POLICE, NEGLIGENCE AND THE ELUSIVE SPECIAL INGREDIENT: A CRITICAL ANALYSIS OF MICHAEL V CHIEF CONSTABLE OF SOUTH WALES POLICE AND THE LIABILITY OF POLICE FOR THE ACTIONS OF THIRD PARTIES.

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> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."

Abstract

The liability of the police for the actions of third parties is a contentious area of tortious law. While the original justifications for declining liability were arguably reasonable and pragmatic, the courts' reluctance to allow for exceptions, even in cases of clear negligence, has been the subject of controversy. This article argues that the original policy issues discussed in dicta by Lord Keith in Hill v Chief Constable of West Yorkshire*, have been stretched by subsequent courts to encompass increasingly distinguishable cases, which has caused controversy. The 2015 United Kingdom's Supreme Court decision of* Michael v Chief Constable of South Wales *arguably shut the door to any prospect of changing the courts' conservative approach to police liability. While there were two powerful dissents given by Lord Kerr and Lady Hale, the majority, led by Lord Toulson, declined to find a duty of care holding that the police had not assumed responsibility towards the victim. This article argues that the Supreme Court's decision in* Michael *endorsed outdated policy concerns and did not give adequate consideration to the proximity arguments advanced before the Court. This article concludes that in certain situations the police should be liable for the actions of third parties.*

Introduction

From an early age, we are conditioned to the idea that the emergency services will respond to our cry for help. Emergency numbers are a core component of modern society. They are supposed to be a predictable,

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consistent and pragmatic source of help. Regardless of whether you have ever called an emergency number, you will undoubtedly know the formula that the conversation will follow. We have seen it play out countless times on our television screens. But what happens when the operator strays from the script; when it is not clear if help is on its way? What happens if, in an emergency, the police are negligent? This is the question that fell before the Supreme Court of the United Kingdom in the tragic case of *Michael v Chief Constable of South Wales Police* (*Michael*).[1]

Michael is the most recent in a series of cases which raise complex issues around the liability of public bodies for negligence. In a majority judgment of 5:2, the Court followed a conservative trend and held that the police did not owe a duty of care to the victim of a negligent omission by police. Lord Toulson gave the judgment for the majority, with Lord Kerr and Lady Hale in dissent. This article will argue that *Michael* was incorrectly decided, that the courts have gone beyond the scope of the decision in *Hill v Chief Constable of West Yorkshire* (*Hill*),[2] and have based their judgments on a flawed policy analysis which has arbitrarily restricted the scope of proximity and led to inconsistency and divergence in the common law. Part I will discuss the rationale and original position of liability for third parties and emergency bodies for negligent nonfeasance. Part II will examine previous cases involving the liability of police for the actions of third parties before *Michael* is analysed in Part III. This analysis will focus on the policy and proximity arguments used by the majority. Part IV will briefly examine alternative remedies to an action in negligence and Part V will consider the implications of *Michael* in a New Zealand context.

I. Omissions by Third Parties

A. Liability for third parties

Liability for the actions of a third party has always been a contentious issue in tort law and is not lightly imposed.[3] It raises the issue of whether an individual should be held liable for the actions of another. Duties arising in novel situations are evaluated by reference to the threefold *Caparo Industries plc v Dickman* (*Caparo*) test of reasonable proximity, foreseeability and assessment of how fair, just and reasonable it is to impose a duty (the policy stage).[4] While courts vary as to the emphasis they place on each stage of the inquiry, the result is normally the same.[5]

1 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732.
2 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL).
3 Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomas Reuters, Wellington, 2016) 147 at 185.
4 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 618.
5 Nicholas J McBride *"Michael* and the future of tort law" (2016) PN 32(1) 14 at 15–16.

The common law draws a distinction between a positive action and an omission, which can be vital to the success of a case.[6] Where there has been a negligent omission, *A* will not be liable for failing to help *B* in a situation that has arisen independently of *A*.[7] There are four exceptions to this general principle, where:[8] *A* assumed responsibility to help *B (Hedley Byrne* principle*)*,[9] *A* has induced reliance from *C* indicating that *A* will help *B, A* has special control over the third party,[10] or *A*'s status imposes a positive obligation on *A* to protect *B*.[11] The courts will presume that there is insufficient proximity for a duty to be imposed unless an exception applies.

This general rule of immunity has been widely criticised as an outdated, and overly expansive, principle[12] that is abhorrent to society's values.[13] It imposes no legal obligation on *A* to rescue a stranger's drowning child. Reasons for this immunity include protecting individual autonomy, concerns of market distortions and the "why pick on me argument", where it is unfair to impose liability for simply being in the wrong place at the wrong time.[14]

Although criticised, this rule applies equally to private citizens and public bodies: governmental organisations empowered by statute to perform public functions.[15] Public bodies, like the emergency services, are not autonomous individuals and are created for the sole purpose of providing aid to identifiable individuals.[16] The courts have been reluctant to extend liability to public bodies, especially professional rescuers. As public bodies implement political policies, the courts have been wary of imposing liability on them as it may affect their administration or cause public money to be diverted away from public functions.[17] The courts have actively refrained from touching upon areas of statutory discretion[18] as they only have jurisdiction to examine the operational decisions of public bodies, not the decisions that created the underlying policy that was acted upon.[19]

6 Todd, above n 4, at 182; *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] AC 874.
7 *Stovin v Wise* [1996] AC 923 (HL).
8 Stelios Tofaris and Sandy Steel "Negligence Liability for Omissions and the Police" (2016) 75(1) CLJ 128 at 128.
9 *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465.
10 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.
11 *Goldman v Hargrave* [1967] AC 645.
12 Alan Sprince and John Cooke "Article 6 and immunity in tort: let the facts speak for themselves" (1999) 15(4) Tolley's Professional Negligence 209 at 230.
13 Tofaris, above n 9, at 142. For further discussion, see Mark Davies *The Law of Professional Immunities* (University Press, Oxford, 2014) at 5–8.
14 *Stovin,* above n 8, at 943–944
15 Tofaris, above n 9, at 130.
16 At 130.
17 Cherie Booth and Dan Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at 7.
18 John Murphy, Christian Witting and James Goudkamp *Street on Torts* (13th ed, Oxford University Press, Oxford, 2012) at 56.
19 *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (QB).

B. Liability of emergency services

It is a well-settled precedent that failing to respond adequately to an emergency phone call or a cry for help does not per se give rise to an assumption of responsibility that can be claimed in negligence against the emergency services.[20] In *Capital & Counties plc v Hampshire County Council* (*Capital & Counties*) the Court expressly noted that if: [21]

> … [the fire brigade] fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.

Slade LJ further elaborated in *Alexandrou v Oxford* (*Alexandrou*) that "it is unthinkable that the police should be exposed to potential actions for negligence at the suit of every disappointed and dissatisfied maker of a 999 call".[22] In order to be liable, the rescuer must perform a positive action to create sufficient proximity between themselves and the claimant.

A positive act must be an extra action beyond the normal task of the rescuer. In *Capital & Counties* the act of turning off the automatic sprinkler system, which caused the fire to spread out of control, was sufficient.[23] In *Alexandrou* however, the police were not liable for negligently checking the premises of a shop after responding to a burglar alarm as there was no additional act.[24] Nor was negligent delay and misdirection by a coastguard sufficient to amount to a positive act.[25] The courts repeatedly refused to find that proximity arises from acceptance of an emergency phone call,[26] geographical proximity[27] or the undertaking of a task.[28] Recent courts have preferred the formulation which requires an express assumption of responsibility with clear reliance by the claimant[29] as opposed to the requirement of just a positive act by the rescuer.[30] While this arguably creates a higher threshold generally, as will be seen below, the approach was relaxed for the ambulance service.

