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Published version

WILLIAMS, K. (2008). Emergency services to the rescue? *Journal of personal injury law*, 202-208.

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EMERGENCY SERVICES TO THE RESCUE?

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Abstract: Drawing on some recent appellate decisions, this article argues that in appropriate cases emergency service providers should be held to owe a duty of care to go to the aid of those they know to be at physical risk.

Introduction

The case of *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39 provides a further opportunity to reconsider the circumstances in which English law may impose obligations on members of the emergency services to act as a rescuer, either by going to the aid of those in physical need or by protecting them from injury or death.¹ In *Smith*, the Court of Appeal refused to strike out a claim alleging negligence against the police after they had failed to safeguard the claimant from a grave risk of imminent attack by his former partner despite knowing of numerous death threats.

It is notorious that the common law is reluctant to impose duties of affirmative action so that there is no duty on ordinary citizens to attempt even the 'easy' rescue of strangers.² Lord Diplock was clear in *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004, 1060 that 'the priest and the Levite would have incurred no civil liability in England'. Until *Kent v Griffiths* [2001] QB 36 radically and somewhat controversially recognised a duty of professional rescue on ambulance trusts, this 'no duty' rule applied equally to the emergency services³ resulting in what Howarth characterised

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¹ Others, such as healthcare and social work professionals undertaking child protection functions may also have 'rescue' responsibilities, see *JD v East Berkshire NHS Trust* [2005] UKHL 23, but they are beyond the scope of this note, which concerns the three emergency services - police, fire, and ambulance.

² The position is otherwise in many civilian systems in continental Europe, see Kortmann J, *Altruism in Private Law* (Oxford: Oxford University Press, 2005), chapter 4.

³ See the English 'no duty' authorities: *Alexandrou v Oxford* [1993] 4 All ER 328 (police); *Capital and Counties plc v Hampshire County Council* [1997] QB 1004 (fire brigade); *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897 (coastguard). In Scotland, the position appears to be otherwise. See *Gibson v CC of Strathclyde* [1999] SC 420 (police liable when the task of warning motorists of a partially collapsed

as 'the extraordinary rule...that the public rescue services have no duty to rescue anyone'.⁴

The usual formal explanation for these 'no duty' rulings is an absence of 'proximity'. Thus, Lord Nicholls in *Stovin v Wise* [1996] AC 923 at 931 said: 'There must be some additional reason why it is fair and reasonable that one person should be regarded as another's keeper...When this additional reason exists there is said to be sufficient proximity. That is the customary label'.⁵ No doubt behind the proximity rhetoric are concerns to avoid burdening the emergency services with potentially widespread and costly liabilities. Lord Hoffmann, also speaking in *Stovin v Wise* [1996] AC 923 at 958 stressed the 'importance before extending the duty of care owed by public authorities to consider the cost to the community.' 'It is one thing', his Lordship said, 'to provide a service at the public expense. It is quite another to require the public to pay compensation when a failure to provide the service has resulted in loss'. Deleterious consequences are commonly predicted by defendants and sometimes by judges. These include anxieties that, for example, there will be an indeterminate (or, at least, large) volume of claims; that a so-called 'compensation culture' may be encouraged and precipitate a litigation crisis; that threats of liability may distort the due performance of socially beneficial public services; that potential defendants will resort to excessively risk-averse behaviour; or that courts and defendants may find themselves overburdened with gold digging, vexatious or otherwise groundless claims.⁶ Craig and Fairgrieve complain that these sorts of policy concerns often seem

road bridge was prematurely abandoned) and *Duff v Highlands and Islands Fire Board* [1995] SLT 1362 (obiter, negligent fire authority not immune from liability).

⁴ Howarth D, 'Public Authority Non-Liability: Spinning Out of Control' (2004) 63 *Cambridge Law Journal* 546 at 547.

⁵ Booth C and Squires D, *The Negligence Liability of Public Authorities* (Oxford: Oxford University Press, 2006) at para 3.109, note that some cases adopt a 'proximity' analysis while others approach what is essentially the same issue of principle via 'omission'. In *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 the act/omission distinction did not feature, whereas its importance was emphasised strongly in *Stovin v Wise* [1996] AC 923. *Kent v Griffiths* [2001] QB 36 considered both.

