# Can the UK police ever be liable for negligent investigation or a failure to protect?

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**Abstract:** The English legal approach to police negligent liability is highly restrictive. Immunity from prosecution continues to be the default position where claimants bring an action for negligent investigation or a negligent failure to protect. The alternative route to liability through the Human Rights Act has been so narrowly interpreted by the House of Lords, making the probability of a successful action as unlikely as an action in negligence. This article discusses the difficulties that claimants have in bringing a successful action and suggests an alternative route may be available using the tort of misfeasance.

**Keywords:** police liability; public policy; negligence; human rights; positive duties; misfeasance.

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## 1 Introduction

It is now over 20 years since Lord Keith's famous judgement in *Hill v Chief Constable of West Yorkshire*[1] heralded the public policy based 'immunity' for the police protecting them from liability for negligent investigation. The recent House of Lords decisions in the conjoined appeals of *Van Colle and another v Chief Constable of Hertfordshire Police* and *Smith v Chief Constable of Sussex*[2] are significant. In *Smith* their Lordships confirmed the common law public policy 'immunity' from prosecution for harm caused as a result of a negligent police investigation; whereas in *Van Colle* they held that claims for damages that would otherwise be dismissed in negligence on public policy grounds may potentially succeed under the Human Rights Act 1998 (HRA)[3]. Consequently, following *Smith* the potential for the law of tort to provide a remedy for losses suffered as a result negligent investigation must be seriously doubted. Whilst it is now established

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that the HRA creates a system of remedies where they do not exist in common law, in *Van Colle*, the House of Lords made clear that the police would rarely be liable under HRA for failing to protect an individual from the criminal acts of a third party. Determined not to depart to far from the principles set out in *Hill*, their Lordships 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 the common law. Thus it is likely that only exceptional claims involving 'outrageous negligence,'[4] will pass the so-called *Osman* test of 'knowledge of a real and immediate risk of harm to life'.[5] As Clair McIvor commented, 'It will be a case of double or nothing, and usually nothing'.[6]

The tort of misfeasance in public office has its origins in the premise that public powers are to be exercised for the public good. In limited circumstances, it may enable those adversely affected by decisions of public officials, to obtain compensation. The offence of misfeasance in a public office is both a common law crime and a tort. The criminal offence can be traced back to 1599 where in the *Crouther Case*[7] a constable was indicted for refusing to raise a 'hue and cry' and pursue a felon. Civil liability is traceable to the 17th century,[8] but the first solid basis for the tort can be found in *Ashby v. White*[9] when the House of Lords upheld an action for damages by an elector who was wilfully denied a right to vote by a returning officer. Despite the tort being recognised in a number of cases in the 18th and 19th centuries, it fell out of use and in 1907 the Court of Appeal denied the existence of the tort in *Davis v. Bromley Corporation.*[10] However in 1979, it emerged as a mechanism to deal with police officers and public officials whose behaviour was on the margins of corrupt practice, including 'wilful neglect'.[11] In 1981, the Privy Council described the tort as being 'well established'.[12]

The purposes of this article are, first, to compare the different causes of action from the viewpoint of police investigations and allegations of failure to protect; second, to consider whether misfeasance in a public office could be applied to policing today; finally, to speculate as to whether the claimants in *Smith and Osman* might have succeeded had they chosen the misfeasance route as an alternative to negligence or a breach of human rights.

## 2 The cause of action

### *2.1 The action in negligence*

*Hill*, *Osman*, *Van Colle* and *Smith* document a series of similar allegations against the police in cases where harm has been caused to the victims by third parties. These allegations include failure to investigate crime, failure to attend scenes, failure to arrest the offender, failure to protect the victim and generally not regarding the complaint by the victim seriously enough.

Where claims of negligence have been made against a police service the problem of apparently random and conflicting results has been particularly acute. The usual explanation for a finding of 'no duty' is the absence of 'proximity'.[13] Nevertheless, despite of the centrality of proximity in these cases the criteria for establishing a relationship of proximity remains in doubt. The problem was summed up by Lord Keith in *Hill*:

> "It has been said too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and the defendant… The nature of the ingredient will be found to vary in a number of different categories of decided cases."[14]

What amounts to the 'ingredient' referred to by Lord Keith is difficult to define because there is little authority on which to form a judgement. The closest we get to are the words of Lord Atkin in *Donoghue v Stevenson* where he identified the 'ingredient' as, "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by the careless act".[15]

This requirement alone presents a formidable obstacle in cases concerning actions brought against the police for negligent investigation but it is not the only barrier to success. *Hill* established another barrier which is in practice inseparable from actions involving allegations of negligent investigation and make pursuing a claim of against the police difficult, if not impossible. Whilst Lord Keith recognised that a police officer is liable in tort in respect of his or her acts or omissions, they would not be liable in negligence where immunity arose on the ground of public policy. Both foreseeability and proximity were present in *Smith* and in *Osman v Fergerson*,[16] where McCowan, L.J. said that, "the plaintiffs have … an arguable case that … there existed a very close degree of proximity amounting to a special relationship".[17] Nevertheless the Court of Appeal did not distinguish *Hill* holding that public policy was "a separate point which is not reached at all unless there is a duty of care".[18] The Court unanimously held that public policy factors in this case would negative any such duty.