20 *Capital & Counties plc v Hampshire County Council* [1997] QB 1004.
21 At 1030.
22 *Alexandrou v Oxford* [1993] 4 All ER 328 (CA) at 342.
23 *Capital & Counties plc*, above n 21.
24 *Alexandrou,* above n 23.
25 *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897 (QB).
26 *Capital & Counties plc,* above n 21.
27 *John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority* [1997] 2 All ER 865; *Alexandrou,* above n 23.
28 *Church of Jesus Christ of Latter Day Saints (GB) v West Yorkshire Fire and Civil Defence Authority* [1997] 2 All ER 865; *Alexandrou,* above n 23.
29 *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] QB 579.
30 *Knightley v Johns* [1982] 1 WLR 349; Rigby, above n 20.

The case of *Kent v Griffiths* (*Kent*)[31] held that the acceptance of an emergency phone call created a duty of care.[32] The case concerned a pregnant woman who was suffering from an asthma attack. The woman's GP called the emergency services and urgently requested an ambulance. Despite ringing several times and being repeatedly told that an ambulance would shortly arrive, it was delayed for 40 minutes. The plaintiff suffered a miscarriage and brain damage.[33]

Exactly what enabled the Court to distinguish the ambulance service from the other emergency services in *Kent* is unclear. In the earlier strike-out application, Schiemann LJ noted the extremely high degree of foreseeable harm and said that "from that factor alone it may be possible to persuade the Court that the requisite proximity can be deduced".[34] But, on appeal, Lord Woolf MR made it very clear that *Kent* did not translate into a general duty.[35] He distinguished the ambulance service from the police and fire brigade by analogising its duties to the function of a hospital and emphasising the nature of a medical emergency.[36] *Kent* resulted in an arbitrary and not easily reconcilable difference between the emergency services.[37]

Despite all emergency services being contactable over the phone, emergency phone calls can only establish sufficient proximity for the ambulance service. The courts have not provided any explanation for this inconsistency.[38] Considering that a finding of proximity does not affect the court's ability to later decline a duty for policy reasons, there is no apparent justification why other emergency services should fail at the proximity stage and thus create inconsistency in the law.

Take, for example, the fire service: it has been suggested that, because of the uncontrollable nature of a fire,[39] when the fire service assumes a duty it is assumed to be owed, not to the individual, but to the wider public.[40] However, as private actions in negligence cannot be based on a duty owed to the public at large, the claim would fail for lack of proximity. The courts would likely reject this argument as a basis for dismissing the claim, as it seems arbitrary to deny a finding of sufficient proximity to an identifiable individual, who would otherwise be proximate, simply because a vague duty is also owed to the public. Indeed, the policy concerns that surround the fire

31 *Kent v Griffiths* [2001] QB 36 (CA).

32 Kevin Williams "Emergency services to the rescue?" (2008) JPI Law 3 202 at 202.

33 *Kent*, above n 32, at [4]–[5].

34 *Kent v Griffiths (No 2)* [1999] PIQR 192 at 202.

35 Lord Woolf MR gave the sole judgment of the Court of Appeal in *Kent*, above n 32.

36 *Kent*, above n 32, at [45].

37 Williams, above n 33, at 205.

38 Note that this is argued on the presumption that the emergency service has identified the individual concerned and has reason to believe that the individual needs aid.

39 *Kent*, above n 32, at [45].

40 Roderick Bagshaw "The duties of care of emergency service providers" (1999) LMCLQ71 at 77.

service, such as the risk of insurance companies pursuing fire departments in an attempt to recover losses via the public purse, which was likely a key consideration of the Court in *Capital & Counties*, provide a stronger rationale for declining a duty than the proximity arguments.[41]

The courts appear to be blocking emergency service cases at the proximity stage of the inquiry. This could be because, as it has been suggested, proximity-based arguments are considered to be more "factual", and thus more authoritative, than those which rely only on policy concerns.[42] However, the courts appear to have taken the opposite approach when dealing with police liability cases and have placed emphasis on the policy stage of the inquiry and neglected the proximity arguments. While both approaches have led to a duty being denied, the courts' inconsistent approach has led to what Williams described as the "immunity creep" and the extension of police immunity into a "profoundly unsatisfactory state of affairs".[43] This criticism arises from the high-profile police omission cases where plaintiffs have been denied the ability to sue the police for what is often argued to be clear negligence, on the grounds of policy concerns against such liability. Especially as policy concerns are, as their name suggests, concerns and not definite facts, this can give rise to the impression that the law is unfair and based on ill-considered assumptions. Whether this is the case requires an examination of the case law and policy considerations which underlie the decisions.

II. Liability of Police

A. Hill and the influence of the Yorkshire Ripper

The origins of modern police liability can be traced to the case of *Hill*.[44] This case saw the mother of the last victim of serial killer Peter Sutcliffe attempt to hold the police liable for her daughter's death. She alleged that, but for the police's negligence, Sutcliffe would have been apprehended before he had a chance to kill her daughter. The claim was dismissed.

In the lead speech for the House of Lords, Lord Keith acknowledged that while the police owe a duty to the public to protect the Queen's peace,[45] that did not mean that they owed private citizens a duty to protect them from the

41 Mark Davies *The Law of Professional Immunities* (University Press, Oxford, 2014) at 172 and 175.

42 David Howarth "Negligence after *Murphy* time to rethink" (1991) 50(1) CLJ 58 at 83 as cited in Davies, above n 42, at 130.

43 Williams, above n 33, at 205.

44 *Hill*, above n 3.

45 Now codified in the Police Reform Act 2002 (UK), s 83.

actions of third parties.[46] The special ingredient of proximity was needed to go beyond mere foreseeability in order to establish a duty.[47]

There was nothing to indicate that the victim was at a "special distinctive risk" of harm to indicate a proximate relationship between the parties.[48] Imposing a duty would have removed the requirement of proximity potentially exposing the police to litigation from any dissatisfied member of the public. If his Lordship had stopped his analysis there, then *Hill* may simply have faded into obscurity, rather than becoming a fundamental case in police negligence.[49] However, he devoted an extra paragraph to list the policy reasons for refusing such a duty. He outlined potential risks such as defensive administration,[50] and warned of the risks of affecting the distribution of resources and diverting police attention from solving crimes onto resolving lawsuits.[51] Subsequent courts have accepted these arguments as forming part of the ratio decidendi of *Hill*.[52]

While the language of Lord Keith's speech indicated that, if there was sufficient proximity, the police could be liable, Lord Templeman's speech took a different approach, arguing that civil ligation was not "an appropriate vehicle for investigating the efficiency of a police force".[53] This argument is notably absent from the reasoning of subsequent cases.

Howarth has argued that Lord Keith used proximity as the focus in *Hill* as a "sleight of hand" to conceal his actual reliance on policy as he thought it would make his reasons more authoritative.[54] However, the wording and reasoning of Lord Keith's speech does not support this argument. His Lordship made it clear that if there was sufficient proximity, such as an identifiable class, then a duty subject to policy considerations could be imposed. His discussion of the policy concerns was simply to highlight the dangers of allowing negligence claims in circumstances such as the present case.[55]

The influence of *Hill* cannot be overestimated. Subsequent courts, adopting the language of Lord Keith's analysis, but the theme of Lord Templeman's speech, have made clear that the "core principle" of *Hill* extends well beyond the facts of the case.[56] The English courts expressly rejected the approach taken by Canada in *Doe v Metropolitan Toronto* (*Doe)* which was similar, but distinguishable, to *Hill*.[57] In *Doe* the police were able to identify

46 *Hill*, above n 3, at 62.
47 At 62.
48 At 62.
49 At 62.
50 At 63.
51 At 63.
52 *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 at [19].
53 *Hill*, above n 3, at 64.
54 Howarth, above n 43, at 130.
55 *Hill*, above n 3, at 62.
56 *Brooks*, above n 53.
57 *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 39 OR (3d) 487 (Ont Ct Gen Div).