⁶ In *John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority* [1996] 4 All ER 318 at 332, Rougier J, when rejecting a claim alleging negligent fire fighting for want of proximity, also said it is 'a truism' that 'we live in the age of compensation...Claims that would have been unheard of 30 years ago are now being seriously entertained, and public money provided for pursuing them'. The Court of Appeal was more guarded. They too explained the absence of duty by reference to the Delphic notion of proximity but rejected as unpersuasive various policy considerations, including floodgates anxieties, so explicitly relied on by Rougier J. See *Capital and Counties plc v Hampshire County Council* [1997] QB 1004, at 1043-4.

to 'elude the ordinary rules of evidence' so seldom are they supported by empirical data.⁷ In practice, there may frequently be little or no empirical data to speak of so that courts perforce fall back on hunch and judicial 'commonsense'.⁸

Whether and when the emergency services might be sued for an unreasonable failure to rescue is part of a wider debate among senior judges about the circumstances in which public authorities generally should be made liable to those who suffer damage by the negligent exercise or failure to exercise state powers. According to Markesinis and Fedtke this debate is being conducted by 'restrictive conservatives' on the one hand and 'pragmatic modernisers' on the other.⁹ The best that can be said is that the law of public authority liability is developing and consequently is currently uncertain.¹⁰

While common law countries have traditionally refused to impose any general duty to rescue, paradoxically those who choose to intervene are theoretically at risk of being sued for negligence by ungrateful rescuees should any rescue attempt go badly. Fleming said that we had thus 'created the anomaly of subjecting the incompetent Samaritan to liability while excusing the Levite'.¹¹ Faced with an allegation of this kind, seemingly both amateur and professional rescuers must rely for protection on the reluctance of courts to accept that there has been a culpable and causative want of

⁷ See Craig P and Fairgrieve D, 'Barrett, Negligence and Discretionary Powers' [1999] *Public Law* 626 at 636. Cf. Buxton LJ in *Perrett v Collins* [1998] 2 Lloyd's Rep 255, at 277 rejecting as unsupported by 'expert evidence' claims that liability would cause the defendant regulatory body to adopt damaging defensive practices.

⁸ Thus Stapleton says that 'in general, there is insufficient empirical evidence to conclude whether tort doctrines are influencing public regulation or social norms, such as the behaviour of the target population, either at the pre-tort stage or in how they react to the commission of a tort'. See Stapleton J, 'Regulating Torts' in Parker C et al (eds), *Regulating Law* (Oxford: Oxford University Press) at 131. Cf. Markesinis and Fedtke, n 9 below.

⁹ Markesinis B and Fedtke J, 'Damages for the Negligence of Statutory Bodies: The Empirical and Comparative Dimension to an Unending Debate' [2007] *Public Law* 299.

¹⁰ See, generally, Booth and Squires, n 5. Bailey S H and Bowman M J, 'Public Authority Negligence Revisited' (2000) 59 *Cambridge Law Journal* 85 at 122, say it is 'increasingly difficult to find a principled basis for the line between liability and non-liability'.

¹¹ See Fleming J G, *The Law of Torts* (Sydney: Law Book Company, 7th ed., 1987) at 135.

care.¹² The further rule that no liability can arise unless defendant volunteers have made an already bad situation 'worse' by some positive act of negligence seems designed to provide them with additional protection.¹³ No doubt it is also reflective of the common law's rejection of any *general* duty to make things 'better' initially by embarking on a rescue. Being funded by taxpayers, emergency service providers are not simple altruists, of course, unlike Samaritan doctors,¹⁴ nor are they indifferent onlookers in the face danger and urgent need.

Recent moves to impose professional rescue duties

Kent v Griffiths [2001] QB 36 is a landmark decision, which has laid the foundations of a duty of medical rescue and, arguably, of a wider entitlement to rescue by the emergency services more generally. It demonstrated that litigation, prompted by an egregious failure to provide reasonably prompt medical assistance, regardless of the casualty's prior status as a 'patient', can be successful despite an apparently well-settled rule to the contrary. Yet it also left the law looking haphazard and illogical, as the everyday example of rescue on the roads illustrates.¹⁵ Police and fire fighters are trained in first aid and in practice are expected to provide it when necessary at a crash site rather than await the arrival of ambulance paramedics.¹⁶ The three services operate common protocols, mount joint training sessions, and must act in highly integrated and cooperative ways if they are to be effective in saving persons and property in the aftermath of traffic accidents. Yet they are currently subjected

¹² The fact that a defendant was responding to an emergency may affect what the law can sensibly expect. For a recent example of an emergency rescue, but one not requiring an 'agony of the moment' decision, see *Davis v Stena Line Ltd* [2005] EWHC 420 (carrier liable for protracted, negligent attempt to save a ferry passenger who had fallen overboard).

