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WILLIAMS, K.

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COMPENSATING TRAGEDY.

Kevin Williams.

Amidst the clamour and controversy surrounding the conviction of the Metropolitan Police who mistook Jean Charles de Menezes for a terrorist, fatally shooting him on Stockwell underground station in July 2005, little has yet been said about whether a civil action for damages might be won against the police.

Like some others who have felt let down by the criminal justice system, the family is reported to be considering suing. One such recent case is *Ashley v Chief Constable of the Sussex Police* [2006] EWCA Civ 1085, where the dead man's relatives sued for common law damages following a failed prosecution for murder. More than twenty years ago, in circumstances bearing some resemblance to the tragic shooting under discussion, armed officers shot (though did not kill) another innocent man, Steven Waldorf, believing him to be an armed criminal. Two officers were acquitted on charges of attempted murder and wounding with intent. The following week, the then recently retired Lord Denning wrote in *The Sunday Times* (23rd October 1983) that, whilst it would be proper for the Metropolitan Police to offer *ex gratia* compensation (which they eventually did), if Waldorf were to sue, he would not succeed. Are the prospects of the de Menezes' family any better? Because their options are heavily fact-dependent, any assessment must necessarily be tentative.

No damages for breach of statutory duty.

The Metropolitan Police were prosecuted under s. 3 of the Health and Safety at Work etc Act 1974, which provides that it is 'the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety'. An Old Bailey jury convicted them on 1st November 2007 and Mr Justice Henriques imposed a fine of £175,000, together with an order for costs of £385,000.

However, none of this will help the family who are prevented from relying on the statute by s. 47(1) which declares that failure to comply with any of the general duties in sections 2 to 9 of the Act shall not be construed 'as conferring a right of action in any civil proceedings'.

The charge of endangering the public may strike many as having 'an inappropriate air of banality', as a Guardian leader put it the following day. However, it has the distinct advantage, from the prosecutor's point of view, that s. 40 of the 1974 Act puts the burden onto the defence to show that it was not reasonably practicable to do more than was in fact done to comply with the obligation of securing safety. No doubt too the CPS was mindful of the fact that, in the past, where more 'mainstream' criminal charges have been brought against individual officers following accidental shooting, acquittal has been the usual outcome.

Criminal Injuries' Compensation?

Would an application to the Criminal Injuries' Compensation Scheme be likely to fare any better? It is clear that a person who is injured while being lawfully apprehended does not sustain a qualifying 'criminal injury' within paragraph 8 of the Scheme. Where the police are operating under a mistake things are less clear cut.

No criminal charges (and no internal disciplinary proceedings either) are to be brought against any of the eleven front line surveillance and firearms officers involved in the Stockwell shooting, apparently on the basis that they would be likely to fail. In the recent *Ashley* case (above), the Court of Appeal confirmed that, in a criminal trial, the burden of negating self-defence is on the prosecution. Not only must they do so beyond a reasonable doubt, but an accused is entitled to be judged subjectively on the basis of the facts as he honestly believed them to be, including a mistaken belief that it was necessary to act in self-defence or in defence of others. In the criminal case of *Beckford v R* [1988] AC 130, the Privy Council held that a police officer who mistakenly thought that he was being fired on, and who shot and killed his supposed attacker in response, was entitled to be acquitted of murder because he had acted reasonably in the circumstances as he honestly believed them to be. Furthermore, while the force used must be reasonable in the circumstances, this is a question of fact and is not to be judged too nicely (see *Farrell v Secretary of State for Defence* [1980] 1 WLR 172).

Accordingly, the pre-emptive shooting of even an entirely innocent person may be lawful and, hence, not a crime of violence. Furthermore, *Clarke v Secretary of State for Northern Ireland* [1988] 5 NIJB 24 held (arguably wrongly) that a man shot by the police who had (reasonably) mistaken him for a gunman was not entitled to a criminal injuries award. Seemingly, an injury arising out of his attempted arrest was not 'directly attributable' to the 'apprehension or attempted apprehension of an

offender or suspected offender'. On this interpretation, the innocent victims of official violence are not within the formula, which benefits only those who are hurt when trying to enforce the law.

Nor does it seem that the s. 3 offence, which is essentially negligence based, will qualify to be treated as a crime of violence, despite its tragic violent outcome. What matters is not the outcome but the nature of the crime, which must entail intentional hostility or recklessness as to injury. Injuries resulting from health and safety and many other 'regulatory' criminal offences are not within the Scheme.

This leaves three other possibilities.

Damages for Trespass to the Person?

The Stockwell shooting *may* give rise to a successful civil action for battery. Battery consists of the direct and intentional application of unlawful force for which the Commissioner would, in principle, be vicariously liable by virtue of s. 88 of the Police Act 1996.