an unknown assailant's potential victims through victim profiling and were held to owe a duty of care to warn the potential victims of the possible risks.[58] While the case is distinguishable from *Hill* as the potential pool of claimants was markedly smaller and meant that, unlike in *Hill,* the duty was not owed to the public at large which created a special relationship of proximity, it is noticeable that the Court did not give significant weight to the policy concerns.[59] The English Court of Appeal in *Osman v Ferguson* (*Osman)* firmly rejected the possibility that *Hill*'s principles could be amended in light of *Doe* and held that *Hill*'s policy concerns overrode the presence of clear proximity between the police and the claimant.[60]

B. Brooks and the extension of Hill

The Court failed to clarify what exactly they meant by "the core principle" of *Hill* in the case of *Brooks v Commissioner of the Police of the Metropolis* (*Brooks*).[61] *Brooks* concerned a young man who witnessed the brutal killing of his friend and was subsequently victimised by racial stereotyping and degrading treatment by the police, which led to him developing post-traumatic stress disorder.[62] Brooks argued that the police owed him a duty of care to assess whether he was the victim of a crime and, if so, a duty to take reasonable steps to afford him the necessary protection and support.[63]

In a unanimous judgment led by Lord Steyn, the House of Lords applied and upheld *Hill* holding that the policy concerns voiced by Lord Keith overrode any duty that could arise based on proximity. This was a startling argument as, prima facie, *Brooks* is distinguishable from *Hill* as the damage was caused by the actions of the police, not a third party.[64] This argument was unsatisfactorily dismissed in a single paragraph by Lord Steyn, who stated that such an argument "hardly does justice to the essential reasoning in *Hill*'s case" and that "[t]he distinction is unmeritorious".[65]

Although several of the Lords[66] agreed with Lord Steyn's concerns that "not every observation in [*Hill*] can now be supported",[67] none of their Lordships elaborated on exactly what element of *Hill* they were referring to. Instead, Lord Steyn quickly endorsed *Hill* by insisting that "a retreat from the principle in *Hill*'s case would have detrimental effects for law enforcement".[68]

58 At [108].
59 At [119] and [122].
60 *Osman v Ferguson* [1993] 4 All ER 344 (CA).
61 *Brooks*, above n 53.
62 At [7]–[8].
63 At [14].
64 Claire McIvor "The positive duty of the police to protect life" (2008) PN 24(1) 27 at 33.
65 *Brooks*, above n 53, at [32].
66 At [3] per Lord Bingham and at [6] per Lord Nicholls.
67 At [28].
68 At [30].

While his Lordship acknowledged that claimants may be left aggrieved without a cause of action in negligence, he noted that existing remedies, such as police complaints procedures, were adequate.[69] While a detailed analysis of *Brooks* is beyond the scope of this article, it is noted that the decision has been criticised. Commentators such as McIvor have argued that *Hill* should not have been applied to the facts of *Brooks*.[70] This criticism is arguably correct; *Brooks* was noticeably distinguishable from *Hill,* and any policy concerns of indeterminate future liability were limited by the fact that the duty in this case would have been owed to individuals directly affected by actions of the police.

C. Smith and the lone dissent

Van Colle v Chief Constable of Hertfordshire Police (*Van Colle*) and *Smith v Chief Constable of Sussex Police (Smith*) were heard jointly in the House of Lords.[71]

Both cases involved negligent investigations conducted by the police that resulted in both claimants being attacked by the men who they had reported for increasingly threatening behaviour. [72] Van Colle was killed,[73] and Smith was permanently disabled.[74]

Van Colle's family attempted to claim a breach under art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR) through the Human Rights Act 1998 (HRA),[75] which does not require the establishment of a duty.[76] This claim was dismissed by the House of Lords as failing on the facts to satisfy the *Osman* test[77] which required the police to appreciate that, at the time, there was a real and immediate risk to the victim's life.[78]

Smith's family brought an action in negligence. Lord Hope led the majority and held, following *Brooks,* that policy concerns overrode the possibility of a duty being owed on the basis of the proximity. Lord Bingham, while carefully noting that, on its facts, *Brooks* had been correctly decided,[79] dissented in a lone judgment where he advocated that a duty of care should be owed on the basis of his newly formulated liability principle:[80]

69 At [31].
70 Claire McIvor "Getting defensive about police negligence: The *Hill* Principle, the Human Rights Act 1998 and the House of Lords" (2010) 69 CLJ 133 at 142.
71 *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] AC 225.
72 At [8]–[9], [23] and [25].
73 At [17].
74 At [26].
75 Human Rights Act 1998 (UK).
76 Claire McIvor, above n 71, at 142.
77 *Osman v United Kingdom* (1998) 29 EHRR 245 at [115]–[116].
78 *Van Colle*, above n 72, at [39].
79 At [33].
80 At [44].

> … if a member of the public (A) furnishes a police officer (B) with 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, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.

His Lordship concluded that his principle was not contradictory to the ratio of *Hill* and fell within the scope of the exception envisaged by Lord Keith,[81] although that was contested by the other Lords.[82] Lord Bridge noted the potential for inconsistencies and arbitrariness and questioned why Lord Bingham's principle only applied to threats to physical safety and not to property.[83] Although Lord Bingham's dissent was strong, the Court's desire for certainty, and for a more utilitarian approach to the issue, overrode any argument for a remedy in negligence.[84]

III. Michael v Chief Constable of South Wales Police

A. The facts

On 5 August 2009 at 2.29 am the Gwent Police call centre received a call from Johanna Michael that was meant for the South Wales Police call centre.[85] Michael's mobile phone signal had accidentally been picked up by the wrong police station.[86] Michael told the operator that her ex-boyfriend had caught her with another man, had attacked her and had threatened to kill her when he returned from escorting the other man away, which Michael said would be "any minute literally".[87]

The operator instructed Michael to keep her phone free as she had to relay the call onto the South Wales Police, and they would want to ring her back.[88] The operator also asked Michael whether she was able to lock her doors to try and keep her ex-boyfriend out of the house.[89] The operator alleged that she had only heard Michael mention the threatened assault, not the death

81 At [46].
82 At [100].
83 At [128]–[132].
84 At [106].
85 *Michael*, above n 2, at [5].
86 At [5].
87 At [5].
88 At [9].
89 At [6].

threat,[90] and when the call was passed onto the South Wales Police, instead of receiving a G1 grade which required immediate response, Michael was graded as a G2 which would be responded to within 60 minutes.[91] Nearly 15 minutes after her first phone call, a distressed Michael rang the Gwent Police back and screamed before the line went dead.[92]

The police arrived at Michael's house at 2.51 am to find that she had been brutally murdered.[93] An independent report harshly criticised the extent of the failings that had led to Michael's death and the police publicly apologised.[94] The Court refused to impose a duty of care.