The public policy considerations set out by Lord Keith are well known and can be summarised as follows. First, whilst that the law of negligence may operate as an incentive to raise standards, the imposition of liability may be detrimental to any sense of public duty which motivated police forces in carrying out their function in the investigation and suppression of crime. Second, allegations of negligence in the apprehension of criminals would require the courts to conduct an elaborate investigation of the facts in order to consider the nature of the police investigation which would include officer's decision making on matters of policy and discretion which are inappropriate for the courts to discuss. Finally, a great deal of police time, trouble, expertise and expense would be taken up in preparing for the defence of such actions with the result that there would be a significant diversion of police manpower and attention from their most important functions which was the investigation of crime.[19] Lord Termpleman summed up their Lordships concerns when he said that, "the threat of litigation against a police force would not make a policeman more efficient. [An action such as this] is misconceived and will do more harm than good.[20]

Questions about how, in practice, police officers approach the task of criminal investigation, what factors might push them towards negligent behaviour, how effective were organisational mechanisms in identifying and constraining such behaviour were not of central relevance to the court at the time. Lord Templeman specifically dismissed any form of judicial examination of the conduct of the investigation:

> "We all hope that the lessons of the Yorkshire Ripper case have been learned, that the methods of handling information and handling the press have been improved, and that co-operation between different police forces is now more

> highly organised. The present action would not serve any useful purpose in that regard."[21]

The courts reluctance to discuss police decision making, in the context of a criminal investigation is understandable, not least by reason of the scope and complexity of the Ripper investigation itself. Whilst there was evidence of poor decision-making which may have gone some way towards developing a hypothesis explaining police failures, it does not demonstrate a negligent investigation, a subject which is driven with problems of interpretation: when does a poor decision or an over reliance on a particular piece of evidence amount to negligence? As Lord Keith pointed out:

> "The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question…"[22]

The enduring difficulty of the ratio in *Hill* is that its boundaries have never been properly defined. The main barrier is the policy limb of a policy – operational distinction that requires claimants whose actions relate to policy level activity to establish that the defendant police service's decision was unreasonable before considering the conventional law of negligence. Richard Mullender has recently pointed out that, 'judges have woven this and a number of other requirements of liability into the fabric of law so as to shield public bodies from claims that would deflect them from the pursuit of outcomes that serve the interests of sometimes very large numbers of people'.[23] Virtually, every decision of the police can be presented in such a way as to involve matters of policy and discretion that are inappropriate for the courts to discuss and any idea that it should only be applied to major investigation, as in *Hill,* has been rejected by a series of cases including *Osman* and *Smith.* This means that the situations in which *Hill* can now apply have broadened to such an extent that there appears to be few limits to its application, and, following *Smith,* it seems clear that the House of Lords now see this area of law as settled against claimants over a wide range of police activities. Yet they are still unwilling to hold either that the police may, sometimes, owe a duty to those harmed by their negligence; or that they never will. Although their Lordship's reaffirmed the policy ratio of *Hill,* they made it clear that the principle may not prevail in all cases. Lord Hope accepted that a departure from *Hill* was a possibility in exceptional cases:

> "…the test for the judge must be an objective one.... In my opinion the balance of advantage in this difficult area lies in preserving the Hill principle… That is why, if a civil remedy is to be provided, there needs to be a more fundamental departure from the core principle. I would resist this, in the interests of the wider community."[24]

Following the decision in *Osman v Fergerson* the appellate courts did start to question the scope of the immunity. For example in *Swinney v. Chief Constable of Northumbria Police Force*[25] Hirst, L.J. stated, that police claims for immunity against an action for negligence on public policy grounds must be assessed in the round, which means assessing the considerations referred to in *Hill* together with other considerations bearing on the public interest in order to reach a fair and just decision.[26]

In *Costello v. Chief Constable of Northumbria*[27] May, L.J. examined several cases concerning the 'public interest immunity' of the police and other public services. His

starting point was *Hill* which he regarded as laying down the general policy reasons for immunity. His opinion was that the immunity was not absolute and whilst it extended to the organisation of policing it did not extend to specific acts of negligence in relation to an identifiable person. The immunity may also be defeated by a competing public interest. The essence of the argument put forward by May, L.J. was that there can be no liability to the public at large in relation to operational and resource decisions but there may be a liability for negligent acts where there is a specific victim who is clearly identifiable.[28]

These cases should not be regarded as exceptions to *Hill.* In both a duty of care existed either because there was the sort of proximity between the defendant and the claimant that a special relationship existed[29] or because there has been an assumption of responsibility.[30] Actions bought by victims of a criminal in situations where the police fail to apprehend the criminal concerned, who then goes on to commit further crimes are not affected by either decision.