¹³ See *Capital and Counties*, n 3 above.

¹⁴ See Williams K, 'Doctors as Good Samaritans: Some Empirical Evidence Concerning Emergency Medical Treatment in Britain' (2003) 30 *Journal of Law and Society*. 258 (doctors overwhelmingly do volunteer and, so far as is known, not one has been sued).

¹⁵ See Williams K, 'Road accidents and the emergency services: the law and practice of professional rescue re-visited'. (2003) 19 *Professional Negligence* 517.

¹⁶ Cf. *Nottinghamshire and City of Nottingham Fire and Rescue Authority v Fire Brigades Union* [2007] EWCA Civ 240, where the Court of Appeal confirmed that presently fire fighters are not *contractually* obliged to administer first aid or other medical interventions at the scenes of emergencies where ambulance crews cannot attend in time.

to different liability regimes, which is productive of incoherence at the level of legal theory and likely confusion at the level of practice. Though it has not been tested directly, tort law currently appears to see these rescues as a highly segmented process. Police and fire crews providing first aid or cutting trapped motorists from vehicles are performing tasks that are, in private law terms, apparently discretionary.¹⁷ Their failure to attend or late arrival seemingly cannot be challenged as actionable negligence. Moreover, however incompetently they deal with the situation once at the scene, they are free of liability unless by some positive act they add to the harm the victims would have suffered had they done nothing whatsoever. In contrast, the attendance of ambulance crews is obligatory, at least once they have undertaken to respond to a (999) call for help. They can be called to account for the timeliness of their arrival, as well as for any unreasonable failure to provide beneficial treatment that would probably have made the casualties better, and not simply for having made them worse.¹⁸ The resulting gap between law and practice is now so wide as to confound the reasonable expectations of the public and, probably, of the various rescue services themselves.

How did we find ourselves in this profoundly unsatisfactory state of affairs? Put briefly, the courts hearing the fire brigade cases extended the broad (if qualified) 'immunity' granted to the police in the context of fighting crime to the very different context of rescue crews fighting fires. The courts were much too eager to ignore the very different context and functions of the police when investigating crime, too ready to make dubious factual and analogical assumptions, and too influenced by unproven floodgate anxieties.¹⁹ In this way, English law became the uncritical victim of 'immunity creep'.

Prompted by human rights considerations, two recent cases have begun to re-evaluate the liability of the police when dealing with crime, which in turn calls into question the 'no duty to rescue' rule as it applies to the emergency services.

¹⁷ See the 'no duty' cases cited in n 3.

¹⁸ See *Kent v Griffiths* [2001] QB 36.

¹⁹ In *Capital and Counties*, n 3, the Court of Appeal denied that policy considerations were determinative or that fighting fires and fighting crime are analogous activities. This left 'proximity' unfeasibly having to bear the whole weight of the 'no duty' conclusion.

In *Van Colle v CC of Hertfordshire* [2007] EWCA Civ 325 the claimants' son, Giles, was shot dead by a former employee, Brougham, who was about to stand trial for theft. Giles was his accuser and would have been a principal prosecution witness at the trial. Brougham is now serving a life sentence for murder. A police Disciplinary Panel found the officer in charge of the theft inquiry guilty of failing to perform his duties 'conscientiously and diligently', having ignored strong evidence of 'an escalating pattern of intimidation' by Brougham against Giles and other witnesses due to give evidence at the trial.

The parents sued under s.7 Human Rights Act 1998 (HRA).²⁰ Mrs Justice Cox found the defendant vicariously liable for breach of the 'right to life' guaranteed by Article 2 of the European Convention on Human Rights, as well as breach of the Article 8 right to family life. In circumstances such as these, Article 2 imposes a positive duty on the state to do all that could be reasonably expected to protect those the police know or ought to know are at 'real and immediate risk'. As a witness, Van Colle was 'vulnerable', in a 'special category', and entitled to 'greater protection' than members of the public generally (at [49]). However, Art 2 must not be interpreted so as to 'impose an impossible or disproportionate burden on state authorities' (at [56]).

As to causation, Cox J was satisfied that if the police had acted properly Brougham would have been unable to carry out his threats because his bail would have been revoked and he would have been remanded in custody.