B. The Court's policy arguments

A discussion of *Hill*'s policy concerns in *Michael* was notably lacking.[95] The judgment was predominately focused on proximity. Lord Toulson noted that the "criticisms [of defensive policing] have force," [96] but dismissed the issue without any deliberation or explanation.[97] Lord Kerr dedicated a few paragraphs to attacking the lack of empirical evidence supporting the concerns and declared that they were not convincing enough to refuse a duty.[98] As policy has been central to the reasoning of previous courts and is inherent in determining proximity, it is arguable that, although not relied upon as a key reason for the decision, policy did influence the reasoning of the majority in *Michael*.[99] While previous cases have painted an image of a police force that needed to be protected from an onslaught of overzealous litigants, the courts' two key concerns, allocation of resources and defensive administration, can be severely criticised.[100]

1. Allocation of resources[101]

The premise is simple; lawsuits against the police will cause money, resources and attention to be diverted away from the vital application of the

90 At [8].
91 At [11].
92 At [12].
93 At [13].
94 Dominic Casciani "Analysis: Why can't we sue the police for negligence?" (28 January 2015) BBC <www.bbc.com>.
95 Stephen Cragg, Tony Murphy and Heather Williams "Police misconduct and the law" (2015) April Legal Action 37 at 37.
96 *Michael*, above n 2, at [121].
97 James Goudkamp "A Revolution in duty of care?" (2015) 131 LQR 519 at 522.
98 *Michael*, above n 2, at [182]–[186].
99 Jonathan Morgan "Policy reasoning in tort law: the courts, the Law Commission and the critics" (2009) 125 LQR 215 at 215.
100 Dermot PJ Walsh "Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog" (2011) 22(1) KLJ 27 at 41–43.
101 This is also considered to be a subsection of defensive administration.

police's statutory functions and into defending lawsuits. As the police can afford to defend themselves from the occasional lawsuit this concern is only substantial if there is a risk of opening the floodgates of litigation. While this argument has merit, it is not supported by data. None of the emergency services that have been held liable in negligence have seen an onslaught of litigation. *Kent*, for example, did not cause an "influx" of delay claims. Between 2000 and 2004, 17.8 per cent of the claims against the ambulance service concerned negligent delay, five of which resulted in monetary settlements.[102] The total cost of litigation for all successful claims (negligent and otherwise) was just over GBP 2 million with 69.2 per cent of claimants receiving under GBP 10,000.[103] Considering that it has been nearly 15 years since *Kent*, with an estimated three to five million ambulance patients seen each year and no evidence to suggest a surge in litigation claims, it appears that this concern was vastly overestimated.[104] Nor, as one New Zealand judge remarked, has the concern been proven to eventuate in areas where liability has been extended.[105] Indeed, evidence has indicated that lawsuits may actually encourage increased productivity and help expose institutional failures.[106]

The arguments of diversion of resources do not carry much weight in claims against other public bodies and the courts have not provided any rationale as to why this argument is more persuasive for the police than other public bodies.[107]

2. Defensive administration

The argument of defensive administration has been a decisive argument for the courts in denying a duty of care. It is the idea that exposing the police to liability will result in the police adopting a defensive mind-set and acting to avoid liability rather than maximising efficiency and allocation of resources.

The concern is not unfounded. The medical sector, for example, has been the subject of extensive litigation which has led to the global phenomenon of defensive medicine: advising unnecessary treatment to avoid liability.[108] In the United States, the annual cost is estimated to be USD 25 billion[109] and 78 per cent of doctors surveyed in the United Kingdom reported using

102 Kevin Williams "Litigation against English NHS ambulance services and the rule in *Kent v Griffiths*" (2007) 15 Med L Rev 153 at 166.

103 At 169.

104 Davies, above n 42, at 180.

105 *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [89] per Thomas J.

106 Tofaris, above n 9, at 135.

107 McIvor, above n 71, at 135–136.

108 John B Fanning "Uneasy lies the neck that wears a stethoscope: some observations on defensive medicine" (2008) 24(2) PN 93 at 93.

109 At 95.

some form of defensive medicine.[110] There is strong contention as to whether similar behaviour would occur if liability was extended to the police.

The courts' dependence on defensive administration, without supporting evidence that it would likely occur in emergency services, has led to academic criticism. Morgan argued that it was "wrong to suggest as an established fact an argument (defensive administration) that was, at best, an unproven hypothesis or, at worst, pure speculation".[111] Indeed, whether allowing private citizens to litigate public bodies is actually detrimental is still subject to debate.[112] Tentative research has indicated that, overall, litigation is a driving factor of positive change in public bodies.[113] For example, the Hertfordshire study found that litigation of doctors actually improved standards of care.[114] Hartshorne, Smith and Everton's research into the aftermath of *Capital & Counties* revealed that very few fire brigades engaged in a formal process of advising firefighters of their potential liability and,[115] as the authors noted, in order for defensive administration to occur the individuals concerned need to be aware of their liability.[116] Only 18 per cent of the surveyed fire brigades had amended their practices.[117] Defensive administration did not occur in the fire service. It has been noted, however, that socially and economically damaging risk-averse behaviour can result from a perceived threat of liability, not necessarily an actual one.[118]

It appears that defensive administration is the product of the myth of a compensation culture rather than a viable threat to performance of a government body. The courts have encouraged the idea of professional victims; overzealous litigants who view public bodies as nothing more than defendants with deep pockets.[119] However, it appears that most public officials are more concerned with doing their job than with avoiding liability.[120] Some officers have even reported that lawsuits make them more aware of their

110 Osman Ortashi and others "The practice of defensive medicine among hospital doctors in the United Kingdom" (22 Oct 2013) BMC Medical Ethics 14(42) 1 <www.bmcmedethics.biomedcentral.com>.

111 Morgan, above n 100, at 220.

112 The Law Commission *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, 2010) at B 83.

113 Lucinda Platt, Maurice Sunkin and Kerman Calvo "Judicial Review as an Incentive to Change in Local Authority Public Services in England and Wales" (2010) 20 Journal of Public Administration Research and Theory i243 at i250.

114 Fanning, above n 109, at 99.

115 John Hartshorne, Nicholas Smith and Rosemarie Everton "*Caparo* Under Fire: a Study of the Effects upon the Fire Service of Liability in Negligence" (2000) 63 MLR 502 at 513.

116 At 514.

117 At 514.

118 Kent Williams "State of Fear: Britain's 'Compensation Culture' Reviewed" (2005) 25(3) LS 499 at 508.

119 John Spencer "An unethical personal injury sector" (2014) 4 JPI Law 226 at 230.

120 Platt, above n 114, at i254.

responsibilities and receptive to any changes that arise as a result of successful claims.[121]

While some studies have shown that police cadets express troubling anxiety over the possibility of being sued,[122] other studies have found that many officers, up to 62 per cent of those surveyed in some cases, did not believe that the prospect of civil liability would affect how they performed their tasks.[123]

The deterrence argument, a similar argument to defensive administration, argues that liability is ineffective at deterring undesired behaviour and that the diversion of resources to resolving liability creates the problems that first led to the lawsuits.[124] There is very little evidence on this point and academic commentary has tended to dismiss the argument as being implausible and unsupported.[125] However, the evidence available from areas such as personal injury shows that, while the effectiveness is dependent on the area, liability can be a deterrence.[126]

Although litigation is often viewed negatively, as it causes a loss in reputation and the depletion of money, time and resources,[127] the resulting productivity, reforms and self-awareness can have advantageous long term gains.[128] Litigation should, like potential lawsuits in businesses, be treated as a risk management issue.[129] The challenges reveal issues with areas of poor performance, leadership and management styles and the "efficacy of internal systems".[130] Fanning noted that defensive practices resulting from liability in negligence demonstrate a misunderstanding of the law as, by their nature, the tests of standard of care and reasonable person in that capacity should act as a safety barrier for any competent official.[131]

121 Frank V Ferdik "Perception is Reality A Qualitative Approach to Understanding Police Officer Views on Civil Liability" (2003) Working Paper no 49 at 18.

122 Victor E Kappeler *Critical issues in police civil liability* (4th ed, Waveland Press, Illinois, 2006) at 6.

123 Daniel E Hall and others "Suing cops and corrections officers: officer attitudes and experiences about civil liability" (2003) 26 (4) Policing: An International Journal of Police Strategies & Management 529 at 542.

124 Fanning, above n 109, at 102.

125 Platt, above n 114, at i250.

126 Don Dewees, David Duff and Michael Trebilcock *Exploring the domain of accident law: Taking the facts seriously* (Oxford University Press, Oxford, 1996) at 413. See also Gary T Schwartz "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?" (1994) 42 UCLA Law Review 377.

