

Police Liability for Negligent Investigations: Unravelling the Blanket of Immunity

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The current law in England and Wales on police negligent liability is highly restrictive. Following the House of Lords decision in *Hill v Chief Constable of West Yorkshire*, ‘de facto’ immunity from prosecution continues to be the default position where claimants bring an action against the police for their negligence in the investigation or suppression of a crime. Despite the introduction of the Human Rights Act 1998, public policy justifications form the core rationale, which serves to reject negligence claims against the police. The fact that the courts apply an extremely narrow interpretation of the ‘obligation to investigate’ under the European Convention on Human Rights makes successful claims against police negligence for the violation of human rights unlikely.

This paper will critically analyse the test developed in *Hill* and evaluate whether the current law on police negligence is an adequate means of justice. It will consider the existence and scope of a police officer’s duty of care in line with the Human Rights Act 1998, and reassess the policy grounds underlying the decisions. In doing so this paper will argue that the principle developed in *Hill* is in dire need for reform. Whilst public policy justifications form a backbone in the law of negligence, and cannot be entirely disregarded, this paper will argue that courts need to formulate a broader test that can determine the scope of a police officer’s duty to investigate in line with the European Convention on Human Rights.

Introduction

The fundamental function of a police officer's role is to protect the public.¹ However, the translation of this function into the tort of negligence is a contentious matter.² In order to formulate a tort of negligence, it needs to be established that the defendant owes the claimant a duty of care. *Caparo v Dickman*³ is the leading case on the test for a duty of care, where the House of Lords established a 'three-fold-test' to determine whether a duty of care arose in negligence. This test comprises that first harm must be reasonably foreseeable as a result of the defendant's conduct, secondly, the parties must be in a relationship of proximity, and thirdly it must be fair, just and reasonable to impose liability. Under the current law there is no general common law duty to rescue another⁴ or to protect another from harm inflicted by a third party.⁵ The issue that arises is then to what extent the police, whose functions involve the rescue and protection of people, owe a duty of care in negligence. The law remains unclear on the scope of a police officer's duty to investigate crime.

The test formulated in *Hill v Chief Constable of West Yorkshire*,⁶ which is based on the foundations of public policy justifications, casts blanket immunity over the actions of police negligence. An automatic blanket of immunity over police negligence is considered to be problematic, as the scope an officer's duty to investigate crime is remained undefined. The test is furthermore challenged under the Human Rights Act 1998 (HRA 1998) for the potential violation of human rights. Article 2 states that 'everyone's life should be protected by law', and Article 3 of the convention prohibits torture and 'in-

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¹ *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

² Mandy Shircore, 'Police Liability for Negligent Investigations: When Will a Duty of Care Arise?' (2006) 11 Deakin Law Review 33.

³ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

⁴ *Stovin v Wise* [1996] AC 923.

⁵ *Alexandrou v Oxford* [1993] 4 All ER 328.

⁶ *Hill* (n 1).

human or degrading treatment or punishment'. Therefore, the Courts have inferred that where there has been a loss of life due to 'unintentional or intentional use of force'⁷ those actions will be scrutinized. Consequently, the compatibility between blanket immunity over police negligence and the HRA 1998 is questioned. Nevertheless, the courts consider public policy reasoning to override a victim's injustice faced under police negligence.

This paper proceeds in four parts:

Section one addresses how the current law on police negligence under the test formulated in *Hill* could be problematic, and whether the 'Hill immunity principle' is stretched to cover blanket immunity over all police actions. During the discussion of these issues, there will be particular emphasis on issue of the scope of a duty of care to investigate crime.

Section two critically analyses scholarly debates on the public policy reasoning that provide the foundations of blanket immunity on police negligence, with consideration of the Law Commission report⁸ addressing the issue. It will aim to address whether public policy reasoning justifies blanket immunity of police negligence.

Section three critically evaluates the case of *Osman v UK*⁹, with the aim of discussing whether the current law is compatible with the human rights legislation. To determine whether the *Hill* principle should be reassessed, an in-depth analysis on subsequent cases following the test formulated in *Osman*¹⁰ will be undertaken. This paper will take an original approach by analysing the 'scope of duty to investigate' as developed in *OOO & Others v Commissioner of Police of the Metropolis*,¹¹ which is the first case in England and Wales

⁷ Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to life or an onerous Burden on a state?' (2010) 21(3) EJIL 701.

⁸ Law Commission, *Administrative Redress: Public Bodies and the Citizen Administrative Redress: Public Bodies and the Citizen* (Law Com No 187, 2008).

⁹ *Osman v United Kingdom* (2000) 29 EHRR 245.

¹⁰ *ibid.*

¹¹ [2011] EWHC 1246 (QB).

to challenge the test formulated in *Osman*. This chapter will conclude by evaluating the merits of the test developed in *OOO*,¹² and consider whether this new test that defines the scope of a police's duty to investigate, should override the formula developed in *Osman*¹³.

Section four will provide a conclusion of the issues, and will argue that the law should reformulate the *Hill* test to incorporate the scope of a police officer's duty of care as considered in *OOO*.¹⁴

The *Hill* Principle

A murderer referred to as the 'Yorkshire ripper' committed 13 murders and 8 attempted murders of unaccompanied women.¹⁵ The claimant was the mother of his last victim, and brought an action under s 48(1) of the Police Act 1964, claiming damages for negligence against the Chief Constable in whose area most of the attacks occurred. The claimant argued that it was the duty of the police to 'exercise all reasonable care to catch the criminal'¹⁶ and the failure to do so, when they could and should have done it in the circumstances, amounted to a serious breach of their duty. The Chief Constable applied to strike out the claim as disclosing no cause of action.¹⁷ The claim was struck out by the High Court on the basis that the police owned no duty of care to a member of the public in respect of an attack on him made by another member of the public. This decision was upheld on appeal by the Court of Appeal¹⁸ and the House of Lords.¹⁹

¹² *ibid.*

¹³ *Osman v United Kingdom* (n 9).

¹⁴ *OOO* (n 11).

¹⁵ *Hill* (n 1).

¹⁶ *Hill* (n 1).

¹⁷ Rules of the Supreme Court (Revision) 1965, SI 1965/1776, para 19.

¹⁸ *Hill v Chief Constable of West Yorkshire* [1988] QB 60.

¹⁹ *Hill* (n 1).

Lord Keith, providing the leading judgement in the House of Lords, underlined the first ground for exempting police liability and denying a duty of care was the absence of a ‘special relationship’ legally referred to as ‘proximity’ between the police and the criminal. His lordship underlined that sufficient proximity arose in situations where a criminal was in police custody, or had escaped from it. It was held that the general duty owed by the police to suppress crime did not give rise to a duty owed to individual members of the public in respect of damage caused to them by a criminal whom the police had failed to apprehend where it had been possible to do so. In this case it was argued that there was insufficient proximity as the victim was one of the ‘vast number of female general public who might be at risk from his activities but was at no special distinctive risk in relation to them.’²⁰ Lord Keith underlined that the test for proximity requires ‘some further ingredient ... and the nature of the ingredient will be found to vary in a number of different categories of decided cases.’²¹

The second ground for granting police immunity was based on the principles of public policy. It was held that police liability would lead to detrimental consequences, in particular policing from a ‘defensive frame of mind’, and a ‘diversion of resources’ theory,²² which will be discussed in Section 3. Lord Keith concluded that ‘the general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their best endeavours to the performance of it.’²³ The police would therefore not be liable for their negligence during the ‘investigation and suppression’ of crime.

