic, with the result that the cyclist was knocked over and injured by an oncoming car. In *Rigby* v *Chief Constable of Northamptonshire* [1985] 1 WLR 1242,

the police fired a gas canister into the claimant's shop. These cases do not provide any support for the notion that an omission by the police can give rise to liability in negligence to a claimant (absent an 'assumption of responsibility' to, or some other 'special relationship' with, the claimant), even where the omission is 'operational' in nature. But it is likely that future courts will not pay any attention to this point and simply hold that Lord Hope's judgment indicates that *any* 'operational error' by the police will give rise to liability to those affected by it, whether that error consists in an act or an omission.

Secondly, there is no clean and clear dividing line between 'operational' errors and other errors made by the police. Is a failure to adopt a good filing system for processing witness statements an 'operational' error (which Lord Hope is prepared to accept the police might be liable) or some other kind of error? If it counts as an operational error, then *Hill* might have been wrongly decided because one of the reasons why the police took so long to catch the Yorkshire Ripper was a failure to adopt a system for filing witness statements which would make it easy to compare witness statements to see if a particular individual's name was coming up again and again as a possible suspect.

Thirdly, if the courts will in future hold the police liable for 'operational' errors and there is great uncertainty about what counts as an 'operational' error and what does not, it is likely that the police will start to make day to day decisions on the basis that they *might* be held liable *whenever* they fail to do their jobs properly. This is because they simply won't know which of their bad decisions will be said to be 'operational' (giving rise to liability) and which 'non-operational' (not giving rise to liability). If this happens, then the bad effects that the majority in *Smith* gave as a reason for not adopting Lord Bingham's 'liability principle' will happen anyway: the police will start to do their jobs 'defensively' (going overboard to demonstrate that they are doing their jobs properly); their policing priorities will be distorted (downgrading the need to protect people who are not likely to sue them for screwing up in favour of protecting people with the time and money to sue if they are unhappy with the performance of the police); and police time and resources will be diverted away from investigating and preventing crime and into dealing with time consuming and costly litigation over past mistakes. As a result, the reasons given by the majority in *Smith* for not adopting Lord Bingham's 'liability principle' will simply fall away and future courts will hold that as the law – as stated by Lord Hope – already drastically impairs the efficiency of the police, adopting Lord Bingham's 'liability principle' won't actually have any adverse effect on the public interest.

So the reasons advanced by the majority Law Lords in *Smith* in support of their decision will – I predict – ultimately result in its overruling. Which, as I say, would be a pity. It was the right decision, but not for the reasons advanced by the majority.

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