127 Platt, above n 114, at i253.

128 At i253-4.

129 At i247.

130 At i247.

131 Fanning, above n 109, at 102–103.

3. Analysis of the policy arguments

Lord Toulson could have easily dismissed *Michael* by expressly relying on policy grounds following *Smith* and *Brooks* but chose to focus on proximity. Perhaps the Court was motivated to change their position because, as McIvor noted, the "traditional justification for the *Hill* immunity [had] been ringing hollow for quite some time now".[132] Canada and Australia have rejected *Hill*'s arguments, as have a few English courts.[133] The courts' continued reliance on the *Hill* principles to block police liability and their refusal to define or articulate exactly what those principles encompass[134] has led to harsh criticism of their reliance on what Brooman argued are unsupported and unfounded theories.[135]

The courts appear to be favouring the interests of the police over those of the claimant by denying a duty in the absence of conclusive evidence to support either argument.[136] While the courts are not obligated to accept the arguments advanced by the plaintiff, who bears the burden of proof, the nature of the policy arguments means that it is extremely unlikely that a plaintiff will succeed in challenging the court's policy assumptions if they need to satisfy the burden of proof with evidence. For a plaintiff to succeed on this point, the courts would need to adopt a more plaintiff friendly approach. The courts' reluctance to do this is inconsistent with other areas of the law, for example, barrister immunity was removed because of the lack of supporting evidence for policy arguments like those raised in *Hill*.[137] The courts appear to have justified this by stating that Parliament will intervene to resolve any injustice. However, this is unrealistic; the courts are the driving force of judicial change,[138] and Parliament did not intervene in *Smith* when the plaintiff was left without a remedy. Rather the courts have demonstrated that they are prepared to take a utilitarian approach to these issues, erring on the side of caution and allowing the victim to bear the disadvantages of the current approach.

The courts have also not addressed the issue of whether Lord Keith's policy concerns are actually applicable to a situation where proximity has been established. The possibility of an influx of claims, diversion of resources and defensive administration is highly likely if *any* individual could sue the police,[139] but become less pervasive in cases where proximity has reduced the

132 McIvor, above n 71, at 134.

133 Hanna Wilberg "Defensive practice or conflict of duties? Policy concerns in public authority negligence claims" (2010) 126 LQR 420 at 433. Note the English courts have only rejected the *Hill* arguments in negligence cases that do not concern police liability.

134 Walsh, above n 101, at 32.

135 Simon Brooman "Domestic violence, judicial austerity and the duty of care" (2015) 31(3) PN 195 at 198.

136 Walsh, above n 101, at 48.

137 Brooman, above n 136, at 197.

138 Morgan, above n 100, at 220.

139 *Michael*, above n 2, at [150].

pool of potential claimants. Canada adopted this approach in *Doe,*[140] and the establishment of a duty did not, as Hoyano noted, result in "an avalanche of cases" or undermine Canada's police force.[141] It highlighted the English courts' indiscriminate use of Lord Keith's policy concerns without careful accompanying analysis which has led to the suggestion that the third limb of *Caparo* should be based on evidence rather than speculative arguments.[142]

Wilberg proposed that the argument of conflicting duties is stronger than the argument of defensive administration and does not need to be supported by evidence.[143] The possibility that the fulfilment of the police's statutory duties could be compromised encourages the courts to be extremely cautious.[144] While this argument is convincing for denying a duty to a criminal suspect to protect them from harm, its strength diminishes when applied to the victim of crime. In child abuse cases, for example, a duty cannot be owed to both the suspect (parents) and the victim (child) to protect them from harm. In such a case, the police would be liable to the child if they did nothing to intervene but would be liable to the parent if they wrongly intervened on the child's behalf.[145] Arguably, this argument is not as strong for police cases such as *Michael*. The police's duty to uphold the Queen's peace will not be compromised because a duty arises when the police gain information that a particular individual is at a high risk of imminent harm.[146] There is no corresponding duty to the suspect and it seems illogical to argue that the police should never owe a duty to an individual, who can clearly be aided by their statutory functions, because they owe a vague duty to the wider public.[147]

The courts have been notably silent on the policy reasons that support the implementation of a duty. Factors such as emergency services being funded by public funds, while not reasons in themselves to impose a duty, are certainly arguments in favour of accountability that should be considered by the courts.[148] One of the stronger arguments, however, is the argument that the tests of standard of care and causation are sufficiently onerous to provide an effective safety net against excessive litigation, especially in complicated cases. The Canadian Supreme Court case of *Hill v Hamilton-Wentworth* expressly endorsed this argument, McLachlin CJ noting that the tests take into account what "can reasonably be accomplished within a responsible and

140 *Doe*, above n 58, at [108]. Refer to Part II for a discussion of the facts in *Doe.*

141 Laura Hoyano "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62(6) MLR 912 at 930.

142 Hartshorne, above n 116, at 520.

143 Wilberg, above n 134, at 438.

144 At 438–439.

145 At 427.

146 Refer to the proximity arguments in Part III.

147 As of yet, this argument has not been made in police negligence cases.

148 Bagshaw, above n 41, at 86.

realistic financial framework".[149] As Bagshaw noted, simply because a vast majority of individuals make emergency phone calls does not, in itself, justify why the police should not owe a duty to take reasonable care in deciding whether to respond.[150] Tort law is designed to serve a corrective justice function. A claimant should be compensated where damage has arisen from a breach of duty. As Lord Hope pointed out in *Chester v Afshar* a duty that has no remedy is a hollow one.[151] The risk of being liable if a duty is imposed should not be a factor against its imposition. Considering that the underlying rationale for the establishment of a duty is to encourage the police to take more care in the implementation of their tasks, the English courts' lack of engagement with these arguments is notable.[152]

It is apparent that, in the face of mounting academic criticism, the courts can no longer simply rely on vague policy concerns to deny claimants a duty. While it has been suggested that Lord Toulson's switch to a proximity focus was an attack on the actual *Caparo* test and an attempt to restrict its use as a judicial tool,[153] it seems more plausible that Lord Toulson simply wanted to firmly cement police immunity in the law to discourage future claims. Subsequent courts have affirmed that policy is still a key consideration.[154] The language of Lord Toulson's judgment indicates that his focus on proximity may have been to avoid addressing the crumbling foundations of defensive administration while maintaining the courts' position on police liability.

The majority acknowledged the policy concerns when they addressed the interveners' principle,[155] and it is likely that these concerns also influenced their proximity analysis as the two concepts are not entirely distinct. However, a discussion of the points raised above was noticeably lacking from the majority's judgment, especially given the weight previous courts have placed on policy concerns in similar cases.

C. The Court's proximity arguments

While foreseeability was not an issue before the court, it, in itself, was insufficient to establish a duty.[156] The Supreme Court examined three principles that proposed the establishment of a structured and practical test for finding a duty:[157]

149 *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41, [2007] 3 SCR 129 at [44].
150 Bagshaw, above n 41, at 87.
151 *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [87].
152 Wilberg, above n 134, at 438.
153 McBride, above n 6, at 22.
154 *James-Bowen v The Commissioner of the Police for the Metropolis* [2015] EWHC 1249 (QB) at [39].
155 *Michael*, above n 2, at [121].
156 At [101].
157 At [18].

(a) the interveners' principle;
(b) Lord Bingham's liability principle; and
(c) Lord Kerr's proximity principle.

As Lord Toulson dismissed Lord Bingham's principle without extensive consideration, by simply stating that the majority's reasoning in *Smith* was still relevant,[158] this article will focus on the remaining two principles.

1. Interveners' liability principle

The interveners' liability principle, so called as it was advanced by domestic violence advocates, proposed the following issue:[159]

> If the police 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, do the police owe to that person a duty under the law of negligence to take reasonable care for their safety?