Blanket immunity under Hill principle?

²⁰ *Hill* (n 1) 57 (Lord Keith).

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

It has been suggested by academics such as Stapleton that the ‘*Hill* principle’ provides the police with ‘blanket immunity’ from civil suit even ‘when carelessness has caused an actionable form of damage to the plaintiff.’²⁴ Lunney refutes this argument and highlights that immunity of the police is not a blanket one because the courts have never exhibited the same reluctance to hold the police liable for positive acts of misfeasance.²⁵ Williams furthermore refuting Stapleton, states that it is essential to note that the police have no general immunity, and may be liable for their own negligent acts that directly harm another.²⁶

The courts have attempted to distinguish between two different types of negligence cases. The first type of case is ‘operational negligence’ where police officers have caused injury as a direct result of their actions or omissions, in which they would be liable for negligence in tort.²⁷ Thus in *Rigby*²⁸ the police were liable in negligence for failing to take adequate precautions against the high risk of fire when firing a canister of CS gas into the shop. Similarly in *Swinney*²⁹ a duty of care was owed to an informant who had received threats from a violent suspect after her contact details had been stolen from an unattended police car. The police were held liable in this case as they had assumed responsibility for the informant’s safety. The Courts have distinguished these ‘direct action’ cases from the rationale adopted in *Hill*, which grants police immunity only in cases where the claimant has suffered a loss because the police have made an error in the course of fulfilling their general public function of ‘investigating and preventing crime’.

²⁴ Jane Stapleton, ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 LQR 301, 303.

²⁵ Mark Lunney, *Tort Law: Text and Materials* (4th edn, OUP 2010).

²⁶ Kevin Williams, ‘Emergency Services to the Rescue, or Not, Again’ (2008) *Journal of Personal Injury Law* 265..

²⁷ WVH Rogers, *Winfield and Jolowicz on Tort* (8th edn, Sweet and Maxwell 2010) 210.

²⁸ *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

²⁹ *Swinney v Chief Constable of Northumbria* [1997] QB 464.

The ‘*Hill* principle’ was not initially formulated to provide blanket immunity over police negligence. However, it must be questioned where the distinction between ‘direct action’ and harm caused during ‘investigating and preventing crime’ lies. Palmer highlights that the principle established in *Hill* is ‘riven with problems of interpretation’³⁰ and continues to suffer severe academic scrutiny, for ‘its boundaries have never been properly defined.’³¹ In order to assess the tenability of the scope of police immunity it is essential to now critically examine subsequent case law following the *Hill* principle.

Hill principle extended - Osman v Ferguson

The facts of *Osman*³² concerned a school teacher, Paul Paget-Lewis, who had developed an unhealthy fixation with his 14 year old pupil, Ahmet Osman. Over a series of months Ahmet and his family were subjected to a campaign of harassment by Paget-Lewis that involved several acts of criminal damage. These incidences were reported to the police, who failed to take any action to arrest him. Consequently Paget-Lewis shot and killed Ahmet’s father and caused serious injury to Ahmet. Upon being arrested, Paget-Lewis stated that he had planned the attacks and questioned the police ‘why didn’t you stop me before I did it, I gave you all the warning signs?’.³³ Mrs Osman took the evidence of a ‘slipshod and lackadaisical investigation’³⁴ to challenge the duties of the police, and sued the Commissioner of the Metropolitan police for acting negligently.

The initial hearing in High Court dismissed claims against the police negligence under the immunity granted in *Hill*. In 1992 the Court of

³⁰ Phil Palmer, ‘Can the UK Police Ever Be Liable for Negligent Investigation or a Failure to Protect?’ (2011) 1 International Journal of Public Law and Policy 100.

³¹ *ibid.*

³² *Osman v Ferguson* [1993] 4 All ER 344.

³³ Claire McIvor, ‘Police Immunity and the Legacy of *Hill v. Chief Constable of West Yorkshire*’ (2005) 21 Professional Negligence 201.

³⁴ Laura Hoyano, ‘Policing Flawed Police Investigations: Unravelling the Blanket’ (1999) 62 MLR 912.

Appeal allowed an appeal from the High Court's decision. McCowan LJ recognized that, unlike in *Hill*, the plaintiffs here had 'an arguable case'³⁵ based on the very close proximity between the police, the family, and the teacher. However, the Court of Appeal held the case could not be distinguished from *Hill* on public policy grounds. McCowan LJ stated that the 'House of Lords decision on public policy immunity in *Hill*'s case dooms this action for failure ... I consider this a plain and obvious case falling squarely within the House of Lords decision.'³⁶ The relevant policy issues in *Osman* seemed to be the 'time, trouble and expense'³⁷ which would be involved in defending such cases and the possibility of floodgate concerns and the potential of re-opening of cases without reasonable cause. The Court struck out Osman's statement of claim as disclosing no reasonable cause of action, and refused an appeal. The applicants seeking justice took their claim to the European Court of Human Rights.³⁸

The decision in *Osman* has set precedent for the courts to stretch the *Hill* principle to an extent that accommodates cases satisfying a sufficient degree of proximity. Therefore, courts are granted permission to apply absolute immunity over police negligence, and it is considered justifiable on public policy grounds.

The undefined scope of Hill

The subsequent decisions in *Brooks*³⁹ and *Smith*⁴⁰ highlight that the application of the *Hill* principle is problematic, as its scope is undefined. Lord Keith in *Hill* introduced immunity for the police only when injury was caused during their 'investigation and suppression

³⁵ *Osman v Ferguson* (n 33) 350 (McCowan LJ).

³⁶ *ibid* 354 (McCowan LJ)..

³⁷ *ibid*.

³⁸ More discussion will be followed in Section 4.3.

³⁹ *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 2 All ER 489.

⁴⁰ *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225.

of crime'. However, one must question to what extent does the duty of 'investigating and suppressing' stretch? It appears that the scope of this duty is 'surprisingly uncertain',⁴¹ and 'there appears to be a few limits to its application.'⁴² McIvor argues that the decision in *Brooks* demonstrates that the courts have stretched the blanket of immunity to accommodate 'direct action' caused by the police, and its scope is now far 'too broad and imprecise.'⁴³ McIvor's line of reasoning, is reinforced by the decision in *Calveley v Chief Constable of Merseyside Police*⁴⁴ where the police were alleged to inflict direct harm on the victim. However, the House of Lords, applying *Hill*, automatically granted the police immunity from liability on public policy grounds 'without advertence to this important difference'⁴⁵ between 'direct harm' and 'investigating and suppressing crime'. The decision in cases such as *Calveley* and *Brooks*, have demonstrated that because the scope of *Hill* is undefined, police immunity is no longer confined to the 'suppression and investigation of crime,' it is problematically been 'stretched too far, and its foundations are wearing increasingly thin.'⁴⁶

The second problem arising under the *Hill* principle is addressed by Mullender who argues that the current law under *Hill* is particularly problematic as public policy justifications enable courts to shield police from claims that would 'deflect them from the pursuits of outcomes that serve the interests of sometimes very large numbers of people.'⁴⁷ Cases such as *Smith* demonstrate that the public policy card is played far too easily to shield liability for police actions, and

⁴¹ Dermot PJ Walsh, 'Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog' (2011) *King's Law Journal* 27.

⁴² Palmer (n 31).