The scope of the immunity, and the manner in which it is applied, were the subject of criticism in *Osman v. United Kingdom*[31]. Following the case there was some optimism that there may be enhanced judicial scrutiny of police decision making, however subsequent case law dampened any initial enthusiasm.[32] The only lasting effect of the decision in *Osman v UK* has been to ensure that a court will consider policy arguments only after hearing the merits of a case. The effect is largely semantic leading courts to a conclusion of 'no duty' rather than 'immunity.' As Chamberlain points out, '…its effects have been minimal and police still enjoy relative immunity in negligence for their conduct during an investigation…'[33]

Although the Law Commission describe the present state of the law in this area as 'unsustainable',[34] pointing towards, 'the uncertain and unprincipled nature of negligence in relation to public bodies,'[35] they accept that limitations on the circumstances where claimants can sue in negligence should remain. They suggest a new test of liability described as 'the key' to their proposals.[36] In order to meet this test claimants would have to establish 'serious fault' on the defendant's part.[37] This would entail a court to look for 'a significantly aggravated level of fault'.[38] They propose a range of considerations that judges should take into account when applying the test. These include, the likelihood of harm, the social utility of the defendants conduct, the extent and duration of departures from good practice, and the extent to which 'senior managers had made possible or facilitated the failure in question'.[39] However they then go onto qualify the test by stating that the 'serious fault' requirement will only apply to 'truly public activity',[40] which they define as a claim in a contested action that was 'conducted in the exercise of a statutory power or the prerogative'.[41] The Law Commission goes on to add that the ordinary rules of negligence will determine cases that do not satisfy the 'truly public test'.[42]

With respect, these proposals add nothing to the existing law in relation to negligent investigation. The legal liability of police officers for inadequate responses to crimes involving harm caused to victims by third parties will continue to be assessed using case law to classify the conduct of officers that has led the courts' to use minimal standards of scrutiny because of a reluctance to 'second guess' the decision making processes of the police in the context of deciding whether they are liable in negligence. At the end of the day, these matters turn solely on policy considerations and the particular policy choice the courts have made in these cases has had a major effect on the restricting police liability in these cases.

### *2.2 Human rights*

Following the House of Lords decision in *Van Colle v Chief Constable of Hertfordshire Police*[43]*,* claimants can bring an action under the HRA in circumstances where the same claim would fail in negligence on public policy grounds. Although their Lordships did not consider negligence in this case and found no breach of Article 2, they did consider in some detail the question of whether the common law should be developed to absorb Convention rights? Lord Bingham did not think that there was a simple answer:

> "It seems to me clear, on the one hand, that the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists. On the other hand, 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, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention."[44]

However Lord Hope was clear that:

> "… the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy. Indeed the case for preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the Osman can now be dealt with in domestic law under the 1998 Act."[45]

This was supported by other members of the Court. Lord Brown rejected any argument that the common law should be developed to reflect the Strasbourg jurisprudence pointing out that Convention claims had very different objectives from actions in negligence.[46] Negligence actions are designed essentially to compensate claimants for the harm caused to them whilst Convention claims are intended to uphold minimum human rights standards and to vindicate those rights. As Article 2 of the Convention and Sections 7 and 8 of HRA already provide for claims to be brought in similar cases, it would seem unnecessary now to develop the common law to provide a parallel cause of action. Their Lordships maintained a strict distinction between cases brought under the common law and those under the HRA. 'Expectations that the common law and the European Convention might develop in tandem have here – as elsewhere – proven misplaced.'[47]

Article 2 imposes three different duties upon the state. First, a negative duty not to take life, apart from the exceptional circumstances prescribed in the article. Second, there is a procedural obligation to properly investigate deaths for which the state has some responsibility. Third, a positive duty to take effective steps to protect the lives of those in its jurisdiction. Following the decision in *Osman v UK*[48] it is clear that the third duty applies in three situations. First, where there has been a systemic failure by member states to enact laws to protect victims from those who threaten their lives. Second where the state has failed to provide procedures reasonably needed to protect the right to life and finally it may also be invoked where, although there has been no systemic failure of that kind, a real and immediate risk to life is present and the state has failed to exercise their powers for the purpose of protecting life.

The *Osman* test tells us that the facts must be examined objectively at the time of the existence of the threat, and that the positive obligation is breached only if the authorities knew, or ought to have known, at that time there was a threat to life which was both real

and immediate. This assumes a degree of knowledge. In *Van Colle*, Lord Justice Bingham pointed out that hindsight was to be avoided and the formulation of the real and immediate risk requirement laid emphasis on what the authorities knew or ought to have known 'at the time', he added that:

> "This is a crucial part of the test, since where (as here) a tragic killing has occurred it is all too easy to interpret the events which preceded it in the light of that knowledge and not as they appeared at the time … the application of the test depends not only on what the authorities knew, but also on what they ought to have known."[49]

What amounted to sufficient knowledge to trigger the duty was only briefly examined by their Lordships in *Van Colle.* Lord Phillips suggested two possibilities. It could mean that the authorities ought to have 'carried out their duties with due diligence, to have acquired information that would have made them aware of the risk'. Alternatively they 'ought to have appreciated on the information available to them'.[50] His Lordship preferred the latter. Lord Bingham went further:

> "Stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further inquiries or investigations would have elicited."[51]

Article 2 places a positive obligation on the police to protect life. It will apply to any activity in which a threat to life is at stake. Neil Alan suggests that, 'the police force would owe a general obligation, derived from its primary duty, to protect the lives of those within its locality. But this is not person specific. It merely requires general measures to be implemented'.[52] This view would seem to require of the police no more than deploying competent officers and adopting appropriate systems of work including multi-agency arrangements. No breach of Article 2 is likely to arise in these circumstances. However if the police become aware of a real and immediate risk to life it would trigger what Allen refers to as the 'protective duty'[53] to do all they reasonably can protect that individual.

