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Domestic violence, judicial austerity and the duty of care: Michael and others (FC) (Appellants) v The Chief constable of South Wales Police and another (Respondents)

Domestic violence, judicial austerity and the duty of care

Michael and others (FC) (Appellants) v The Chief constable of South Wales Police and another (Respondents)

[2015] UKSC 2

United Kingdom Supreme Court

28 January 2015

Duty of care — police liability — domestic violence — policy — floodgates

Introduction

The duty of care owed to members of the public by the police for their failures to fulfil their primary duty to preserve the Queen's peace is the subject of a long line of cases. Where, in light of the facts, the police appear to have fallen short of intuitive expectations of those involved, many claimants have succumbed to the courts' reluctance to extend the duty of care into new areas on 'policy grounds'. This includes including the prevention of indeterminate liability or an unwillingness to stray into matters of public resource allocation.

The case of *Michael and others (FC) (Appellants) v The Chief Constable of South Wales Police and another (Respondents)* [2015] UKSC 2[1] saw the Supreme Court examine whether or not to extend of duty of care owed by this core public service. The case is notable as it clashes head-on with high-profile national and international campaigns in the emotive area of domestic violence.[2] In particular, when the police are made aware of immediately life-threating circumstances yet fail to act, is a duty of care owed to a victim who is seriously injured or tragically, as in this case, killed by a third-party?

The case is significant in that the Supreme Court gave a clear statement of its reasoning as to why a duty of care would not be owed in this particular case and would, in future cases, be unlikely to extend to such victims.

Facts

The traumatic facts of this case began with Gwent Police receiving a phone call from Ms Michael on 5 August 2009 at 2.29am. She was in a highly agitated state and stated that her ex-boyfriend had turned up at her house in the middle of the night. He had hit her having found her with another man. He then gave the man a lift home in his car stating that when

[1] *Michael and others (FC) (appellants) v The Chief Constable of South Wales Police and another (Respondents)* [2015] UKSC 2

[2] Carline A, and Easteal, P, *Shades of Grey - Domestic and Sexual Violence Against Women: Law Reform and Society* (Oxford, Routledge, 2014).

he came back he was going to hit her again. Ms Michael said he had bitten her ear and said 'I'm going to drop him home and fucking kill you.'

The civilian call handler asked if Ms Michael was able to lock the doors and then graded the call as 'G1' – in need of immediate response to pass on to Gwent Police in Cardiff. However, in passing the message on, no mention was made of the threat to kill which led Cardiff Police to assign a 'G2' grading – respond within 60 minutes. At 2.43am, Ms Michael called again but the call was interrupted by a scream and the phone went dead. It transpired that the ex-boyfriend had stabbed her to death. There was a known history of domestic violence between the couple which had been recorded on a public protection referral.

These tragic events led to a claim for damages in negligence by Ms Michael's parents and her two children under the Fatal Accidents Act 1976 and the Law Reform Miscellaneous Provisions Act 1934. A claim was also made under the Human Rights Act 1998 for a breach of the defendant's positive duty to prevent foreseeable loss of life under Article 2 of the European Convention on Human Rights 1950 (ECHR).[3]

The decision

The leading judgment, given by Lord Toulson was supported by Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge with Lord Kerr and Lady Hale dissenting.

The main element of his judgment centres on whether the police owe a duty of care for the violent acts of third parties. Case law in this area stretches back to *Hill v Chief Constable of West Yorkshire*[4] where a duty of care was held not to exist to the family of a subsequent victim of the so-called 'Yorkshire Ripper' regarding mistakes made in failing to secure his arrest. A private action could not arise out of the public duty of the police to protect anyone potentially affected by their failure to carry out this duty effectively. The court in *Michael* was presented with evidence that the rising incidence of domestic violence could lend weight to distinguishing *Hill*.[5] However, Lord Toulson rejected this as encouraging too many litigants in other areas of claimed failures of police operations.

Lord Toulson accepted that the police, as with any public body, could be subject to individual claims where it is appropriate to move the case into the sphere of a private claim, such as the circumstances of *Knightly v Johns*.[6] Whether to extend the duty of care in the circumstances of Ms Michael, either by imposing a general duty on the police to all who might be affected by poor policing, or by a smaller incremental step based on her circumstances were the central issues in this case.

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[3] Article 2 of the Convention for the Protection of Human Rights and Fundamental freedoms (Rome, 4 November 1950)

[4] *Hill v Chief Constable of West Yorkshire* [1989] AC 53

[5] Anon, Everyone's Business: Improving the police response to domestic abuse, Her Majesty's Inspectorate of Constabulary, 2014, at www.hmic.gov.uk (Accessed 11th June 2015).

[6] *Knightly v Johns* [1982] 1 WLR 349

Lord Toulson rejected the contention that the police owed a duty of care to Ms Michael on receiving her telephone call and being advised of her perilous circumstances. English law does not, except in certain limited situations accept that a person or body can be held responsible for harm caused by someone else unless there exists some 'special' proximity between the parties.[7] The police were to be treated no differently from other organisations such as the fire service, health care and education – such institutions should not be liable for harm caused by a third party for whom they are not responsible. This would apply even in the light of strong evidence submitted to the Supreme Court regarding the incidence of domestic violence which identifies it as a substantial and known risk.