⁴³ Claire McIvor, 'Getting Defensive About Police Negligence: the *Hill* Principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 *CLJ* 133, 142.

⁴⁴ *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228.

⁴⁵ Walsh (n 42).

⁴⁶ McIvor (n 44) 5.

⁴⁷ Richard Mullender, 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 *MLR* 961.

the courts have afforded a ‘privileged status’⁴⁸ to the police, who have therefore attained the freedom to discharge their duties with the excuse of ‘preventing and detection’ of crime. With the undefined scope of the *Hill* principle coupled with public policy justifications, courts are able to cast a blanket of immunity over all police actions.

McIvor concludes that until cases such as *Brooks* and *Smith* are challenged, the *Hill* principle cannot be ‘properly understood and implemented.’⁴⁹ Wilberg, in consensus with McIvor, has held that the ‘*Hill* principle’ may lead to injustice and needs to be reassessed. However the courts are yet to offer ‘any principled analysis on whether there are limits to the police functions.’⁵⁰ The continuing academic contention and judicial uncertainty of the scope of the *Hill* principle has suggested that the time has come for it to be reformed.

Public Policy Reasoning

Public policy reasoning has been a central characteristic of the judicial development of tort law.⁵¹ Policy considerations come into play at the third stage of the prevailing duty of care test set out in *Caparo*.⁵² They involve ‘examining the effect that imposing a duty of care would have on law and on society more generally, rather than the nature of the relationship between the parties.’⁵³ A policy consideration in favour of imposing a duty of care on police actions is that liability would contribute to deterring negligent conduct that may occur during the investigation and suppression of crime. Conversely, public policy grounds would dictate that imposing a duty of care will lead the police to adopt ‘defensive practices’, which will interfere

⁴⁸ Palmer (n 31).

⁴⁹ McIvor (n 44).

⁵⁰ Hanna Wilberg, ‘Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims’ (2010) 126 LQR 420.

⁵¹ Jonathan Morgan, ‘Policy Reasoning in Tort Law: the Courts, the Law Commission and the Critics’ (2009) 125 LQR 215.

⁵² *Caparo Industries* (n 4).

⁵³ *Cooper v Hobart* [2001] 3 SCR 537, [30]; *Attorney General v Carter* [2003] 2 NZLR 160 CA (NZ), [22].

with the proper discharge of the authority's public duties, functions or powers.

Lord Reid dismissed the defensive administration argument in *Dorset* by declaring that:

[I]t may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way. But my experience leads me to believe that her Majesty's servants are made of sterner stuff. So I have no hesitation in rejecting this argument.⁵⁴

Since Lord Reid's speech the courts have changed their line of reasoning, and public policy reasoning developed in *Hill* dictates the current law on police negligence.⁵⁵ It is essential, then, to analyse these public policy justifications.

Courts have granted immunity to the police based on public policy reasoning. Not only does this open up a serious gap in police accountability, it can also result in grievous injustice for the victim to be denied a remedy.⁵⁶ This next section will critically analyse the public policy arguments utilized by the courts, and evaluate whether the rationale developed by Lord Keith can still justify a blanket of immunity.

Lord Keith's policy argumentation

In *Hill*, Lord Keith provides the foundation for public policy reasons that exclude the police from owing a duty of care in the investigation and suppression of crime, even in circumstances where a high proximity threshold was satisfied.⁵⁷ It was argued that the imposition of

⁵⁴ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

⁵⁵ *Hill* (n 1).

⁵⁶ *Walsh* (n 42).

⁵⁷ *Hill* (n 1).

liability could result in police operations being conducted in a ‘detrimentially defensive frame of mind.’⁵⁸ His lordship held that the defence of such actions would also entail a significant diversion of resources and attention away from the most important police function: the suppression of crime. He argued the police were motivated by a sense of public duty to apply their best endeavours. Therefore to argue that the threat of liability for negligence would promote officers to perform to higher standards, and improve levels of service for the community, is futile in the context of police investigation and suppression of crime. Lord Keith’s second argument rested on a ‘diversion of resources’ theory. He argued that reducing the scope of immunity for police negligence was argued to lead to a growth in litigation aimed at re-opening and reviewing lengthy and complex police investigations. It was furthermore emphasized that matters of policy and discretion should be left for the government. Therefore it was held that the ‘public interest in allowing the police to remain focused on their essential law enforcement tasks outweighs the interests of the individual in securing a remedy in damages for their negligent failure to discharge those tasks.’⁵⁹

Evaluating Lord Keith’s arguments

The claim in *Hill* failed on two public policy grounds proposed by Lord Keith; firstly the ‘diversion of police resources’ and secondly the ‘defensive practice’ argumentation. Lord Keith’s ‘diversion of resources’ public policy rationale is based on a utilitarian rationale that is particularly justifiable in light of the current economic downturn. Wilberg highlights that the imposition of duty of care would certainly lead to time and energy being diverted into unproductive or unnecessary defensive measures, for example excessive production of paper trails.⁶⁰ McIvor, in consensus with Wilberg, argues that the

⁵⁸ Walsh (n 42).

⁵⁹ Walsh (n 42).

⁶⁰ Wilberg (n 51).

‘diversion of resources argument is perhaps more tenable’⁶¹ because it is objectively verifiable. It would cost both time and money to defend any legal action. In a climate where police officers are being made redundant,⁶² it is neither feasible nor desirable for the limited budget to be spent unnecessarily. McIvor notes that liability will inevitably involve a ‘depletion of already limited public funds,’⁶³ and the entire community will suffer as a result of an individual’s claim. Taking McIvor’s point into consideration it can be argued that the ‘diversion of resources’ reasoning enables the greatest good for the greatest number, and public policy reasoning based on this theory does not leave much scope to be challenged.

Whilst the ‘diversion of resources’ provides convincing grounds to deny a duty of care, McIvor critically notes that the central policy defence argument that is most often exclusively implemented by the courts is the ‘defensive practice’ argument. It is therefore essential to critically consider whether the public policy argumentation based on ‘defensive practice’ justifies police immunity for negligence.

Judicial support of ‘defensive practice’

Lord Keith’s reasoning provides the backbone for policy considerations for negligence claims, and has received much judicial support. In *Smith*⁶⁴ Lord Carswell stated that it was of ‘paramount importance’ for the law to enable the police to fulfil their duty ‘without being trammelled by the need to devote excessive time and attention to complaints, or being constantly under the shadow of threatened litigation.’⁶⁵ Furthermore, Lord Hope underlined that not all threats reported to the police are genuine.⁶⁶ It is therefore essential for the

⁶¹ McIvor (n 44).

⁶² Nigel Morris, ‘Home Office: 20,000 police officers predicted to lose jobs’ *The Independent* (London, 21 October 2010).

⁶³ McIvor (n 44).

⁶⁴ *Smith* (n 41).

⁶⁵ *ibid* 76 (Lord Carswell).

⁶⁶ *ibid* 70.

police to assess the seriousness of a threat in a given situation, and their judgement should not amount to liability for negligence. In *Brooks*, Lord Steyn concluded that the ‘defensive practice argument’ continues to justify police immunity, and any retreat from the principle in *Hill* would have a detrimental effect on law enforcement. His lordship stated:

Such legal duties would tend to inhibit a robust approach in assessing a person as 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 in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill*’s case, be bound to lead to an unduly defensive approach in combating crime.⁶⁷

Their lordships regarded this ‘detrimental defensive frame of mind’ would have a grave impact on society and an individual’s claim for negligence would not justify the potential threat for society to be jeopardized.