The police were aware of previous instances of domestic abuse between Michael and her ex-boyfriend.[160] This data was held on file by the South Wales Police.[161] It was argued that because of the "scale and nature" of the domestic violence problem a duty was needed to encourage more effective police response[162] and align the common law with United Kingdom's obligations under the ECPHR, enforced through the HRA.[163] Lord Toulson quickly dismissed the second claim. As the common law and HRA have different purposes, one is designed to vindicate and the other to uphold the minimum standards of human rights, there was no reason why the law had to develop in unison.[164]

His Lordship spent more time addressing the domestic violence argument.[165] He agreed that it was a systemic and serious problem within the United Kingdom[166] but dismissed the possibility of a duty ever being owed to a restricted category of victims or type of damage.[167] Such a duty was untenable and could not be adequately restricted to particular groups

158 At [129].
159 At [18].
160 At [14].
161 At [14].
162 At [117].
163 The international considerations raised in the judgement at [20]–[28] will not be addressed in this article.
164 At [127].
165 The bystander argument was also used to dismiss the interveners' principle; however, this is discussed in Part III, 3(b) as Lord Kerr considered the applicability of the argument when defending his proximity principle.
166 At [19].
167 At [118].

without creating inconsistencies in the law.[168] He also noted that there was no evidence to suggest such a duty would improve domestic violence call outs and would most likely serve to be financially detrimental to the police.[169] However, it is noted that Lord Toulson only addressed the interveners' liability principle in the context of domestic violence, rather than as a principle per se. Although the principle was advanced by domestic violence advocates, it was not restricted to domestic violence situations and his Lordship's narrow approach may have been taken in order to quickly dismiss it.

2. Lord Kerr's proximity principle

Lord Kerr gave a powerful dissent and proposed an adaptation of Lord Bingham's liability principle that was endorsed by Lady Hale,[170] where he proposed that a duty should arise where there is:[171]

> (i) a closeness of association between the claimant and the defendant, which can be created by information communicated to the defendant not need not necessarily come into existence in that way; (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 is a person or agency who might reasonably be expected to provide protection in those circumstances; and (iv) he should be able to provide for the intended victim's protection without unnecessary damage to himself.

Prima facie Lord Kerr managed to significantly restrict the scope of his proposed principle while still maintaining its utility for emergency situations. His Lordship argued that the source of the information was irrelevant, only the knowledge of the police and their ability to intervene should be relevant considerations for the courts.[172] Lord Toulson however, strongly criticised this principle.

The criticisms that applied to Lord Bingham's proximity principle are applicable to Lord Kerr's principle and Lord Toulson noted the risk of creating unsatisfactory abnormalities in the law.[173] He gave an example:

168 At [119].
169 At [122].
170 At [197].
171 At [144]. There was confusion within the judgment about this point, with Lord Toulson arguing that Lord Kerr had advocated two separate duties at [144] and [168], however, as it appears that the second duty was simply further discussion on the first duty, the proximity principle refers to the duty advanced by Lord Kerr at [144].
172 At [168].
173 At [137].

if the police were aware of a potential criminal act planned against X and negligently allowed that act to occur, X would be able to recover damages while any bystander who was injured in the same incident would not.[174] Lord Kerr responded that this argument was arbitrary in nature, as no proximity had ever existed between the police and the bystander.[175] His Lordship analogised it to firefighters owing no duty to protect a passer-by from the flames of a fire that they are trying to control. A bystander is owed nothing more than the Queen's peace. It is also arguable that similar distinctions have been previously accepted by the House of Lords, such as those for primary and secondary victims in nervous shock cases, which create similar results to those seen in the bystander scenario.[176]

Lord Toulson also attacked Lord Kerr's proximity test as being "circular".[177] He noted that it "provides no yardstick for answering the question that it poses".[178] Lord Kerr responded, stating that circularity is inherent in many tests of proximity and does not undermine its utility.[179] While Lord Toulson has found academic support in his dismissal of this argument as unsatisfactory,[180] others have agreed with Lord Kerr's approach that, although the test may be circular, it does provide a "workable basis" for a duty that does not impose an impossible burden on the police.[181]

Lord Kerr argued that Michael had "transcend[ed] the ordinary contact that a member of the public has with the police".[182] She had provided specific information regarding the imminent threat against her, the police had been in a position to help her and, as Lady Hale noted, quoting Tofaris and Steel, the police were Michael's only realistic source of protection.[183] The police effectively have a monopoly over protection services,[184] and the individuals to whom this duty would apply are not, as Bagshaw noted, "in a position to 'shop around' for services".[185]

Lord Kerr's principle is the preferable approach to the imposition of a duty in a situation like that in *Michael*. It vastly limits the police's potential

174 At [120].
175 At [170].
176 *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.
177 *Michael*, above n 2, at [137].
178 At [134].
179 At [146].
180 Goudkamp, above n 98, at 522.
181 *Michael*, above n 2, at [171].
182 At [167].
183 At [197].
184 Julia Tolmie "Police negligence in domestic violence cases and the Canadian case of Mooney: what should have happened, and could it happen in New Zealand?" [2006] 2 NZ L Rev 243 at 256.
185 Bagshaw, above n 41, at 86.

liability.[186] The court would still take into account the stressful nature of the circumstances, the limited information available to the police and the urgency of the situation.[187] Viewed in light of the policy reasons that advocate for the imposition of police liability, while Lord Kerr's proposition is not the perfect solution, it is an attractive alternative to denying a claim.

3. Assumption of responsibility

An alternative to finding a general duty of care was to find that the police had fallen under the *Hedley Byrne* exception of assumption of responsibility, which on the facts Lord Toulson phrased as:[188]

> On the basis of what was said in the first 999 call, and the circumstances in which it was made, should the police be held to have assumed responsibility to take reasonable care for Ms Michael's safety and therefore owed her a duty of care in negligence?

Lord Toulson addressed and dismissed this argument in a single paragraph, despite it being, it is suggested, the most persuasive argument before the Court. He reiterated the arguments of the Court of Appeal,[189] holding that it was untenable to say that responsibility had been assumed.[190] The request for Michael to keep her phone free, and the question asking her whether she could lock her doors, did not amount to an instruction, advice or a misleading assurance.[191] This, coupled with the fact that Michael had only been in contact with a civilian call operator, not the police, made the case, according to Lord Toulson, distinguishable from *Kent*.[192]

With respect to Lord Toulson this argument can be heavily criticised. This approach means that the entire case turned on the express words that were said to Michael, which, as Goudkamp noted, makes Lord Toulson's argument extremely vulnerable.[193] His Lordship simply held that the lack of express assurance meant that responsibility had not been assumed.[194] This was despite having earlier dismissed Lord Kerr's argument that a distinction between an explicit assurance and a wrongly created impression was arbitrary by stating

186 Rosemary Tobin and Maya Mandery "Immunity, public policy and police negligence: should the police owe a duty of care to an identifiable member of the public who as a victim of crime suffers harm as a result of police negligence?" (2015) 21 NZBLQ 200 at 210.
187 Bagshaw, above n 41, at 87.
188 *Michael,* above n 2, at [18].
189 *Michael v Chief Constable of South Wales Police* [2012] EWCA Civ 981, [2012] HRLR 30.
190 *Michael*, above n 2, at [138].
191 At [138].
192 At [138].
193 Goudkamp, above n 98, at 523.
194 *Michael*, above n 2, at [138].

that such an impression was arguable under the *Hedley Byrne* rule.[195] Lord Toulson failed to explain why he had adopted an extremely literal approach. However, it appears that his apparent desire to avoid judicially imposing responsibility on the police where they had not assumed it had resulted in,[196] as Lord Kerr noted, Lord Toulson ignoring the realities of the situation.[197]

While exactly what is required to establish an assumption of responsibility is widely debated,[198] the core of the *Hedley Byrne* principle states that: if you are in a position where you ought to know that what you say will be relied upon, you must speak with reasonable care.[199] Restricting this exception to situations where the defendant expressly assumes responsibility undermines the core of the *Hedley Byrne* principle and creates arbitrary results. Following Lord Toulson's reasoning, if the operator had told Michael to "Stay in the house and lock your doors, I'll pass on your call", then Michael's claim would have succeeded. However, because the operator only said, "Are you able to lock your doors, I'll pass on your call,"[200] even though it had the same *implication* as the first statement, the case failed.

