

# Time for a public policy update in police liability?

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## Time for a public policy update in police liability?

With the introduction of a single police force in Scotland on 1 April 2013, under the Police and Fire Reform (Scotland) Act 2012, some critics have voiced concerns about local police accountability. The recent decision of the High Court in England in *DSD, NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) (hereinafter referred to as the “Worboys case”) has increased police accountability in the detection and investigation of crime, an area that historically has been subject to a high degree of immunity under the common law, being as it is, an area where the police have discretion in the allocation of resources. However success in this case was through the application of the Human Rights Act 1998 (“HRA”), not the common law. The decision calls into question the common law development of police immunity in the investigation and detection of crime, which began with the policy reasons identified in the case *Hill v Chief Constable of West Yorkshire* [1989] AC 53. The domestic courts have clung on to and even extended the reach of these policy reasons, most notably in the cases *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24 and *Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225. The Worboys case highlights the difference in approach between the common law and human rights law.

The *Worboys case* was decided under the HRA, article 3. This is an unqualified article. The right against torture or inhuman or degrading treatment or punishment cannot be qualified unlike some of the other rights protected in articles 8 to 11, where amongst other grounds, the right can be qualified in order to protect health or morals; public safety; and/or the rights and freedoms of others. This provides some scope for public policy to be taken into account when determining whether a right has been violated in a particular set of circumstances. The unqualified nature of Article 3 however effectively prevents public policy from being considered. The Barrister Jon Holbrook was recently very critical in an article in the New Law Journal (164 NLJ 9) of the fact that policy was not taken into account when deciding the Worboys case. Public policy is however still very much a factor to be taken into account when considering the existence of a duty of care on public authorities and the police in particular under the common law of delict/tort.

The *Worboys case* was brought by two victims of the “black cab rapist” John Worboys. The claimants brought an action against the Metropolitan Police Service, for declarations and damages, for its failure to carry out an effective investigation

into their allegations of serious sexual assault. The claims were brought under section 7 and 8 of the HRA. As is well known, section 6 of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The defendant is a public authority. The question was whether the defendant, in the way it had treated the victims and subsequently investigated the alleged crimes, had acted incompatibly with articles 3 and 8. (Mr Justice Green focused his attentions on Article 3 being the broader of the two articles.)

The High Court, relying on *Hill; Brooks* and *Smith* recognised that under the common law, the police do not owe a duty of care in relation to their investigation of a crime. However the issue before the Court was whether the HRA imposed a positive obligation and duty on the police vis a vis victims of crime in relation to the investigation of that crime, by virtue of the right the HRA gave to victims under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment. The defendant accepted only that the HRA gave rise to a limited right to victims, where the police were either directly or indirectly responsible for the harm perpetrated by a third party, for example where a prisoner attacked another prisoner, when both were in custody. But was there also liability to victims for a failure to investigate alleged crimes of a particularly severe nature, such that the failure amounted to inhuman or degrading treatment?

Mr Justice Green helpfully collated a large number of the relevant cases decided in Strasbourg; identified the main facts and main points of principle in each case; and reported the decision of the court. He found that there was a consistent and settled body of case law from Strasbourg that established liability on the police for failure to investigate, by virtue of breach of Article 3. This duty was not dependent on article 1 but arose from the freestanding duty in Article 3. The duty did not simply arise where the state was directly or indirectly complicit in the violence; it was a free standing duty. Moreover Mr Justice Green felt bound to attach significant weight to this body of Strasbourg case law, primarily because in his opinion it was coherent, well evolved and its core tenets were settled.

In addition therefore to the obligation on the police laid down in *Osman v UK* (23452/94) [1999] FLR 193 and domestically in *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225, to take reasonable measures within the scope of their powers to avoid the risk to life, where they knew or ought to have known of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, the High Court held that Article 3 requires that where there is a credible or arguable claim by the victim or a third party that

a person has been subjected to treatment at the hands of a private party that can be categorised as torture or inhuman or degrading treatment, the police are under a duty to ensure that there is an effective, prompt and reasonable official investigation which is capable of leading to the identification and punishment of those responsible. Allegations of grave or serious crime such as rape and serious sexual assault will come within the ambit of Article 3.

Mr Justice Green emphasised however that allegations of failure had to meet a threshold of culpability and he quoted a part of the judgment from *MC v Bulgaria* (2005) 40 EHRR 20 which referred to "significant flaws" in the investigation. (Under the common law, even if a duty of care is found to exist in any particular case, there still requires to be established a breach in that duty of care.) Mr Justice Green repeated more than once the opinion of the European Court of Human Rights ("ECtHR") that the duty created by Article 3 was not to impose impossible burdens on the police force (See *Milanovic v Serbia* (2014) 58 EHRR 33). He refers to a statement by the ECtHR in *Szula v United Kingdom* (2007) 44 EHRR SE19 where it says that in that case the facts did not disclose any "culpable disregard, discernible bad faith or lack of will on the part of the police or prosecuting authorities as regards properly holding perpetrators of serious criminal offences accountable pursuant to domestic law." Perhaps this is the standard of care that is to be applied to the police in relation to this duty?