Challenging the ‘defensive practice’ argument

Academics have asserted the need to question whether the ‘defensive practice argument’ formulated by Lord Keith continues to justify police immunity, as the core principle of *Hill* has remained unchallenged in our domestic jurisprudence for many years. Wilberg argues there is no empirical support for the notion that imposing a duty of care on the police for the manner in which they undertake the detection and prevention of crime function will result negatively on law enforcement.⁶⁸ Morgan reiterates Wilberg’s criticism and questions ‘upon what evidence did the House of Lords rely? What proof was adduced of the societal interest for which the tort remedy was thus

⁶⁷ *Brooks* (n 40) [30].

⁶⁸ Wilberg (n 51).

sacrificed?’⁶⁹ Morgan notes, that the fact of the matter is that the courts have merely speculated about the effects of liability upon policing, and there is a lack of any ‘empirical foundation’⁷⁰ for the assertions of the ‘defensive practice argument’.

Walsh argues that Lord Steyn’s speech in *Brooks* demonstrates how the foundation of the ‘defensive practice’ principle relies ‘too heavily on hyperbole and exaggeration as a substitute for empirical evidence.’⁷¹ According to Walsh, the Hill reasoning is weak and the reader is simply ‘papered over by the power of Lord Steyn’s presentation.’⁷² He argues that the use of terminology such as ‘fearlessly and with despatch’⁷³ or ‘unduly defensive’⁷⁴ or ‘robust approach’⁷⁵ conjures an image of a ‘brave and resolute police force’⁷⁶ fighting crime. Furthermore, the use of ‘community’ in Lord Steyn’s speech as opposed to ‘public’ or ‘state’ is particularly effective in boosting emotional support for the public policy principle.⁷⁷ Consequently, imposing liability on officers of the community would seem almost selfish and unpatriotic.

Walsh’s criticism highlights that the defensive practice argumentation is not as convincing as it initially appears. He depicts that there is a hole in the policy reasoning: there is a lack of evidence on ‘defensive practice’ assertions, and judges are attempting to patch up that hole through effective terminology and persuasive lexis. He argues that the judgements fail to clarify the deeper legal and political issues at stake.⁷⁸

⁶⁹ Morgan (n 52) 217.

⁷⁰ *ibid.*

⁷¹ Walsh (n 42).

⁷² *ibid.*

⁷³ *Brooks* (n 40).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Walsh (n 42).

⁷⁷ *ibid.*

⁷⁸ *ibid.*

The scope of the public policy

The lack of clarity and scope provided by the judges on policy reasoning is particularly problematic when considering the broader issue of police accountability to the law in a 'liberal democracy based on respect for human rights.'⁷⁹ Walsh states that the current public policy reasoning may be justified in a case involving minor negligence and harm for the victim. However, it is essential to question how wide these public policy reasonings stretch? Should they equally justify a case involving gross negligence and serious injury? Walsh argues that it is unconvincing for a victim of a human rights violation resulting from gross negligent police behaviour, to be denied a remedy based on feeble 'defensive practice arguments'⁸⁰. For example in *Smith*⁸¹ where the victim is denied the remedy for the negligence of police to respond 'promptly and professionally to reports of a serious criminal threat, simply because to grant liability might deter the police from responding to threats "robustly" or "fearlessly and with despatch"'⁸² is, according to Walsh, a ridiculous infringement of one's basic human rights.

Walsh has convincingly demonstrated that the lack of evidence has led to question the credibility of the Hill public policy argument, and to raise several issues concerning human rights. However, should policy consideration be a judicial decision in the first place? Academics such as Stevens and Beever have argued that legislative process is the appropriate forum for policy consideration. They argue it is 'instructive to compare the Law Commission's treatment of the defensive administration issue.'⁸³ Lord Phillips CJ in *Smith* reiterates this notion and states that matters for public policy 'is not readily resolved by a court of law'⁸⁴ and one should refer to the government

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *Smith* (n 41).

⁸² Walsh (n 42).

⁸³ Morgan (n 52).

⁸⁴ *Smith* (n 41) 102.

on investigation of the issue. The Law Commission report on the matter should therefore be considered.

Law commission report on public policy

The Law Commission's report on *Administrative Redress* contains a discussion on the problems of the law's impact upon public authority decision-making.⁸⁵ The Commission acknowledges that the central question relating to public authority liability concerns the assertions that are frequently made without empirical backing. The Commission stated that whether liability is beneficial, detrimental or non-existent is 'heavily context, indeed organisation specific.'⁸⁶ Having surveyed the research on the impact of tort liability on police, the Commission concluded that it is 'simply not possible to make an accurate general statement as to the likely outcome of any given change in liability on a range of public bodies.'⁸⁷ The report stated that its proposals on the public authority compensation paper therefore cannot be predicted because of the lack of detailed figures existing on government liability.

Morgan argues that the Law commission's reasoning is rather opaque.⁸⁸ He argues that it is 'unacceptable'⁸⁹ for the courts to deny liability based on theoretical reasoning, and the Law commission should attempt to fill the gaps of empirical evidence.⁹⁰ In the current economic climate where there is already a limited budget, the government identified what it saw as a very significant difficulty with the proposal, that being 'the potentially huge financial impact of any changes'. As it stated in the consultation paper⁹¹ there are no com-

⁸⁵ Law Commission (n 8) Appendix B.

⁸⁶ *ibid* para B(82).

⁸⁷ *ibid* para B(83).

⁸⁸ Morgan (n 52).

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ Law Commission, *Evaluation of Regulatory Impact Assessments* (HC 2006-07, 606) para 6.9.

prehensive figures setting out the present cost of providing redress, making it difficult to quantify the impact of amending the law. However, the sheer scale of the figures quoted indicate the ‘potential difficulties for the problems with the financial services system are challenges to regulatory decisions.’⁹²

The lack of evidence on the defensive practice theory presents a credible argument against public policy reasoning. However, the feasibility in obtaining the sufficient evidence to determine whether or not liability for police negligence will in fact cause a detrimental impact on society is proven to be extremely difficult. Furthermore has been held as an issue that the government has refused to spend time and costs on.

‘Defensive medicine’ argumentation

The difficulty in obtaining adequate empirical information by the Law Commission and the government, would consequently imply that the obstacle would be as formidable for the judiciary.⁹³ Therefore in order to depict the potential ramifications on police liability the courts should consider the effects of liability on medical negligence, ‘defensive medicine’.

The Public Accounts Committee has reported that outstanding medical negligence claims against the health service amounts to £3 billion; a number which is reported to grow every year.⁹⁴ Furthermore, Dr. Panting emphasizes the repercussions of liability on medical negligence has caused the doctors in the country to work ‘often under extreme pressure’.⁹⁵

Indeed, the medical practice cannot be completely likened to policing, however, the financial repercussions of ‘defensive medicine’ cannot

⁹² *ibid* 6.10.

⁹³ Morgan (n 52).

⁹⁴ BBC News, ‘Litigation: Next NHS Crisis’ *BBC News* (19th January 2000) <news.bbc.co.uk/1/hi/health/610487.stm> accessed 23 August 2013.

⁹⁵ *ibid*.

be disregarded. Therefore with reference to statistics obtained under ‘defensive medicine’ it could be argued that liability on police negligence could have the same detrimental effect, which is highly undesirable particularly under the current economic austerity.