The relevant test for causation for failing in their protective duty appears to be much less stringent than the 'but for test' that applies in negligence. In *E v United Kingdom*,[54] the applicants alleged that a local authority had failed to protect them from abuse by their step-father, invoking Articles 3, 8 and 13 of the Convention. In relation to causation of damage the ECtHR held the test does not require it to be shown that 'but for' the failing or omission of the public authority ill-treatment would not have happened. 'The test is satisfied if it can be shown that the pattern of lack of investigation, communication and cooperation by the police had a significant influence on the course of events and that poor management of their responsibilities resulted in a failure to take reasonably available measures which could have a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.'[55]

When viewed this way the protective obligation is entirely distinct from the common law duty of care. It applies when the elements in *Osman* are present. The police would be obliged to do all they reasonably could to protect life when they knew or ought to known that a real and immediate risk to life exists. This raises questions about the principles that should govern assessments of the reasonableness of the measures taken to protect life. The issue was briefly discussed in *Re E.*[56] In contrast to *Smith* this was not a private claim but an application for judicial review about the policing of a sectarian flashpoint in Northern Ireland where loyalists had directed abusive and threatening behaviour at

Catholic children and parents walking to school. It was accepted that Article 3 ECHR prohibiting inhuman and degrading treatment was engaged by the activities of the loyalists (the loyalists' behaviour was so violent and intimidating that the physical and emotional health of the children was affected). The issue before the House of Lords was whether the decision of the police to adopt a particular tactic to protect the children met their protective duty to do all they reasonably could to protect the children from inhuman and degrading treatment? This case can be distinguished from *Van Colle* as the police knew that there was a real and immediate risk of ill treatment. As Baroness Hale observed, 'there is no issue about whether the police should have appreciated the real and immediate risk of ill treatment. They knew all about it. It was going on under their noses. The fact that it may not have occurred to them that it fell within Article 3 makes no difference'.[57]

The House of Lords in *Re E* emphasised that reasonableness in judicial review proceedings had been replaced by proportionality in proceedings bought under the HRA. The difficulty is deciding when the duty should come into play and in determining which measures are appropriate. There must first be a 'real and immediate risk' to life, not just some bodily harm, a distinction which is often difficult to establish. Predicting that someone is at risk from others is a difficult exercise. Threatening someone's life hardly ever leads to that threat manifesting itself. Take the example of domestic violence. Living with a violent partner potentially puts life at risk. Sadly all police officers deal with domestic violence on a regular basis. I can speak from my own experience as a retired police officer. These incidents are amongst the most difficult to police and often involve escalating violence, but it cannot be argued that that this escalation leads inevitably to death, however the risk is there. Given that human conduct is also very unpredictable the question I would pose in these circumstances is at what stage on this continuum of violence can a 'real and immediate risk' be identified?

### *2.3 Misfeasance in a public office*

Misfeasance in a public office is an intentional tort which involves either targeted malice or bad faith on the part of a public official. In principle exemplary damages are available,[58] however the tort is not actionable per se so it is vital for a claimant to establish some kind of loss or damage. In *R. v. Bowden*, the Court Appeal held that the tort applied generally to every person who was appointed to discharge a public duty and was remunerated for doing so, whether by the Crown or otherwise. It clearly applied to police officers and in *R. v. Dytham*[59] a police officer who witnessed a serious assault and failed to intervene was convicted of misfeasance in a public office**.** The prosecution of the police officer in this case seems to represent a contrast to the immunity from suit that attached to police officers in situations where they fail to protect.

In *Watkins v Secretary of State for the Home Department and Others*[60] the respondent, a prisoner, claimed that prison staff had breached prison rules by opening and reading his mail when they were not entitled to do so. Lord Bingham had some sympathy with the claim, stating that:

> "If a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is great force in the respondent's submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There

> is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity."[61]

However he went on to add that the 'primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not' and that there were 'other and more appropriate ways of bringing them to book'.[62] It was agreed in *Akenzua v. Secretary of State for the Home Department*,[63] that no principle of law excluded an action based on the tort of misfeasance in public office because the consequence of the misfeasance was personal injury or death – a comparison of misfeasance and negligence within that parameter is, therefore, valid.