Although Lord Toulson was correct in concluding that a literal interpretation of the operator's words did not state that the police were coming, that did not mean that they implied that the police were *not* coming. A literal translation of the words, devoid of context, is at most ambiguous. When viewed in the context of the situation and the operator's role, the most plausible interpretation is that the police will be alerted, which carries with it the *implication* that they will come. Considering that Michael stayed in her house and rang the emergency number a second time indicates that she was, at the time of the first call, under the impression that the police were on their way.[201] Lord Toulson's approach has apparently restricted the scope of *Hedley Byrne* to only the purest of express assurances and Lord Kerr is correct with his criticism that Lord Toulson's approach is completely "unacceptable".[202]

As Goudkamp noted, as *Michael* was a strike out application and the actual conversation itself was in dispute, Lord Toulson did not need to consider whether the operator's words *did* establish proximity, only if they *could* establish proximity.[203] The case should have proceeded to trial.

195 At [165].
196 At [100].
197 At [167].
198 Kit Barker "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461 at 462.
199 Bagshaw, above n 41, at 78.
200 The words used here were not the exact words said in *Michael*, they have been used to demonstrate the argument.
201 Tobin, above n 187, at 210.
202 *Michael*, above n 2, at [167].
203 Goudkamp, above n 98, at 523.

4. Alternative arguments

While not discussed in *Michael*, it is arguable that Michael's reliance on the police responding to her call caused her to lose the possible benefits of help from a third party.[204] Michael could have left the house or sought help from a neighbour; instead she stayed where she was because she *thought* the police were coming.[205]

Tofaris and Steel proposed that a possible duty could be owed to individuals who are at special risk of personal harm and are dependent upon the police for protection.[206] This test would bypass the need for an explicit acceptance of responsibility and could encompass situations such as where the emergency call was missed because the operator was listening to music, which under the *Hedley Byrne* test would fail.[207] However, it is likely that a court would find such a test to be too broad to justify its imposition.

5. Analysis of the proximity arguments

The exact definition of the elements that make up the tests for negligent liability have eluded the courts. Proximity is not easily defined.[208] It is an almost fanciful umbrella concept; both descriptive and elusive. As Lord Oliver remarked in *Caparo*:[209]

> 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definite concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.

This approach has meant that that in many cases the proximity and policy tests have effectively merged.[210] As Beever described in his criticism of the court's use of *Caparo*'s three-stage inquiry, "because proximity has come to mean anything and nothing, the duty of care is in fact determined by policy".[211]

The different approaches by the courts in the emergency service cases clearly illustrate a policy-laden approach to determining proximity. This merger is not problematic per se, as William Young J noted in *Spencer on Byron*, as

204 Whether this principle is applicable when the third party was never present/influenced into not intervening is contentious; see Donal Nolan "The liability of public authorities for failing to confer benefits" (2011) 127 LQR 260 at 272–274.

205 On the facts provided in the case Michael did not take any of these types of actions.

206 Tofaris, above n 9, at 150.

207 At 151–152.

208 At 149.

209 *Caparo*, above n 5, at 633.

210 Todd, above n 4, at 159.

211 Allan Beever *Rediscovering the law of negligence* (Hart Publishing, Oxford, 2007) at 178.

long as the court keeps in mind the "ultimate question – namely, whether it is fair, just and reasonable to impose a duty – perversity of outcome should be avoidable".[212] It appears, however, that the courts may not be approaching police liability cases with the question of whether it is fair just and reasonable to find a duty, but rather whether the core principle of *Hill* should prevail.

The Court in *Michael* was in a prime position to chip away at what was, essentially, blanket immunity established by the "core principle" used in *Brooks*. But the language of the courts indicates that this was never a possibility. Lord Toulson's comments that "Lord Keith's use of [blanket immunity] was, with hindsight, not only unnecessary but unfortunate,"[213] indicated that he was reinterpreting the ratio of *Hill*. Lord Kerr pointed out that the core principle in *Hill* "is that there is, in general, no duty of care owed by police to individual members of the public".[214] That is, if Lord Keith had intended his discussion to be used to thwart cases where the omissions principle should not normally prevail, then his language would have been inappropriate. However, as he arguably only intended for police to have immunity if the claimant was unable to establish an exception to the omissions principle, then his language was completely appropriate. *Brooks* reformulated "blanket immunity" into the "absence of duty" as a nod to their human rights obligations, and a move towards a function rather than status-based approach but, arguably, continued to treat the test as blanket immunity.[215] Lord Toulson's assurances that the case would be decided using only common law principles was undermined by what appeared to be attempts to exclude Michael from any of the possible exceptions, which hints at a perversity of outcome.

Michael would have made more sense and would be more consistent with previous case law and the *Caparo* test if the Court had found proximity but declined to find a duty on policy grounds. Instead, the case turned on weak arguments that denied a finding of proximity. The scope of proximity is, of course, influenced by policy concerns which underpin where the boundaries of proximity in a case are drawn. It is not the purpose of this article to argue otherwise. As Lord Bridge in *Caparo* noted, the words are themselves merely convenient labels.[216] However, labels serve a purpose in highlighting the principles at play within a judgment. While proximity and policy may overlap, they shape the reasoning process. The question that is raised is whether the courts are actually using *Caparo* to determine liability by evaluating the merits of an individual case in light of well-reasoned legal principles, or whether they are simply relying on labels to support reaching a predetermined conclusion based on assumptions made by earlier cases. Regardless of what stage of

212 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [232].

213 *Michael,* above n 2, at [44].

214 At [148].

215 Davies, above n 42, at 126.

216 *Caparo*, above n 5, at 618.

Caparo a court focuses on, the result should, theoretically, be the same.[217] However, the courts seem intent to uphold *Brooks*' vague interpretation of *Hill* and apply it regardless of the individual facts of the case. This raises serious concerns over the transparency of the reasoning in police negligence cases. Proximity may be turning into a conceptual veil, shielding the policy arguments from attack and, as Barker noted, "shroud[ing] the true face of tort law".[218] The reasoning within a judgment should be transparent. The issue in *Michael* was that the policy arguments appeared to be dismissed without extensive consideration, with the majority taking a strict, and what could be viewed as an unfair, approach to the proximity issue. This does not mean that the only correct result in *Michael* was that a duty should have been found, as the majority was still entitled to fail the case on policy grounds, but it should have been clearer as to why the majority took such a narrow approach. There should have been a discussion of both the proximity and policy limbs of *Caparo*. *Michael* will make it harder for future litigants to bring their cases, with the decision indicating that the courts will take a narrow approach to these issues. The role that policy played in *Michael* could have been clearer, which would have arguably helped make the judgment fair, just and reasonable.

IV. Alternative Remedies

It has been argued that litigating against the police is unnecessary, as claimants have other avenues of legal redress. In *Michael*, the Court was unanimous in declaring that *Michael*'s claim under the ECPHR should proceed to trial,[219] but her chances of success are low.