It was also contended by the appellants that special proximity was created during the telephone call based upon a relationship between the police and Ms Michael such that they had a duty to act because of the immediate threat to her well-being. This was also rejected by Lord Toulson. In citing two cases that were heard together, *Van Colle v Chief Constable of the Hertfordshire Police* and *Smith v Chief Constable of Sussex Police*,[8] Lord Toulson denied that the police knew in the present case that the police knew or ought to have known of the imminent risk to the life of the Ms Michael - on the facts of the phone call, they could not be sure. They had no control over the ex-boyfriend which distinguished this case from the control of the borstal boys in *Home Office v Dorset Yacht*.[9] And, on the facts the police had not assumed a responsibility to protect Ms Michael which could distinguish it from cases such as *An Informer v Chief Constable*.[10] The only assurance given by the civilian worker was to pass the call onto the South Wales Police. Her inquiry about locking the doors did not amount to instruction or advice – which may have given rise to a finding of the police having assumed responsibility for her safety so triggering a duty of care.[11]

The argument that the actions of the police breached article 2 of the ECHR was referred to investigation at a trial.

Commentary

The decision in *Michael* is disappointing. It revisits the oft-used cautious approach taken since Lord Wilberforce's so called 'high-water mark' in *Anns v Merton Borough Council*.[12] It reinforces the policy influence of financial prudence rather than victim protection, and the fear of the floodgates looms large. However, it also seems contrary to a strand of case law which has been developing which does not accept the fear of litigation as deterring the courts from imposing potential liability for a failure in the performance of the service in question. Solicitors (*White v Jones*)[13] and barristers (*Hall v Simons*)[14] have seen immunity

[7] *Smith v Littlewoods Organisation Ltd* [1987] AC 241
[8] *Van Colle v Chief Constable of the Hertfordshire Police* and *Smith v Chief Constable of* Sussex Police [2009] AC 225
[9] *Home Office v Dorset Yacht* [1970] AC 1004
[10] *An Informer v Chief Constable [2013] QB 579*
[11] *Barret v Ministry of Defence* [1995] 3 All ER 87
[12] *Anns v Merton* Borough Council [1978] AC 728
[13] *White v Jones* [1995] 2 AC 207

from liability removed after decades of protection under the duty of care formula. It also goes against the grain that has seen public authorities generally under greater scrutiny for their actions or inactions, for example, in the areas of child protection and social work.[15]

Lord Toulson rejected an incremental extension of the duty of care because of his fears of influencing how resources are allocated in the prevention of crime.[16] His Lordship was clearly uncomfortable in making a decision that might influence how resources would be allocated to protect potential victims of domestic violence with the effect, potentially, of reducing other areas of funding. However, would this not be overturned by Parliament if it felt necessary to do so?

The way in which Lord Toulson dealt with the issue of the assumption of responsibility may create problems in practical implementation in future as discussed by Lord Kerr in his dissenting judgment.[17] Rather than developing systems that attempt to provide the best possible service for individuals in such stressful situations, would the best legal advice to telephone-handlers be to avoid making statements about guaranteeing safety or advisory statements based on best experience? If they did so they might expose the police to a duty of care based upon the assumption of responsibility. The danger of 'defensive practice' is that it might lead to doubts as to whether the best possible service is being offered to keep potential victims safe.

The dissenting judgments are worthy of note as an alternative to the 'austerity' policy approach taken in Lord Toulson's leading judgment. Lord Kerr took the view that there is a need for a legal duty on the police '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'.[18] He was convinced that there was sufficient proximity to warrant a better police response in this case and the resource implications of such a decision should not deter the court. He also doubted the reasoning behind a fear of the 'floodgates' questioning whether evidence for potential rush of unfounded claims actually exists.[19] Lady Hale also took the view that the evidence in the case provided sufficient justification for requiring more than had been done by the police in this case and that the fears of making policing more difficult were unfounded.[20]

It is clear that there is a divergence of approach amongst members of the Supreme Court in their willingness to expand the duty of care. The language of financial prudence, so eminent in the political sphere can still dominate judicial thinking in defining and applying 'policy considerations'. A majority of the court were fearful of encouraging the vexatious litigant seeking a 'big pay-day'. It is disappointing that, despite an impressive body of evidence presented by the appellants which might have influenced discussions of 'policy' in this case

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[14] *Hall v Simons* [2000] WLR 543
[15] *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373
[16] Supra n 1 at para 121
[17] Supra n 1 at paras 184-6
[18] Supra n 1 at para 175
[19] Supra n 1 at para 184
[20] Supra n 1 at paras 197, 198

they were still trumped by the catch-all and ill-defined 'floodgates'. This well-known phrase falls short of reliable doctrine – there are regular references to it in the senior courts but no-one, it seems, has yet provided evidence that the fears at its heart are actually supported by evidence.

The Supreme Court missed an opportunity to respond to calls for greater protection of women who are the victims of such abuse, or worse. Change will surely come. A new approach here might have had a positive influence on changing first-contact procedures, noted as being in need of revision by Her Majesty's Inspectorate of Constabulary.[21] The duty of care might have been incrementally extended here where the caller was on a list of those known to the police to have been the subjects of previous abuse. Police procedures could be enhanced to ensure that call-handlers had better access to information to identify whether a caller is a repeat victim to ensure the dispatch of an immediate response. If Parliament felt it to be a step too far in judicial law-making then they could legislate.

Even in an emotive area in need of urgent reform such as domestic violence, the decision in *Michael* shows that, for the present, financial considerations and unproven theory can be at the heart of judicial definitions of 'policy'.

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[21] Supra n 5 at p 10