Misfeasance in public office is usually divided into targeted and untargeted malice: both require bad faith. The ingredients of the tort were clarified in *Three Rivers District Council v Bank of England* [64], where the House of Lords held that the conduct must be by a public officer, exercising power in that capacity; the officer must either intend to injure the claimant by his or her acts or knowingly or recklessly act beyond his or her powers. Damage must thereby be caused to the claimant and the damage must be caused in circumstances where he or she knew the act would probably cause damage of this kind. Lord Steyn summed up the nature of the tort as follows:

The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer i.e., conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.[65]

In relation to the first limb of the test, police officers carrying out their functions in investigating and prosecuting crime are clearly public officers exercising power in that capacity. Lord Hope defined the necessary mental element as:

> "where the act or omission was done or made intentionally by the public officer: (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury or (b) recklessly because, although he was aware that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he willingly chose to disregard that risk…. [T]he fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith."[66]

On first reading this seems that a difficult test of positive bad faith must be established if misfeasance in public duty is to be proved. However, Lord Hope sought to clarify this:

> "[I]t is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk. Various phrases may be used to describe this concept, such as 'probable loss', 'a serious risk of loss' and 'harm which is likely to ensue' … The absence of an honest belief in the lawfulness of the conduct that gives rise to that risk satisfies the element of bad faith or dishonesty."[67]

Lord Hope suggests that the test as to the likelihood of harm arising is one of both a positive choice to act or not to act and includes a negative belief. This follows on from the original explanation given by Lord Steyn in *Three Rivers*, where he accepted that, 'recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law'.[68]

This suggests that it is not necessary in every case to show that a police officer knew he or she was acting in excess of their powers and that the act was likely to cause harm, it would appear to include situations where officers ignore the potential outcome of a failure to take action including a failure to investigate. Such a failure could, in certain circumstances be regarded by a judge to be reckless. Mason and Laurie point out that, "given that the tort is still 'evolving', it is apparent that the mental conditions justifying a claim of misfeasance in public office can be far removed from targeted malice and are coming closer to those normally associated with an action in negligence".[69] They also warn that recklessness is a more demanding test than carelessness. Negligence is characterised by inadvertent carelessness, whilst recklessness requires knowledge on the part of the wrongdoer. The requirement of recklessness is central to the tort of misfeasance but it should be noted that the precise scope of this criteria is uncertain as we have few authorities from which to make a judgement.

Nevertheless it is clear that the tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which a police officer's act or omission is not directed at the injured party but where the officer foresees, or is reckless as to the consequences for that person. The purpose behind the imposition liability in these circumstances is to prevent injuring members of the public by deliberate disregard of an official duty. The core purpose of the tort is the prevention and reparation of harm from abuse of public office and it is now well established that the tort can take different forms, 'targeted malice' and deliberate and knowing unlawfulness, the purpose of the latter is to provide for cases where the injury was not intentional.

Can misfeasance be an alternative to an action in negligence or human rights? Mason and Laurie suggest that, 'on the face of things, misfeasance might well be regarded as the more difficult route insofar as, at least in its original form, it requires some form of malice or unlawfulness on the part of the tortfeasor'. However they add, 'no actions in misfeasance resulting from personal injury had been taken before the judgement in *Three Rivers* where, as we have seen, the minimum threshold for the tort was reduced to subjective recklessness'.[70] They point to the Court of Appeal in *Cruikshank v Chief Constable of Kent County Constabulary*,[71] where Lord Justice Brooke held that misfeasance was a 'newly evolving tort', which will 'in all but extreme cases…afford any remedy which may be due for the abuse of public power'.[72]

## 3 An action in misfeasance

It could be argued that a major advantage an action in misfeasance is the absence of the requirement of proximity. In *Three Rivers*, Lord Steyn commented that "the state of mind required to establish the tort… as well as the special rule of remoteness… keeps the tort within reasonable bounds".[73] He went on to add, that the plaintiff must establish that the defendant acted "in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member".[74] Nevertheless cases like *Osman*

and *Smith* show that in negligence cases where proximity is established the claimant will still fail in an action on the policy grounds laid down in *Hill* and there is no reason to suggest that the tort of misfeasance will escape the policy hurdle present in negligence, however there is, as yet, no indication that the courts consider this to be a relevant factor.

In the recent case of *Abdillaahi Muuse v Secretary of State for the Home Department*,[75] the Court of Appeal considered an action bought by a Dutch national, born in Somalia, who had been unlawfully detained on the orders of Home Office officials pending deportation to Somalia in circumstances where there was no right to deport. The Home Secretary accepted that the claimant had been unlawfully detained but challenged the decision of the High Court, that the unlawful detention had arisen from misfeasance in public office by officials of the department. The Court of Appeal found in favour of the Home Secretary but significantly not on the grounds of policy but on the relevant knowledge of the officials. Lord Justice Thomas set out the test, 'in order to establish the tort of misfeasance in public office the judge had to find that the officials acting on behalf of the Home Secretary were recklessly indifferent to the legality of their actions. This had to be a finding of subjective, not objective, indifference'.[76]

