28 January 2015

PRESS SUMMARY

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

On appeal from [2012] EWCA Civ 981

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Reed, Lord Toulson and Lord Hodge

BACKGROUND TO THE APPEALS

On 5 August 2009, at 2.29am, Ms Michael dialled 999 from her mobile phone. She told the call handler at the Gwent Police call centre that: her ex-boyfriend was aggressive; he had just turned up at her house; he had found her with another man; he had bitten her ear really hard; he then drove the other man home with Ms Michael's car but, before doing so, told her that he would return to hit her; that he was going to be back "*any minute literally*"; and, according to the recorded transcript of this conversation, that her ex-boyfriend had told her "*I'm going to drop him home and (inaudible) [fucking kill you]*". The call handler later gave evidence that she had heard "*hit you*" rather than "*kill you*".

Gwent Police graded the call "G1"; it required an immediate response. The call handler immediately called South Wales Police, in whose area Ms Michael lived, and summarised their conversation. No mention was made of a threat to kill. South Wales Police graded the call "G2"; officers should respond within 60 minutes. Ms Michael's home was five or six minutes from the nearest police station.

Ms Michael called 999 again at 2.43am. Following a scream from Ms Michael, the line went dead. South Wales Police were informed immediately and officers arrived at Ms Michael's address at 2.51am. They found that she had been brutally attacked, stabbed many times and was dead. Her attacker subsequently pleaded guilty to murder and was sentenced to life imprisonment. The Independent Police Complaints Commission later seriously criticised both police forces for individual and organisational failures.

Ms Michael's parents and children (the "*Appellants*") claimed against the Chief Constables of the Gwent Police and the South Wales Police (the "*Respondents*") for damages in, amongst others, negligence and under the Human Rights Act 1998 pursuant to Article 2 (right to life) of the European Convention on Human Rights ("*ECHR*"). The Respondents sought a strike out of these claims or summary judgment.

At first instance, HHJ Jarman QC refused to strike out or give summary judgment on these claims. On appeal, the Court of Appeal unanimously held that there should be summary judgment for the Respondents on the negligence claim but, with Davis LJ dissenting, the Article 2 ECHR claim should proceed to trial. The Appellants appealed against the Court of Appeal decision on the negligence claim and the Respondents appealed against the Court of Appeal decision on the Article 2 ECHR claim.

JUDGMENT

The Supreme Court dismisses the Appellants' appeal by a majority of 5-2 (Lady Hale and Lord Kerr dissenting) and unanimously dismisses the Respondents' cross-appeal. Lord Toulson (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agree) gives the lead judgment. Lady Hale and Lord Kerr give separate judgments both allowing the Appellants' appeal (in dissent) and dismissing the Respondent's cross-appeal.

REASONS FOR THE JUDGMENT

Lord Toulson asks whether, in the context of police protecting victims from potential future crimes, an exception should be made to the ordinary application of common law principles that a defendant will not generally be liable for harm to a claimant caused by the conduct of a third party **[116].**

Having surveyed the case law **[29]-[96]**, including from abroad, Lord Toulson rejects the arguments that the police owe a duty of care in negligence where: (i) they are aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group ("*Interveners' Liability Principle")*; or alternatively, (ii) a member of the public gives the police apparently credible evidence that a third party, whose identity and whereabouts are known, presents a specific and imminent threat to his life or physical safety ("*Lord Bingham's Liability Principle").*

On the first issue, the Interveners' Liability Principle is rejected because: (i) it is hard to see why the duty should be confined to physical injury or death or to particular victims and not others **[119]-[120]**; (ii) it is speculative whether a duty would improve the performance of individual officers in domestic violence cases and it is not in the public interest for police priorities to be affected by the risk of being sued **[121]**; (iii) it would have potentially significant financial implications for the police and/or public **[122]**; (iv) it is not necessary to develop the law of negligence to mirror or go beyond what is required by Articles 2 and 3 (right to be free from torture or inhuman or degrading treatment or punishment) ECHR **[125]** – ECHR claims have different objectives from civil actions such as negligence **[127].**

On the second issue, and in addition to those reasons, Lord Bingham's Liability Principle is rejected as it would be unsatisfactory to draw dividing lines according to: (i) who reports the threat; (ii) whether the threat is credible and imminent or credible but not imminent; (iii) whether the whereabouts of the threat-maker are known or not; and, (iv) whether the threat was aimed at physical injury or not **[129]**. It should be for Parliament to determine the existence and scope of such a compensatory scheme **[130].**

On the third issue, it is untenable that what the call handler said to Ms Michael gave rise to an assumption of responsibility**.** The call handler gave no promise as to how quickly the police would respond and did not advise or instruct her to remain in her house **[138].**

On the fourth issue (Article 2 ECHR), whether the call handler should have heard Ms Michael say that her ex-boyfriend was threatening to "*kill her"* is a question of fact to be investigated at trial **[139].**

Lord Kerr (dissenting) would have allowed the appeal. There should be recognised a sufficient proximity of relationship, such as to create a duty on the police in negligence, where: (i) there is a closeness of association between the claimant and the defendant, such as where information is communicated to the defendant; (ii) the information should convey to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken; (iii) the defendant might reasonably be expected to provide protection in those circumstances; and, (iv) the defendant should be able to provide for the intended victim's protection without unnecessary danger to himself **[144].** On these facts, there was clearly a sufficient proximity of relationship between the police and Ms Michael **[173].**

The general rule that there is no duty to protect others from third party harm is not appropriate for members of a force whose duty it is to provide protection **[181].** The fundamental principle that legal wrongs should be remedied outweighs the complete absence of evidence to support the claims of dire consequences if liability was found **[186].**

Lady Hale (dissenting), supporting the analysis of Lord Kerr, would also have allowed the Appellants' appeal. The policy reasons said to preclude a duty in a case such as this are diminished by the fact that the police already owe a common law, positive duty in public law to protect members of the public from harm caused by third parties **[195],** as well as by the existence of the ECHR claims **[196].**

References in square brackets are to paragraphs in the judgment

NOTE