‘Separation of Powers’

It has been suggested that judges should not be involved with matters of policy in accordance with ‘a dogmatic adherence to the Separation of powers’.⁹⁶ Lord Scarman asserts that judges should simply ignore policy questions ‘which neither they, nor the forensic process which it is in their duty to operate, are equipped to resolve.’⁹⁷ If legal principles lead to practical consequences that are socially unacceptable then it is up to the Parliament to ‘legislate to draw a line or map out a new path.’⁹⁸

Lord Edmund-Davies in *McLoughlin v O'Brian* refutes Lord Scarman’s approach as being ‘as novel as it is startling’⁹⁹ on two grounds. Firstly, he argues that for the judiciary to disregard all policy issues would jeopardize the development of the law, due to the slow processing that would occur if a case had to be under legislative consideration. The lengthy processing may result in the ‘gap in lawmaking’¹⁰⁰ and prospects for legal reform would fail under what Friendly J described as ‘judges who can’t and legislators who won’t’.¹⁰¹ Morgan reiterates this notion and comments that it would be impractical ‘for judges to abdicate all responsibility for the social acceptability of the common law’¹⁰² and automatically rely on the Parliament to intervene when the law appears to have problematic consequences on

⁹⁶ *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) 430.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid* 427.

¹⁰⁰ *ibid.*

¹⁰¹ Henry J Friendly, ‘The Gap in Lawmaking – the Judges Who Can’t and the Legislators Who Won’t’ (1963) 63 *Columbia Law Review* 787.

¹⁰² Morgan (n 52).

the society. Secondly, Lord Edmund Davies in *McLoughlin*¹⁰³ argued the judiciary are capable of assessing social policy reasoning. Morgan reinforces this argument on the basis that the courts are required to assess compatibility of Acts of Parliament with the ECHR under the HRA 1998, therefore it would be obscure to argue that these judges are incapable of weighing ‘the costs (to the individual) against the benefits (to society) of the challenged legislation’¹⁰⁴ in a tort case. Under the ‘defensive practice’ argumentation it has been highlighted that the Law Commission, government and parliament all lack the data for cost-benefit analysis and implement the law on a ‘speculative basis’.¹⁰⁵ This suggests that the legislature is not superior in governing ‘public policy reasoning related to ‘defensive practice’ to the judiciary. Lord Scarman’s ‘separation of powers’ argument is therefore easily refutable and public policy reasoning can be understood as an issue that should be considered by the judiciary.

Police Liability under the Osman Test

This section aims to consider whether the current law, under which the police are granted blanket immunity for their negligence, is compatible with the European Convention on Human Rights (ECHR). It will further seek to address the scope of a police officer’s duty to investigate crime under the HRA 1998.¹⁰⁶ The judgements of the English courts, and European Court of Human Rights (ECtHR) in *Osman*¹⁰⁷ will be critically evaluated with particular reference to Lord Hoffman’s critique of Osman, in order to highlight the problems the current law on police negligence may face in terms of human rights. The judgement in *Van Colle*¹⁰⁸ will be critically compared to the re-

¹⁰³ *McLoughlin* (n 97) 428.

¹⁰⁴ Morgan (n 52).

¹⁰⁵ *ibid.*

¹⁰⁶ HRA 1998, s 15(1)(b).

¹⁰⁷ *Osman v Ferguson* (n 33), *Osman v United Kingdom* (n 9).

¹⁰⁸ *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225.

cent decision in *OOO*¹⁰⁹ in order to determine to what extent the police have a duty to investigate crime under the HRA 1998.

Osman v UK

Following the decision in *Osman v Ferguson*¹¹⁰ the Osmans claimed that the striking out procedure had denied their case a fair hearing, and went to the European Court of Human Rights (ECtHR) to argue violations of Article 2 (the right to life, in relation to the father), Article 6 (the right to a fair trial), Article 8 (the right to respect private and family life) and Article 13 (the right to an effective remedy) under the ECHR.

The right to life under Article 2 is interpreted to impose ‘positive duties’ that can either be ‘procedural duties’ or ‘substantive duties.’ The primary procedural duty imposes an obligation on the state to:

... carry out an independent public investigation into any death occurring in circumstances in which it appears that an individual’s Convention rights have been, or may have been, violated and it appears that agents of the state may be in some way implicated, whether through deliberate act or negligent omission.¹¹¹

Article 2’s ‘substantive duty’ requires the state to take preventive measures ‘to protect an individual whose life is at risk from the criminal acts of someone.’¹¹² The government has stated that an infringement of this duty will occur on actions of gross negligence or wilful disregard of the duty to protect life.¹¹³ The test of duty to investigate set by the European Court requires an applicant to show that the authorities know or ought to have known of the existence of a real and immediate risk to the life of an identified individual from

¹⁰⁹ *OOO* (n 11).

¹¹⁰ *Osman v Ferguson* (n 33).

¹¹¹ *McIvor* (n 44) 146.

¹¹² *ibid.*

¹¹³ *Hoyano* (n 35).

the criminal acts of a third party, and that they failed to take reasonable measures within their powers which might have been expected to avoid that risk.¹¹⁴

The courts applied this test in *Osman* and concluded that at no stage the police ‘knew or ought to have known’ that the lives of the Osmans were at real and immediate risk from Paget-Lewis, therefore there was no breach of Article 2 or 8.¹¹⁵ The psychiatrist who interviewed Paget-Lewis had stated there were no signs of mental illness, and it would be unreasonable for the police to determine from only the complaints by the school, that Paget was a mentally disturbed and highly dangerous individual. Neither were his acts of vandalism or cryptic threats sufficient to amount to as a threat against the lives of the Osman family. The Court held the police had acted in a reasonable manner given the information that was provided to them, and were not in breach of their duty to protect lives.

In consideration on whether there had been a breach of Article 6 the ECtHR gave regard to the legitimacy of the public policy justification, and acknowledged that the exclusionary rule of liability developed in *Hill* was not ‘of an absolute nature.’¹¹⁶ However, it was held that the public policy hurdle ‘provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.’¹¹⁷ It was found that the Court of Appeal in applying the public policy justifications had made no further enquiry into the existence of competing public interest considerations, and this serves ‘to confer a blanket immunity on the police for their acts and omissions’¹¹⁸ which therefore ‘amounts to an unjustifiable restriction on the applicant’s right.’¹¹⁹ The ECtHR held the current law under the *Hill* principle confers ab-

¹¹⁴ *ibid.*

¹¹⁵ *Osman v United Kingdom* (n 9).

¹¹⁶ *Osman v United Kingdom* (n 9).

¹¹⁷ *Hoyano* (n 35) 919.