This being the case should a misfeasance action be considered in police cases? As far as police investigation is concerned, probably not. Investigations are often complex and are a matter of discretion. The criteria of subjective recklessness are therefore very difficult to establish because the element of discretionary decision making in investigations can usually be subjectively justified. However *Osman v Furgerson* extended the influence of *Hill* beyond investigation to include the suppression of crime, more specifically to a failure to protect. As Cowan and Steele pointed out, "In holding that public policy dictated the striking out of this action, the Court was therefore asserting something beyond the duty of care components of foreseeability, proximity, and what is 'fair, just and reasonable'. A general rule against liability was being endorsed, which is properly referred to as an 'immunity'."[77]

The success of an action in misfeasance in these may depend on establishing whether police officers actions fall within the first limb of the test, that of targeted malice, i.e., conduct by the officer specifically intended to injure a person or persons which includes situations where the officer is aware that the claimant would suffer loss due to an act or omission which he knew to be unlawful and the officer has willingly chosen to disregard that risk. The next question is to ask what might the courts consider to be unlawful conduct by the police for the purpose of misfeasance?

It is important for the courts to establish where the reckless conduct took place. Establishing causality is therefore essential as liability will rest on finding a direct connection between an intentional or reckless decision to ignore an obvious risk. The question of what is meant by recklessness may have been resolved by *R v G and R*[78]. There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission.

Misfeasance in these terms can be defined as an action to support a victim's right to be protected. There is, however, little statutory authority defining the duties of protection owed by police. For something approaching a statutory statement, we must turn to the attestation all constables make. I took a similar oath over thirty years ago and can testify that it is important to all police officers for two main reasons. First, it confirms them as a

sworn officer holding the office of constable. Second, it is the attestation that police officers themselves recognise as defining their primary duties. The most recent version is set out in Section 83 of the Police Reform Act 2002 and provides that:

> "I ...do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law."

Non-statutory official pronouncements include Sir Richard Mayne's famous instructions to officers of the new Metropolitan Police in 1829 where he said that:

> "The primary object of an efficient police is the prevention of crime: the next that of detection and punishment of offenders if crime is committed. To these ends all the efforts of police must be directed. The protection of life and property, the preservation of public tranquillity, and the absence of crime, will alone prove whether those efforts have been successful and whether the objects for which the police were appointed have been attained."[79]

Historically, the courts have had little trouble in identifying what may amount to a police duty. For example in *Haynes v Harwood*, Lord Justice Maugham stated that, "the primary duty of the police is the prevention of crime and the arrest of criminals".[80] In *Rice v Connolly,* Lord Parker C.J. recognised that there was no exhaustive definition of the duties of the police, however he maintained that they included keeping the peace, preventing and detecting crime, protecting property, and bringing offenders to justice.[81]

The duty of the police would appear to include an obligation in particular situations to protect an individual, or individuals from harm. The duty, in misfeasance cases, is not based on a relationship of proximity between the police and the citizen, but on what the police should have known and done in a situation where an endangered individual has demanded they perform their duty of protection. This is similar to the positive obligation provided by the ECHR, however the threshold for a misfeasance claim has not yet been developed or discussed. The key issue is this: in situations where personal survival or the prevention of harm depends upon actions of the police, may the endangered individual properly demand the exercise of these duties, and is an intentional or reckless disregard of the risk sufficient to amount to bad faith? Significantly in *Three Rivers,* Lord Justice Auld said that,

> "where the function of a public body is to protect individuals from damage from the conduct of others, its exposure of them to such damage by its failure to protect from it is in clear and obvious disregard of their interests. The public body's knowledge of probable or possible damage from the defaults of those whom it should be supervising will depend largely on the assiduity with which it performs its duties."[82]

The motive with which a police officer acts, or omits to act, is crucial to a finding of misfeasance. It will normally be necessary to consider the likely consequences of the conduct in deciding whether it falls so far below the standard of conduct to be expected of the officer to amount to misfeasance. The consequences of corrupt conduct by a police officer may be obvious, however, the likely consequences of a failure to protect are less clear. Whether the conduct amounts to misfeasance, "is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public

objects which they serve and the nature and extent of the departure from those responsibilities".[83] In *Dytham*, Lord Widgery C.J. said, the element of culpability "must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment".[84]

Recently, the Court of Appeal considered a claim of misfeasance against the police. In *Hussain v The Chief Constable of West Mercia Constabulary*,[85] the appellant, a taxi driver, appealed against a decision to strike out his claim against a police authority for misfeasance in public office. He alleged that during his work as taxi driver he had asked for police assistance more than 50 times and that the police had failed to respond effectively and, on occasion, had subjected him to racially motivated hostility. He produced evidence that he had suffered symptoms of anxiety at times of stress. However, he could not produce a medical diagnosis. His appeal was dismissed on the basis that there was no material damage established. On the specific issue of psychiatric illness, the Court of Appeal held that a recognised psychiatric illness was one that had been recognised by the psychiatric profession, not just distress or any other normal emotion. As the appellant did not have a psychiatric diagnosis, his claim would fail. Lord Justice Maurice Kay made the following comments:

> "'It is common ground that mere distress, anxiety and heightened emotional reaction are insufficient to satisfy the test of material damage', he described the damage in this case as 'trifling and without the significance required to turn the non-actionable into the actionable'.[86] Significantly he added that, 'whilst it is entirely appropriate to deny actionability where the non-physical consequences are trivial (so avoiding lengthy trials which, at best, result in very modest awards of damages), it is important not to set the bar too high'."[87]