If liability continues to be hotly contested, it may be evidentially significant that the burden of proving self defence in a civil case rests upon the police. Sir Anthony Clarke MR emphasised in *Ashley* (above [at 78]) that self defence is available where a defendant shows, 'first that he mistakenly but reasonably thought that it was necessary to defend himself against attack or an imminent risk of attack, and secondly that the force he used was reasonable'. Auld LJ added [at 173] that the 'reasonableness' of a defendant's reaction and the degree of force used must be determined 'in the light of all relevant circumstances, including...the fact that he may have had to act in the heat of the moment'.

So, it will be for the two firearms officers who shot Mr de Menezes to show that these conditions are satisfied; in particular, that their undoubted belief that they were dealing with a suicide bomber was *reasonable* and not merely honest. When judging the likely mindset and reactions of the officers, it will be material: that 52 people had been killed just a fortnight earlier; that there had been an abortive bomb attack on the underground only the previous afternoon; that the officers had been misled about the identity, behaviour, and supposed nature of their target; that the command from above about the suspect being 'stopped' lacked clarity; and that, by the time of their compromisingly late arrival, Mr de Menezes had already entered the Stockwell tube station so that the

apparent threat was highly immediate and their options limited. Given this background, it is possible that the burden of proof *could* be discharged, and that even seven bullets to the head might not be excessive. As said earlier, such matters are highly fact-sensitive.

Damages for Negligence?

Stockwell One, the IPCC report, lists 16 'concerns', 11 of which relate to planning, control, and management. Whilst recognising the fast moving nature of the event (just over half an hour elapsed between Mr de Menezes leaving his flat and being shot dead), and that other lines of enquiry were being pursued simultaneously, the report characterises operation *Theseus* as marked by command confusion, information breakdowns, and the late deployment of available resources. Accordingly, any negligence action should focus on the manner in which the operation was directed and controlled from the top, rather than concentrating on mistakes alleged to have been made by the front line shootists. The key issue will thus be organisational breach.

Proof will be assisted by s.11 of the Civil Evidence Act 1968, which allows the s. 3 health and safety conviction to be admissible in a civil action. Given that the focus of that offence concerns what is 'reasonably practicable', this is likely to be strong, albeit not conclusive evidence of negligence. There is also an inquest to come, probably in Spring, 2008. Additionally, should the Metropolitan Police Authority decide that some senior officers ought to face internal disciplinary proceedings that will put further pressure on the force to settle. Prima facie, the prospects of making out culpable managerial failure seem strong.

Human Rights Act claim?

In principle, a claim that the 'right to life', conditionally guaranteed by Article 2 of the ECHR, was infringed is possible. Once the right is unquestionably engaged, as it is here, it would be for the police to show that no more force than was 'absolutely necessary' was used. A court should subject this plea to 'the most careful scrutiny...taking into consideration not only the actions of the agents of the State who actually administered the force but also...such matters as the planning and control of the actions under consideration' (see *McCann v UK* (1995) 21 EHRR 97 at [150]). This test of necessity is more compelling than the ordinary negligence standard. On the other hand, compensation is likely to be more modest than an award of common law damages (see *Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325). More

critically, such a claim is already out of time because of the short, one year limitation period in the Act.

Treasury Counsel, the IPCC and the police believe the shoot-to-kill protocol (known as *Kratos*) is Convention compliant, at least when properly managed and used as a last resort. At the health and safety trial, the police denied that it had been invoked when Mr. de Menezes was shot.

Conclusion.

One suspects that following the s. 3 conviction and publication of the damning IPCC report, many ordinary members of the public will have concluded that the Stockwell shooting is an 'open and shut' case for compensation. On closer examination, matters appear less clear. The three possible causes of action - battery, negligence, and breach of human rights - despite being differently expressed and subject to different procedural rules and evidential burdens, essentially turn on the same issue, namely, whether the police used only reasonable force in response to a grave and genuine threat to themselves or to public safety. On the basis of the currently available evidence, the family's only chance of success appears to lie in negligence.

I have argued before how anomalous it is that the Criminal Injuries' Scheme will automatically provide (limited) compensation to those shot by criminals but none to those unfortunate enough to be mistakenly shot by the police (see 'Compensation for accidental shootings by police', *NLJ*, 22 February 1991, 231-232). The Scheme should, in my view, adopt an expanded definition of a qualifying 'criminal injury' so as to cover the latter contingency explicitly. We are told that 'defeating terrorism' may take a generation or more. If so, we had better steel ourselves for more tragic errors. Law enforcement is a benefit to us all and we should take collective responsibility to see that, if it goes badly awry, its innocent victims are not left to take pot luck in the forensic lottery of the tort system.

Kevin Williams is a Reader in Law at Sheffield Hallam University. He can be contacted by e-mail at k.m.williams@shu.ac.uk