¹¹⁸ *ibid.*

¹¹⁹ *Osman v United Kingdom* (n 9).

solute immunity on police actions, and is therefore inconsistent with the human rights legislation, amounting to a breach of Article 6, and Article 13.¹²⁰

Lord Hoffman's critique on Osman

Lord Hoffman held that the decision in *Osman* filled him with apprehension,¹²¹ and should be challenged on several grounds. His Lordship maintained that the ECtHR in their decision had utilized Article 6 in deciding what a person's civil rights and obligations should be, rather than merely providing the right to access a court.¹²² He contended there was a potential conflict between the UK legal system and the Strasbourg jurisprudence, as the ECtHR is 'challenging the autonomy of the courts, and indeed the Parliament of the United Kingdom to deal with what are essential social welfare questions involving budgetary limits and efficient public administration.'¹²³ His lordship contended that *Osman* concerned the 'merits of the substantive tort law rather than the right to a hearing.'¹²⁴ He supported the notion that the ECtHR had misinterpreted the law of negligence, as they 'did not understand the principle by which an action is struck out without going to trial if proof of all the facts alleged would not sustain a cause of action.'¹²⁵

George supports Lord Hoffman's critique by citing the case of *Z v United Kingdom*¹²⁶ in which the ECtHR has stated that its reasoning in *Osman v UK* was 'based on a misunderstanding of the English law of negligence which led to it misapply the distinction between

¹²⁰ *ibid.*

¹²¹ Lord Hoffman, 'Human Rights and the House of Lords' (1999) 62 MLR 159, 164.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *Z v United Kingdom* (2001) 34 EHRR 97.

substantive and procedural rights.’¹²⁷ In the case of *Z* the local authority failed to separate four children from their mother even though it was clear that the children were being subjected to an unacceptable level of abuse and neglect. The ECtHR held there had been a breach of Article 3, but did not find a breach of Article 6(1) of the Convention, the right to a fair trial. The majority of the Court – although not expressly stated – implied that the decision in *Osman v UK* was wrongly decided. Therefore the decision in *Z* casts doubt over the validity of *Osman v UK*.

Evaluating Lord Hoffman’s Critique

The decision in *Z* reinforces Lord Hoffman’s critique, and demonstrates that the *Hill* principle does not violate the ‘right to access Court’ under Article 6 of the Convention. However, a close examination on the European Court’s judgement in *Z* indicates that although courts have held the *Hill* principle is not a violation of Article 6, blanket immunity over police negligence is not completely compatible with the HRA 1998.¹²⁸

It is essential to note that in *Z*, although the ECtHR may have retreated from *Osman* and Article 6, the authorities were still in breach of their positive duties under Article 3, and the claimants had an effective right of remedy under Article 13 of the Convention.¹²⁹ This highlights that Article 6 may not have been breached, but there was still a breach of other Convention rights. The dissenting judges in *Z* refused to accept the argument that ‘barring the examination of the case on its merits was proportionate to the need for adequate protection of individuals and society’.¹³⁰ Judge Palm most convincingly argues that if the complaint involves a violation of core Convention rights, such as Article 3, and grants an effective remedy un-

¹²⁷ *ibid* 100.

¹²⁸ *ibid*.

¹²⁹ *ibid*.

¹³⁰ *ibid*.

der Article 13, then the Court is bound to provide a judicial remedy under Article 6.¹³¹ A decision otherwise would be nonsensical. Walsh critically concludes that the Court has held it was incorrect in deciding a breach of Article 6 in *Osman*, however *Z* demonstrates that the current law on police negligence under the *Hill* immunity principle is incompatible with the human rights legislation.¹³²

McIvor argues how the courts have ‘deliberately interpreted the existing HRA and European Court of Human Rights jurisprudence as restrictively as possible, so as to create a test for police liability under the HRA which would operate in a similar fashion to its common law cousin.’¹³³ The question that arises from this line of reasoning is whether potential ‘floodgate concerns’ and public policy reasoning outweigh the fundamental rights of individuals that may be breached? Lord Millet held it was ‘difficult to defend a blanket professional immunity in view of the Convention.’¹³⁴ Lord Hope reiterated this notion and stated the principle at common law and the ECHR was that any immunity had to be fully justified, as it was a derogation from a person’s fundamental right of access to the court.¹³⁵ He concluded that in civil cases ‘the immunity was disproportionate since, as a derogation from a fundamental right, it was no longer justifiable on grounds of public interest.’¹³⁶ The current law under *Hill* is insufficient in protecting a citizen’s fundamental rights under the convention; therefore the law needs to develop in harmony with the HRA 1998. However the courts have realized that when there is a breach Article 2 and Article 3 of the ECHR a claimant can bring a claim under the test developed in *Osman*.

¹³¹ *ibid.*

¹³² Walsh (n 42).

¹³³ Claire McIvor (n 44) 146.

¹³⁴ Andrew Bowen, ‘A Terrible Misunderstanding? *Osman v UK* and the Law of Negligence’ (2001] Scots Law Times 59, 64.

¹³⁵ *ibid.*

¹³⁶ *ibid.*

Van Colle

Following the decision in *Smith* where liability was not imposed for police negligence under the *Hill* principle (see above), the parents of Mr Van Colle brought a claim under sections 6 and 7 of the HRA 1998, in reliance on Articles 2 and 8 of the ECHR. Lord Bingham applied the duty of care test developed in *Osman* and questioned whether the police, making a reasonable and informed judgment on the facts and in the circumstances known to him at the time, should have appreciated that there was a ‘real and immediate risk to the life’ of Mr Van Colle. According to Lord Bingham there was no reprehensible failure on the part of the police to exercise their powers.¹³⁷ The lordships applied the formulation of the *Osman* test to consider police liability for the breach of human rights, and most problematically did not even consider the scope of the procedural duty arising under Article 2 of the ECHR.

Separate cause of action

The decision in *Van Colle*¹³⁸ demonstrates that courts have not relaxed the *Hill* principle, but have recognized there is a separate cause of action where there has been a breach of human rights, under the test developed in *Osman*, which imposes liability when ‘authorities know or ought to have known of the existence of a real and immediate risk to the life of an identified individual’.¹³⁹ It is essential to question how effective the *Osman* test is in granting justice to a victim whose human rights have been breached through police negligence. On one hand it may be argued that the recognition of a separate cause of action for a breach of human rights instils justice and fairness to the law on police negligence, as a claimant who is denied rights from the *Hill* principle of blanket immunity is now able to bring a cause of action to court. On the other hand, it may be argued

¹³⁷ *Van Colle* (n 109).

¹³⁸ *ibid.*

¹³⁹ *Osman v United Kingdom* (n 9).

that a separate action brought under the *Osman* test changes little about police immunity. The decision in *Van Colle* demonstrates that the ‘duty of care test’ developed in *Osman* is narrow in its scope, confining an applicant to successfully claim against the police for their failure to investigate crime only when there is an ‘immediate risk to life’. The undermined scope of the ‘risk to life’ under *Osman* is restrictively interpreted in a way that the police would ‘rarely be liable under the HRA for failing to protect an individual from the criminal acts of a third party.’¹⁴⁰ Under this narrow interpretation, justice may be curtailed. Lord Browne Wilkinson in *Barrett* held the *Osman* test has left English tort law in a ‘very unsatisfactory state of affairs.’¹⁴¹ McIvor also challenges this jurisprudence, and argues that the English courts need to adopt ‘a more refined and context-specific approach to the determination of this form of police liability.’¹⁴² Therefore, *Van Colle* demonstrates that despite creating a separate cause of action for a breach of human rights, the *Osman* test is inadequate in protecting those same rights of applicants.

The case of OOO

The claimants here were Nigerian women who brought a claim against the Metropolitan Police for the infringement of their rights under Article 3 (prohibition of torture) and Article 4 (prohibition of slavery and forced labour) of the ECHR, and damages pursuant to section 8 of the HRA 1998. The claimants were brought into the United Kingdom from Nigeria illegally, and subject to years of physical and emotional abuse whilst working for no pay in various London households. They alleged that their treatment over these years was such that they were subject to inhuman and degrading treatment and that they were held in slavery or servitude contrary to Articles 3 and 4 respectively. The officers of the Metropolitan Police were asked to investigate the treatment, but failed to undertake any such

¹⁴⁰ Claire McIvor (n 44) 145.