This ruling indicates that an action in misfeasance against the police is a viable option where a recognised physical or psychological injury has occurred as a result of an abuse of power, provided the legal criteria set out above is met. Lord Justice Maurice Kay concluded (obiter):

> "There is a risk that, in the hands of an average claimant, it would become a toothless tort, availing only commercial claimants who can show pecuniary loss and individual claimants with eggshell personalities who are tipped over the edge into recognized psychiatric illness. For my part, I would not wish to shut out a claimant who has the robustness to avert recognized psychiatric illness but who nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance."[88]

This suggests that had the claimant in *Hussain* been able to provide a medical diagnosis the result may have been different, however, the exact nature of the harm required is still unclear. In *Hussain*, Sir Anthony Clarke M.R. said,

> "As to the precise scope of the 'material damage' required to establish the tort of misfeasance in public office … I would prefer to defer expressing an opinion upon precisely what amounts to actionable damage until the issue arises on the facts of a particular case. I would only say that, as I see it at present, in a case such as this, it must be injury of some kind, whether psychiatric or physical."[89]

It will also be necessary to distinguish between those cases in which the police exercise discretion, as in an investigation, and those situations where they do not. For example, in *Hill* the conduct of the investigation can be explained by decisions involving the exercise of discretion as to the allocation of resources dependant on the nature of the information received. In contrast in both *Osman* and *Smith* the police failed to take any action to

protect the claimants from threats to their lives from identified third parties. It is difficult to see what amounts to the exercise of discretion here, other than a discretion to do nothing.

If we now pose the hypothetical question, had the claimants in *Osman* and *Smith* bought an action in misfeasance against the police, would they have succeeded?

The police satisfy the first and second requirements of the tort. Police officers hold a public office and they exercise their powers as public officers. In our hypothetical situation establishing the third requirement of the tort is problematic because it concerns the examining the state of mind of the police officers. However, two different forms of liability for misfeasance in public office may be available. The first would involve establishing targeted malice by the police officers officer towards the claimants. In both *Osman* and *Smith* there is no suggestion that any act or omission by the police would amount to conduct specifically intended to injure either party. The second form would involve establishing untargeted malice if it could be shown that the police officers acted knowing that there was no power to do the act complained of and that the act may injure a claimant. A knowing breach of duty with the knowledge that harm to the plaintiff is likely is sufficient, and 'knowing' includes acting recklessly in the sense of suspecting the true position and going ahead anyway.[90] Bad faith would have to be established. This requirement is therefore one which would have to be applied to the state of mind of the police officers in *Osman* and *Smith* and covers both a conscious decision or a subjectively reckless state of mind, either of which would satisfy the test for bad faith. Establishing that the police officers concerned took a conscious decision not to protect either *Osman* or *Smith* would, I suggest, be impossible, because the element of knowledge required is an actual awareness of the type of harm that may occur and as it related in each case to the awareness that a certain consequence will follow as a result of the act or omission.

But what of reckless untargeted malice? According to Lord Hope the test for this limb of the tort may be met if it was established that the police officers in *Osman* and *Smith* were aware of a serious risk of loss due to an act or omission on their part which they knew to be unlawful but chose deliberately to disregard that risk.[91]

As Mason and Laurie point out, "a straightforward analysis …from the perspective of misfeasance leaves little doubt that the police knew of the dangers, that they had been specifically appraised of them and that they failed to take adequate action … it is arguable that [an action in misfeasance] might well have succeeded given the …*Three Rivers* judgement".[92]

## 4 Conclusions

The tort of misfeasance imposes a heavy evidential burden. This is because it is necessary to establish the defendant had the necessary bad faith and that an abuse of power caused the loss or damage complained of. In *Three Rivers,* it was common ground that the claimants had sustained substantial losses but they were unable to prove bad faith. The issue was not discussed in *Hussain.* In cases of minor loss or injury, a misfeasance claim may not be a proportionate response and other remedies may have to be considered, However given the that the chances of a successful action in either negligence or human rights are low the only option available to claimants may be a claim

for a breach of a statutory duty or making a formal complaint through an existing statutory or regulatory complaints procedure.

Perhaps the greatest threat to a successful action of misfeasance is public policy and the judicial reluctance to finding liability against the police. It is likely that the courts will resist any attempt to replace actions in negligence or human rights with one brought in misfeasance. As Mason and Laurie conclude, "we suspect that the twin devices of (a) a restrictive interpretation of the meaning of recklessness, and (b) policy arguments drawn from the negligence arena, will ensure that, should misfeasance begin to be seen as an attractive alternative to negligence [or human rights] …it will finish as a victim of its own success."[93] But, in the words of Lord Justice Brooke in *Cruikshank*:

> "In matters of this kind, where public officers do not merely possess relevant powers but also have duties to perform in the public interest, it is to the evolving tort of misfeasance in public office that one needs to turn when an abuse of those powers is alleged."[94]

Nevertheless, whatever the promise of the tort of misfeasance may have in bringing abusive or incompetent police officers to book remains to be seen, and there is plenty to suggest that judges will seek to restrict liability wherever possible.