Although this was a claim under the HRA, Cox J said she was 'not persuaded' that a claim in negligence would inevitably have failed (at [89]). Unlike *Hill v CC West Yorkshire* [1989] AC 53, where there was no relationship between the police, Sutcliffe and his last victim (who was simply an undifferentiated member of the public at risk of attack by a then unidentified serial rapist), Giles Van Colle, his attacker, and the Hertfordshire Police were all 'proximate', to borrow the language of negligence. Moreover, her Ladyship did not consider that liability *on these particular facts* (specific and serious threat against known vulnerable victim from known source

²⁰ As to their status as dependents, see Davison R, 'The Fatal Accidents Act 1976 - does it mean what it says?' [2007] JPIL 297.

reported to the police) will 'inevitably result in open season for limitless claims against the police' (at [80]), so writing down the strongly expressed policy anxieties in *Hill*.

Lastly, decisions in this area are highly fact sensitive. In *Van Colle*, there was little dispute about the facts, unlike *Osman v UK* (1998] 29 EHRR 245 where there 'never was any determination of the facts...which led up to the shooting of Ali and Ahmet Osman', and about which there was 'considerable dispute between the parties', both as to the police's knowledge of events and as to the real nature of the threat posed by the deranged schoolteacher.²¹

The Court of Appeal upheld the finding of liability, though the damages were reduced from £50,000 to £25,000. Unlike Cox J, the Court expressed concerns that a claim for common law negligence might be 'fraught with difficulty' given 'the authorities as they stand at present' - a reference both to *Hill* (especially its policy objections to police liability) as well as to *Brooks v Commissioner for the Metropolis* [2005] UKHL 24 (no duty to treat witnesses with proper consideration or care).

While *Van Colle* was solely a claim under the Human Rights Act, *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39. was founded solely on common law negligence (the claimant having missed the one year limitation period in the HRA). *Smith* raises a number of issues, particularly the significance of policy and the influence of human rights considerations on negligence. Here the Court of Appeal refused to strike out a negligence action as disclosing no reasonable cause of action. The claim alleged failure by the police to protect a man from attack, despite knowing that he had received numerous death threats from his former (male) partner. Unlike *Hill*, arguably there was sufficient proximity here. *Smith*, like *Giles Van Colle*, was known to be at risk and was not simply one of a large number of unidentified, potential victims.

Sedley LJ said it would not be sensible if *Smith*, who was both a victim and a potential witness, were to be worse off legally speaking than an informer (see *Swinney*

²¹ On the wider significance of *Osman*, see Weir R, 'Duties of Care: human rights and competing public policy arguments after *Osman*' [2000] JPIL 208.

v Chief Constable of Northumbria [1997] QB 464) or a witness to a crime which happened to have been charged (see *Van Colle*). Moreover, Rimmer LJ noted that the policy considerations emphasised by Lord Keith in *Hill*, such as the possible fruitless diversion of scarce resources from frontline policing to fighting off claims, defensive policing or that the threat of liability would be unlikely to improve policing standards, are no longer effective in conferring a blanket immunity. Instead they are to be treated simply reasons why it *may* not be 'fair, just and reasonable' for a duty of care to be imposed (at [34]) and may need to be 're-visited' if the common law and the Article 2 right to life are to 'develop in harmony' (at [45]). Pill LJ similarly said that 'there is a strong case for developing the common law action for negligence in light of Convention rights' (at [53]).²² Lord Steyn had earlier said in *Brookes v Commissioner for the Metropolis* [2005] UKHL 24 at [27] that 'not every observation in *Hill* can now be supported'.

So, whilst few doubt that *Hill* would almost certainly be decided in the same way today, it may be possible to establish a case in negligence where a known victim's life or physical safety is at real and immediate threat from an aggressor whose identity is also known to the police. The police may have to take positive, albeit not disproportionate, preventative operational measures. Sedley LJ (at [31]) suggested that some distinctions, not explored in this appeal, might need to be considered in the future. In particular, whether a distinction between 'neglect by inefficiency' and 'wilful neglect' should be drawn, as well as whether a difference should be recognised between protecting property (as in *Alexandrou v Oxford* [1993] 4 All ER 328, a 'no duty' property case about which Sedley LJ rightly expressed reservations) and the protection of life (as in *Osman*, *Van Colle*, and *Smith*).

These decisions are to be welcomed as countering the too easy assumptions made in the past about the virtual immunity of the police when dealing with crime and the extension of that kind of thinking to emergency service providers in other contexts.