What is the reason for the ECtHR finding such a duty embedded in Article 3? According to the ECtHR itself, it is because of the need to maintain confidence in the rule of law; and the need to prevent any appearance of tolerance or collusion in unlawful acts (*Milanovic v Serbia*). So what have the police to do exactly under this new duty? The ECtHR has explained the scope of the state's obligations under this duty, in the case of *Denis Vasilyev v Russia* App No 32704/04 (17<sup>th</sup> December 2009). For the investigation to be regarded as effective, it had to in principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including eye witness testimony, and forensic evidence. Mr Justice Green, in providing a summary of principles laid down in the Strasbourg case law, articulated the time frame in which the police's actions would be open to analysis, as being from the time of assault on the claimant to the last point in the criminal process including the trial, although in the case of a serial offender, the starting point may be the first point in time that evidence of a person offending comes to the police's attention. The duty is one of means not results. A successful prosecution within a reasonable period of time will nullify prior operational failures. However if the prosecution is brought after an unreasonable period of time the operational failures in the lead up to that prosecution may still be relevant in

determining whether the public authority breached Article 3. In the context of operational failures, it will however only be operational failures that are capable of leading to the apprehension and prosecution of an offender. It is not just any operational failure that will establish liability on the police. This brings us back to the standard of care that the police are being held to account to. The law is not looking for perfection. In the *Worboys case* there were some fairly blatant failings in the recognition and handling of a drug facilitated sexual assault by junior officers and a serious lack of supervision by more senior officers. The policies that were in place were not subject to criticism, it was the systemic and operational conduct that was so flawed. Mr Justice Green clarified that the duty existed in relation to both systemic failures and operational failures.

Mr Justice Green recognises the inevitable subjective nature of the assessment as to whether a particular investigation is reasonable or capable of leading to the apprehension, charge and conviction of a suspect and that each case will very much depend on its own facts. Such an assessment is he says, subject to a margin of appreciation and also to proportionality. He opines that factors that may be relevant will include the resources available to the police; the nature of the offence; whether the victim fell into an especially vulnerable category; and whether the operational failures were caused by (up stream) systemic failures in the law or in the practice of the police.

There are obviously inevitable difficulties in a court carrying out the sort of assessment that Mr Justice Green and the Strasbourg court are suggesting. Mr Justice Green stated however that the domestic court, when determining the quality of the investigation of the police, should not take a sweeping and generalised view but should examine the case in detail and with care. He warned that a finding of breach should not be arrived at lightly.

The decision in the *Worboys case* contrasts markedly with the common law position in delict/tort. At present the police enjoy an immunity from negligence claims for failures in their investigation and prevention of crime. The policy issues first raised in *Hill* in relation to a member of the general public, have been relied on in *Brooks* where the claimant was a witness and also a potential suspect, and *Smith*, where the claimant was a victim. The two main policy reasons that have stood the test of time are the defensive practices concern and the diversion /expenditure of resources concern. There has been much criticism of these policy reasons however. Does the *Worboys case* not suggest that it is time for a re-think of the public policy considerations that have been relied upon in this area to date? *Hill* was decided back in 1988, before events such as the Hillsborough disaster, which have since shown that the police are as capable of getting it wrong as any

other public body. Healthcare professionals and social workers owe a duty of care to children who they are making decisions about- *D v East Berkshire Community Health NHS Trust* [2004] QB 558. In England, the liability of lawyers in civil and criminal court appearances has been established in *Hall v Simons* [2002] 1 AC 615. The fire brigade owe a duty of care in relation to their fire fighting activities – *Duff v Highlands and Islands Fire Board* 1995 SLT 1362. Why not the police? Rather than relying on policy reasons that don't stand up to scrutiny shouldn't the police be held to account for serious failings in the same way as most other providers of a service? No one suggests that doctors should not be held liable for their negligence because otherwise they would act in a particularly defensive manner. The Scottish Courts already recognise the liability of the police in relation to civil operational tasks (*Gibson v Orr* 1999 SC 420).

Times have changed since the time *Hill* was decided. The public's view of the police has changed. *Brookes* did not have to follow *Hill* as it was a quite different factual situation. *Hill* concerned a member of the general public. A refusal of a duty of care in this situation could be defended on the basis of the policy reason of the floodgates of litigation, but also because of a lack of sufficient proximity. *Brooks* concerned a witness and a potential suspect. *Smith* concerned a victim. In contrast to *Hill*, the facts in *Brooks* and *Smith* gave rise to a high degree of proximity between the claimant and the police. *Brookes* should be overruled by the Supreme Court. It is time for a public policy update. The *Worboys* case has brought the public policy reasons for granting immunity to the police in certain circumstances, under the common law of delict/tort under further renewed scrutiny, and the reasons just don't stand up to that scrutiny. Surely human rights considerations themselves have to form part of the policy considerations that are now considered by a court. The proximity tool in the tripartite test is sufficient to ensure that the liability net is not cast too widely in delict/tort actions against the police.