## Notes

1 [1989] AC 53

2 [2008] UKHL 50

3 Although not on the facts in this case

4 per Lord Steyn's exceptional category of 'outrageous negligence', as set out in *Brooks v Commissioner for the Metropolis* [2005] UKHL 24 at 34.

5 *Osman v United Kingdom* (1998) 5 BHRC 293

6 Clair McIvor(2010) 'Getting defensive about police negligence: the Hill principle, the Human Rights Act 1998 and the House of Lords', *Cambridge Law Journal*, Vol. 69, No. 1, pp.133–150 at 146.

7 (1559) Cro Eliz 654

8 *Turner v. Sterling* (1671) 2 Vent. 24.

9 (1703) 92 ER 126

10 [1908] 1 K.B. 170.

11 *R v Dytham* [1979] 3 All ER 641

12 *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, at 172F.

13 *Stovin v Wise* [1996] A.C. 923, as per Lord Nicholls at 931

14 Note 1 at 60

15 [1932] A.C. 562 at 581

16 [1993] 4 All E.R. 344

17 Ibid p.350j

18 Ibid p.354 a–b

19 Note 1 at 64

20 Ibid at 65

21 Ibid at 64

22 Note 1 at 63

23 Richard Mullender (2009) 'Negligence, Public Bodies and Ruthlessness', *Modern Law Review*, Vol. 72, No. 6, pp.961–983 at 962.

24 [2008] UKHL 50 at 78

25 *Swinney v. Chief Constable of Northumbria* [1996] 3 All E.R. 449.

26 Ibid 483–484

27 [1999] 1 All E.R. 550

28 May, L.J. regarded this case as being very close to *Knightley v. Johns* [1992] 2QB 283; "the duty is a duty to comply with a specific or acknowledged police duty where failure to do so will expose a fellow officer to unnecessary risk of injury".

29 *Caparo v Dickman Industries* [1989] 1 All ER 798

30 *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283, *Reeves v Metropolitan Police Commisioner* [2001] AC 360 suicide in custody cases and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (assuming responsibility at a siege and negligently causing damage) Dytham [1979] 3 All E.R. 641, failing to act.

31 Note 5

32 *Z and Others v UK* (2002) 34 EHRR 3

33 Chamberlain, E, 'Negligent investigation: tort law as police ombudsman', presented at the *Fourth Biennial Conference on the Law of Obligations*, held at the National University of Singapore, 23–25 July, At p.4.

34 Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Commission Consultation Paper No 187) (2008) 2.7.

35 Ibid. 2.7

36 Ibid 4.152

37 Ibid A 77(4)

38 at 4. 146

39 Ibid

40 4.110–4.112

41 A 77(1)

42 2.12

43 Note 2

44 n 2 at para 58

45 Ibid at para 81

46 Ibid 136–138

47 Gordon Anthony (2009) 'Positive obligations and policing in the House of Lords', *EHRLR*, p.538.

48 Note 30

49 Note 2 at 32

50 Ibid at 86

51 Ibid at 32

52 Allen, N. (2009) 'Saving life and respecting death: a savage dilemma', *Medical Law Review* (*Med L Rev*), Vol. 17, No. 2, p.262.

53 Ibid at 265

54 [2002] 3 F.C.R. 700

55 Ibid at 1

56 Re E (a child) [2009] 1 All ER 467

57 Ibid at 475

58 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122
59 [1979] 2 QB 722
60 [2006] 2 A.C. 395
61 Ibid 403
62 Ibid
63 [2003] 1 All E.R. 35
64 [2002] AC 1
65 Ibid at 191
66 Ibid at 44
67 Ibid at 46
68 Ibid at 194
69 Mason, J.K. and Laurie, G.T. (2003) 'Misfeasance in public office: an emerging medical law tort?', *Med. L. Rev.*, Vol. 11, No. 2, pp.194–207 at 199.
70 Ibid at 197
71 [2003] All E.R. (D) 215
72 Ibid at 43
73 Note 63 at 193
74 Ibid at 196
75 [2010] EWCA Civ 453
76 Ibid at 51
77 Cowan and Steele (1994) 'The negligent pursuit of public duty a police immunity', *Public Law*, pp.4–11.
78 [2003] 3 W.L.R. 1060 (although this case dealt with criminal misfeasance)
79 http://www.met.police.uk/history/definition.htm
80 [1935] 1 KB 146 at 161–162
81 ([1966] 2 QB 414 at 419)
82 Note 63 at 163
83 per Sir Anthony Mason, *Shum Kwok Sher v HKSAR* [2002] 5 HKCSAR 381
84 Note 10
85 [2008] EWCA Civ 1205
86 Ibid at 19 and 20
87 Ibid at 20
88 Ibid
89 Note 85 at 21
90 Note 64 per Lord Hutton at 1220, 1265.
91 Note 67
92 Note 68 at 204
93 Note 69 at 205
94 Note 70 at 32