²² How best 'harmony' might be achieved was not examined in any detail. Cf. Hickman T R, 'Tort Law, Public Authorities, and the Human Rights Act 1998' in Fairgrieve D *et al* (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002).

Conclusions

It is submitted that the common law *should* recognise the existence of a legal duty of professional rescue, the purpose of which would be to provide compensation in accordance with standard notions of corrective justice in those rare cases where a victim has been harmed unnecessarily by egregious negligence when they might readily have been saved.²³ While it is beyond the power of the law to make people good, it is commonplace for the law to condemn in damages those who culpably fail to come up to community standards of expected behaviour.²⁴

In line with human rights jurisprudence, the basic building blocks for constructing a theory of liability are already to hand, though we should be careful not to underestimate the extent to which English courts are likely to continue to be cautious about departing from the orthodox position that there is *normally* no duty of care to confer benefits on another.²⁵ Nonetheless, it is suggested that such a duty should be held to exist whenever a relevant authority knows or reasonably ought to know that vulnerable, identified or identifiable persons are at real and immediate risk of serious physical harm, injury or illness.²⁶ What matters is the urgent need of the victim, so that it ought to be irrelevant whether the need results from their own actions, natural processes or the behaviour of others.

It is suggested that the focus of judicial attention ought then to shift from duty to the utility of breach as the principal gatekeeper of liability.²⁷ At that point no doubt courts considering whether the duty to rescue has been met will be particularly

²³ The proposed duty should be confined to the protection of persons and not extend to the salvation of property, which can be replaced and may frequently be insured.

²⁴ On the influence of public perception, see Bartlett A, QC and Waite J, 'Searching for duties of care: the fire brigade cases' [1997] JPIL 147.

²⁵ Van Dam C, *European Tort Law* (Oxford: Oxford University Press, 2006), at 467, notes that 'all [European] legal systems are very reluctant in accepting liability for pure omissions, particularly in rescue cases'.

²⁶ 'Relevant authority' means here police, fire and rescue, and the coastguard services. The position of voluntary, non-state actors, such as Mountain Rescue teams and the RNLI, which are not funded by taxpayers but largely by charitable donations, requires separate and careful consideration. Ordinary citizens should continue to be free of any legal obligation to assist a stranger.

²⁷ Dicta in *Phelps v Hillingdon London Borough* [2001] 2 AC 619 and elsewhere support this approach. See too Bailey and Bowman, n 10, at 131-132, and Craig and Fairgrieve, n 7, at 638-639.

sensitive to the nature of the emergency, the risks it presents to the rescuers, their professed skills and operational choices, and any constraints which competing priorities and limited time or resources impose. The burden imposed on defendants should not be disproportionate and claimants should be expected to prove breach with convincing clarity. The *Bolam* standard, as interpreted in *Bolitho*, imposes a properly demanding test of fault without the need to introduce a concept of 'gross' or 'subjective' negligence, which would be unhelpful and fragmenting refinements.²⁸ Moreover, as Lord Bingham reminded us in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [32], 'the professional is not required to be right', merely careful.

Finally, we should be careful before we too readily accede to generalised and largely unsubstantiated claims that the legal system already faces a personal injury litigation crisis to which an extension of liability of the sort advocated here will further and damagingly contribute.²⁹ Thus, whilst English ambulance services every year make more than three million 'emergency patient journeys', research shows that they face claims in only a minute percentage of cases, and that when patients complain overwhelmingly they allege conventional care and treatment failures rather than the fact or the timeliness of their rescue. The theoretically radical imposition in *Kent v Griffiths* of a duty to respond reasonably promptly has resulted in few claims, poor success rates and low payouts, contrary to some fearful predictions.³⁰ Requiring the other emergency services to similarly take responsibility is unlikely to provoke a litigation crisis.

²⁸ See *Bolam v Friern HMC* [1957] 1 WLR 582 and *Bolitho v City and Hackney HA* [1998] AC 232. In addition to establishing breach, proof of causation and damage may be expected to be significant sources of difficulty for some claimants, as in *Bolitho* itself.

²⁹ See House of Commons Constitutional Affairs Committee, *Compensation Culture, Third Report of Session 2005-06* (HC 744-I, March 2006), Williams K, 'State of Fear: Britain's "compensation culture" reviewed'. (2005) 25 *Legal Studies*. 499, and Lewis R *et al*, 'Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom?' [2006] JPIL 87.

³⁰ See Williams K, 'Litigation against English NHS Ambulance Services and the rule in *Kent v Griffiths*' (2007) 15 *Medical Law Review* 153.