¹⁴¹ *Barrett v Enfield London Borough Council* [1999] 3 All ER 193.

¹⁴² *ibid.*

inquiry.¹⁴³ The case centred upon the question: to what extent do the police have a duty to undertake an investigation? The Court decided against the decision in *Van Colle* and held the failure of the police to undertake an effective investigation amounted to a successful claim in negligence, which infringed Articles 3 and 4 of the Convention.¹⁴⁴ The decision in *OOO* is the first in England and Wales to challenge the test developed in *Osman*, and determine the scope of an officer's duty to investigate. An analysis of the judgement is therefore useful here.

The judgement of OOO

Ms Kaufmann, the barrister representing the claimants refers to the judgement of *Rantsev v Cyprus and Russia*¹⁴⁵ to support the claim for a breach of Articles 3 and 4. In *Ranstev* the applicant complained that his daughter had been trafficked from Russia to Cyprus, and brought a claim against the Russian authorities upon the failure to investigate this alleged trafficking. Williams J accepted that the paragraphs from the *Rantsev* judgement submitted by Ms Kaufmann confirming the following features as necessary components of the duty to investigate:

Once a credible allegation of an infringement of Article 4 has come to the attention of the police, there is a duty upon the police to act of its own motion. The existence of a duty to investigate does not depend upon an actual complaint from a victim or next-of-kin.

The duty to investigate carries with it a requirement to investigate promptly and / or with reasonable expedition.

Once the duty has been triggered the investigation must be effective. It must be capable of leading to the identification

¹⁴³ *OOO* (n 11)..

¹⁴⁴ *ibid.*

¹⁴⁵ *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

and punishment of the individual or individuals responsible. This is an “obligation not of result but of means.”¹⁴⁶

If the components identified in *Ransteve* are incorporated into the domestic law of England and Wales, it would follow once a ‘credible amount’ of information of a breach of Article 4 has brought to the police, they would have a duty to ‘investigate promptly with reasonable expedition’. This essence of the duty is the ‘obligation’ to undertake the investigation.

The defendant’s barrister, Lord Faulks QC, did not accept that the investigative duty arising under Article 4 should be interpreted in this way.¹⁴⁷ He argued the test developed in *Ransteve* was far too broad in its interpretation, and the scope of the duty should be informed by the decision in *Osman* and the common law of England and Wales. Under the principle of *Hill* the claim against the Commissioner of Police of the Metropolis would fail easily under public policy reasoning. However, in order to defend the claim against a breach of human rights, Lord Faulks QC needed to establish that the facts of *OOO* fell outside the *Osman* test on ‘real and immediate risk to life.’ In order to defend the claim, he underlined that although there is a positive obligation upon the police to prevent a person from being subject to treatment falling within Articles 3 and 4, the scope of this preventive duty is restricted by reference to paragraph 116 in *Osman*, which states:

Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.¹⁴⁸

¹⁴⁶ *OOO* (n 11) [151].

¹⁴⁷ *OOO* (n 11) [130].

¹⁴⁸ *Osman v United Kingdom* (n 9) [116].

Lord Faulks used this paragraph to support the argument that the test developed in *Rantsev* would challenge fundamental public policy concerns that govern the law of police negligence in the UK. Therefore, he submitted the limited scope as developed in *Osman* would be the most appropriate.

Williams J challenged Lord Faulks submission on several grounds. Firstly, he applied the decision in *Van Colle* and stated that Lord Faulks had failed to distinguish that the scope of the duty to investigate can be informed by two separate causes of action, those being; one under the common law of England and Wales which follows the *Hill* principle, and the second under the *Osman* test. In *Van Colle* the House of Lords ‘unanimously and unequivocally accepted’¹⁴⁹ that the test and scope developed in *Osman* would be applied by the UK courts to determine whether the police are in breach of their positive duty to prevent action amounting to a breach of the Convention. Therefore, Williams J stated that an actionable duty to investigate the alleged breaches of Articles 2, 3, and 4 arises only by virtue of the Convention under the *Osman* test, and there is no existing duty in the common law of England and Wales, as the *Hill* principle confers automatic blanket immunity over police negligence. Thus, he submitted that Lord Faulks was in error to state that the ‘duty to investigate ought to be defined by reference to the common law of England and Wales’;¹⁵⁰ he reasoned that the court should consider the scope of the duty to investigate under the *Osman* test.

Williams J accepted that public policy reasoning, such as priority of resources and not imposing a disproportionate burden upon the authorities, were essential to consider. He argued that support for policy reasoning was gained from paragraph 287 in *Rantsev* itself.¹⁵¹ However, he noted that Lord Faulks has been unable to identify that the specific test formulated in *Osman* could not be used to determine the scope of the duty to investigate ‘when the infringements alleged

¹⁴⁹ *Van Colle* (n 109).

¹⁵⁰ *OOO* (n 11).

¹⁵¹ *Rantsev* (n 150) [287].

have taken place i.e. when they are historical.¹⁵² Therefore, he maintained that policy reasoning ‘cannot be used to justify the emasculation of the investigative duty which arises under Articles 2, 3 and 4 of the ECHR.’¹⁵³ Furthermore, the operational consideration of means of proportionality was overridden by *Ransteu* which stated the investigation must be ‘capable’ of leading police to the suspect, an ‘obligation not of result but of means.’¹⁵⁴ Therefore, the duty to investigate entails providing the means of arresting, but does not cover an obligation to achieve the result. To conclude, Williams J rejected Lord Faulks’ argument, and applied the principle formulated in *Ransteu*: where there is ‘credible evidence’ that breach of Convention rights has occurred, the police have a duty to provide an effective investigation capable of capturing and punishing offenders.

The law post OOO?

The decision of OOO causes one to question what is to become of the English tort of human rights liability for police negligence. Liability for the negligence to prevent harm, causing a breach of a Convention right, is determined through courts applying a narrow interpretation of the *Osman* test, ‘real and immediate risk to life.’¹⁵⁵ The ramifications of this narrow test are exemplified in the injustice suffered in *Van Colle*, where the House of Lords did not go beyond the test, and consider the scope of the investigative duty of police. As a result, human rights are not adequately protected. Williams J in OOO recognizing the limitation of the *Osman* test, held that there is certainly no sufficient reason for the scope of the investigative duty to be interpreted differently from the definition provided by the European Court in *Ransteu*. The judge proposed a persuasive argument, however it may be argued that OOO concerns an ‘absolute right’ not to be tortured or inhumanely treated (Article 3) and should therefore

¹⁵² OOO (n 11) [157] (Justice Williams).

¹⁵³ *ibid* [158].

¹⁵⁴ *ibid* [151].

¹⁵⁵ *Osman v United Kingdom* (n 9).

be confined to its particular facts, and the *Ransteve* test should not be utilized to determine the scope of investigative duty. Upon consideration of this argument, Lord Faulks' submission on public policy limitations addressed in *Osman* has some merit. However, denying the incorporation of the *Ransteve* test into domestic law, on public policy grounds is a weak argument. To quote Sir John Freeland, the public policy hurdle is an 'inappropriately blunt instrument for the disposal of claims raising human rights issues.'¹⁵⁶ A claimant cannot defend their human rights through the *Hill* principle, therefore it would be nonsensical to impose a test that is again far too restrictive on public policy reasoning. Moreover, the *Ransteve* test does not challenge public policy reasoning by imposing a disproportionate burden on the police force, but instead it develops a formula that enables human rights to be adequately protected. Under *Ransteve* a duty to investigate only arises 'once a credible allegation'¹⁵⁷ has come to the attention of the police, and is an 'obligation not of result but of means.'¹⁵⁸ Therefore, it is essential for the decision in *OOO* not to be confined to its particular facts, but for the courts to develop the *Osman* test and incorporate the *Ransteve* formula to determine liability for police negligence causing a breach in Convention rights.

Proposal

The judiciary have developed a separate cause of action under the *Osman* test. However, it is essential for the judiciary to recognize that if the scope of the *Osman* test remains undefined, and restricted on public policy reasoning, it will suffer the same fate as the *Hill* principle, whereby the test will be stretched to cover absolute immunity over police negligence. For the *Osman* test to be stretched to such an extent would be extremely problematic, as it would deny individuals their basic human rights. Public policy grounds certainly do not outweigh considerations such as 'individual liberty', and so

¹⁵⁶ Hoyano (n 35) 919.

¹⁵⁷ *Rantsev* (n 150) [287].

¹⁵⁸ *ibid.*

the scope of the *Osman* test needs to be reconsidered. The *Ransteve* principle, based on an ‘obligation not of result but of means’, enables courts to consider public policy reasoning and the claimant’s human rights. It follows that incorporating the *Ransteve* principle into domestic jurisprudence is the most desirable solution to the issues surrounding police liability for negligence.

Conclusion

This paper has demonstrated that the rationale developed in *Hill*, whereby police are granted blanket immunity over negligence that may occur during the ‘investigation and suppression of crime’ is problematic on several grounds, and in need for reformulation. The judgments in *Brooks*¹⁵⁹ and *Smith*¹⁶⁰ have exemplified that when the judiciary have applied the principle of *Hill* in subsequent case law there is difficulty in determining the scope of the duty to ‘investigate and suppress crime’. Academics have critically discussed how the undefined scope of the test has caused the distinction between negligence occurring as a result of ‘direct actions’ and that occurring as a result of the ‘investigating and suppressing of crime’ to have merged.¹⁶¹ The law on police negligence is thus left to unjustly cast blanket immunity over all police actions, and victims are unable to bring a claim against the police despite situations where there is sufficient proximity between a claimant and the police.

This paper then considered whether public policy reasoning justified absolute immunity. It has been exemplified that public policy justifications cannot be completely disregarded, as the repercussions of ‘defensive medicine’ have demonstrated the potential financial burden liability on police could impose on an already economically strained society. However, the foundations of policy reasoning are based on complete hypothetical assumptions that cannot justify ab-

¹⁵⁹ *Brooks* (n 40).

¹⁶⁰ *Smith* (n 41).

¹⁶¹ *McIvor* (n 44).

solute immunity over all police actions; the public policy hurdle cannot be used to justify the emasculation of the investigative duty which arises under Articles 2, 3, and 4 of the ECHR.

The ECtHR's decision in *Osman* has furthermore highlighted the need to reform the *Hill* principle, as the scope of police negligence is incompatible with the HRA 1998. The absolute immunity conferred on the police has been criticized to problematically provide a 'water-tight defence' that is in breach with a claimant's 'right to a fair trial' under Article 6 of the ECHR. On this basis, the *Hill* principle which was formulated prior to the enactment of the HRA 1998 needs to be reconsidered by the judiciary.

The second cause of action available to a claimant whose human rights have been breached is through the *Osman* test, where 'authorities know or ought to know the existence of a real and immediate risk to life'.¹⁶² After critically evaluating the ramifications of the *Osman* test in *Van Colle* it is apparent that the judiciary have applied the test in line with the principles of *Hill*, and this interpretation is narrow to restrict the applicant to successfully claim against the police, even if police actions have caused a breach of Convention rights.¹⁶³ The law on police negligence challenges the fundamental principles of human rights, and it is therefore essential for the courts to reconsider the narrow 'scope of duty to investigate' test in *Osman*, to a broader test that does not curtail justice so extensively.

This paper has proposed the test developed in *Ranstev* and implemented in *OOO*¹⁶⁴ to form the basis in determining the scope of the duty to investigate. If the principles developed in *Ranstev* were to be implemented by the English courts, it would follow that the police would have a duty to carry out an effective investigation of an allegation of a breach of a Convention right 'once a credible account of an alleged infringement had been brought to its attention'.¹⁶⁵ This

¹⁶² *Osman v United Kingdom* (n 9).

¹⁶³ *Van Colle* (n 109).

¹⁶⁴ *OOO* (n 11).

¹⁶⁵ *ibid.*

test would offer a broader scope to *Osman*, and cover the duty under Articles 3 and 4.

This paper has demonstrated that the approach taken in *OOO* should be utilized by the judiciary to reformulate the principle of *Hill*, by clearly defining the scope of the duty to ‘investigate and suppress crime’, and ultimately develop a test which is compatible with the HRA 1998, and lifts blanket immunity.

Bibliography

BBC News, ‘Litigation: Next NHS Crisis’ *BBC News* (19th January 2000) <news.bbc.co.uk/1/hi/health/610487.stm> accessed 23 August 2013

Bowen A, ‘A Terrible Misunderstanding? *Osman v UK* and the Law of Negligence’ (2001) *Scots Law Times* 59

Chevalier-Watts J, ‘Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to life or an onerous Burden on a state?’ (2010) 21(3) *EJIL* 701

Friendly HJ, ‘The Gap in Lawmaking – the Judges Who Can’t and the Legislators Who Won’t’ (1963) 63 *Columbia Law Review* 787

Hoffman (Lord), ‘Human Rights and the House of Lords’ (1999) 62 *MLR* 159

Hoyano L, ‘Policing Flawed Police Investigations: Unravelling the Blanket’ (1999) 62 *MLR* 912

Law Commission, *Administrative Redress: Public Bodies and the Citizen Administrative Redress: Public Bodies and the Citizen* (Law Com No 187, 2008)

- *Evaluation of Regulatory Impact Assessments* (HC 2006-07, 606)

Lunney M, *Tort Law: Text and Materials* (4th edn, OUP 2010)

McIvor C, 'Police Immunity and the Legacy of *Hill v. Chief Constable of West Yorkshire*' (2005) 21 *Professional Negligence* 201

- 'Getting Defensive About Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 *CLJ* 133

Morgan J, 'Policy Reasoning in Tort Law: the Courts, the Law Commission and the Critics' (2009) 125 *LQR* 215

Morris N, 'Home Office: 20,000 police officers predicted to lose jobs' *The Independent* (London, 21 October 2010)

Mullender R, 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 *MLR* 961

Palmer P, 'Can the UK Police Ever Be Liable for Negligent Investigation or a Failure to Protect?' (2011) 1 *International Journal of Public Law and Policy* 100

Rogers WVH, *Winfield and Jolowicz on Tort* (8th edn, Sweet and Maxwell 2010)

Shircore M, 'Police Liability for Negligent Investigations: When Will a Duty of Care Arise?' (2006) 11 *Deakin Law Review* 33

Stapleton J, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *LQR* 301

Walsh DPJ, 'Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog' (2011) *King's Law Journal* 27

Wilberg H, 'Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims' (2010) 126 *LQR* 420

Williams K, 'Emergency Services to the Rescue, or Not, Again' (2008) *Journal of Personal Injury Law* 265