The common law and HRA cases sit in parallel, but not in harmony.[220] The *Osman* test is more stringent than negligence.[221] *Van Colle*, for example, may have succeeded in the common law but for *Hill*'s policy concerns. This difference, however, is arbitrary. A claim can be refused in the common law while being simultaneously recognised as a breach by the ECPHR. As McBride noted, the courts may very likely reconsider their position if the HRA is repealed, as victims would be left without any legal remedy.[222] Also, art 2 of the HRA is only available to claimants in cases such as *Michael* and *Van Colle* where the victim is killed.[223] Alternative claims under arts 3 and 8 pose serious difficulties for claimants.[224] The courts have effectively blocked

217 Walsh, above n 101, at 49.
218 Barker, above n 199, at 843.
219 *Michael*, above n 2, at [139], [188] and [199].
220 At [126]–[127].
221 McIvor, above n 71, at 146.
222 McBride, above n 6, at 26.
223 McIvor, above n 65, at 35.
224 At 35.

police liability at every avenue, shutting the door to the common law and restricting the HRA route to a threshold that, in practice, is unattainable.[225]

The courts have failed to explain why negligence is an acceptable remedy for other public bodies such as the Ministry of Defence [226] and ambulance services,[227] but not the police.[228] Attempts to distinguish such cases on grounds such as employment ignore the underlying rationale of the principles of liability.[229] In *Smith v Ministry of Defence*, for example, the Ministry was held to owe a duty to provide sufficient training and available resources, even though the case raised similar policy concerns to those in police liability cases.[230]

While some cases may be better suited to be dealt with away from the courts,[231] denying a duty on this basis ignores the vindicatory function of tort law.[232] Possible alternatives such as complaints procedures and internal inquiries do not hold public bodies to account,[233] they strip the claimant of control of the situation and are unlikely to be as independent as a court.[234] They also do not produce damages equivalent to those that could be achieved in an action in tort. Internal inquiries, for example, do not normally result in compensation. Victims of violent crimes in England, Scotland or Wales may be eligible for compensation through the Criminal Injuries Compensation Authority, however, this is again assessed differently to tortious claims and does not provide a vindicatory function.[235]

V. Relevance to New Zealand

This article has examined the implications and rationale of *Michael* from the position of England's law. While a full analysis of the application of *Michael* to the New Zealand framework is beyond the scope of this article, the potential relevance of the decision to New Zealand will briefly be addressed.

The relevance of negligent omission cases in New Zealand has been greatly decreased by the introduction of the Accident Compensation Act 2001 (ACC), which stops any claims arising from a personal injury that is covered by the statutory framework from being litigated.[236] However, the New Zealand Supreme Court decision in *Couch v Attorney General* (*Couch*)

225 McIvor, above n 71, at 150.
226 *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.
227 *Kent*, above n 32.
228 Walsh, above n 101, at 36.
229 Davies, above n 42, at 163.
230 At 165.
231 Beever, above n 212, at 197.
232 JR Spencer "Suing the Police for Negligence: Orthodoxy Restored" (2009) 68 CLJ 25 at 27.
233 Walsh, above n 101, at 46.
234 At 44.
235 GOV.UK "Criminal Injuries Compensation Authority" <www.gov.uk>.
236 Accident Compensation Act 2001, s 317.

indicated that actions for negligent omission may still have some impact in New Zealand.[237]

In *Couch*, the plaintiff had sustained severe injuries after her assailant, who had worked at the plaintiff's workplace during his parole, returned to rob the premises.[238] Although the Court was unanimous in finding that a duty of care could be owed by the probation service to protect potential victims from harm,[239] there was disagreement as to how that duty should be found.[240]

Tipping J, speaking on behalf of the majority with Blanchard and McGrath JJ concurring, formulated his approach as requiring the plaintiff to belong to an identifiable class and to be at a special and distinct foreseeable risk that rendered them vulnerable to harm.[241] His Honour did not appear to place significant weight on the policy concerns against such duties.[242] The minority, Elias CJ and Anderson J, argued that a general vulnerability-based approach should be adopted where the statutory purpose of a public body is to protect the public.[243] The majority's approach has been more favourably received,[244] and is aligned with the traditional rationales of liability for negligent omissions, whereas the minority's approach would arguably be too broad, bringing in policy concerns.

Tobin and Mandrey have argued that the approach taken by the minority in *Michael* is similar to the majority's approach in *Couch*.[245] They advanced that a duty would likely be found in *Smith* and, possibly *Michael,* if the cases arose in New Zealand.[246] This is arguably correct. ACC has not removed the common law action of negligence and a duty can be found even if compensation would be barred. Importantly, a finding of a duty of care would allow an individual to pursue exemplary damages in a case where the defendant, as Tipping J explained, "deliberately and outrageously ran a consciously appreciated risk of causing personal injury to the plaintiff".[247] Exemplary damages cannot be used to circumvent the ACC barrier to compensation but are rather used for their punitive effect to address the failings of the public body in question. The case of *Smith* is a situation where this would likely arise. As Smith had been left disabled after a violent attack, he would have been unable to bring a claim for compensation against the police, however, he may have been able to succeed with a claim for exemplary damages, especially as the failings of the police were particularly serious in his case.

237 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
238 At [6] and [22]–[23].
239 At [3] per Elias CJ and Anderson J, and [123]–[125] per Blanchard, Tipping and McGrath JJ.
240 At [71] and [124].
241 At [112].
242 At [129].
243 At [71].
244 Stephen Todd "Negligence: Particular Categories of Care" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomas Reuters, Wellington, 2016) 277 at 360.
245 Tobin and Mandrey, above n 187, at 206–207.
246 At 212.
247 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [179].

It is unlikely that a New Zealand court would take an approach as restrictive as the majority's in *Michael*. New Zealand's negligence case law indicates a generous and broad approach to the issues. It is also possible that ACC may, in itself, be a factor for finding duties of care. It practically eliminates floodgate concerns and, in cases where the failing has been serious enough to indicate that exemplary damages are likely to be found, that would arguably be the exact circumstance where a duty of care should arise.

Until a case like *Michael* arises in New Zealand, it cannot be known whether a duty would be found. From the arguments discussed in this article in the analysis of *Michael*, it is advanced that a duty should be found in such circumstances. Novel questions of duty of care are a contextual and fact-specific inquiry and one which will depend on how the court approaches the issue. While it is likely that Lord Toulson's reasons will not be adopted in New Zealand, the question remains as to whether a court will agree with Lord Kerr or take a different approach entirely.

Conclusion

It is difficult to imagine that Lord Keith intended his short discussion on policy concerns in *Hill* to become an overarching principle of police liability. The prospect of police liability in the English courts is effectively non-existent after the decision in *Michael*. The possible avenues of exceptions have been so restricted that they will be practically unattainable for the vast majority of cases and it is very likely that the courts will continue to restrict these exceptions even further.

The decision in *Michael* was arguably not just, fair and reasonable. The arguments relied on by the majority can be heavily criticised. They artificially restricted the scope of proximity, making the word mean exactly what they wanted it to mean, nothing more and nothing less. They ignored the mounting academic disapproval of the courts' treatment of police liability cases and gave the impression of attempting to hide their reinforcement of *Hill* behind a shield of proximity.

While the Court left open the possibility of a duty being owed, by refusing to define exactly what is required for sufficient proximity, they effectively shut the door to any future case. *Brooks* and *Smith* failed on the grounds of policy despite clear proximity and assumption of responsibility by the police. These cases do not echo the speech of Lord Keith in *Hill*. Instead, they hint at the reasoning of Lord Templeman's speech that litigation is not appropriate for grievances against the police. As each case went before the Court, their Lordships, no matter how clear the proximity or how vulnerable the plaintiff, refused to amend their position.

The Court's switch to a proximity-focused inquiry presents a serious problem for any future attempts at extending police liability. Proximity may become a conceptual veil, allowing the courts to abstract the technicalities of

police liability from the realities of the situation without relying on groundless theories. As proximity is normally a fact-based inquiry, such an approach encourages an analysis focusing on factual analogies rather than taking a broader, big picture approach. Whether the courts will allow the rest of the common law to diverge or take a similar approach in *Michael* is unclear, however, currently, the law surrounding police liability is difficult to reconcile within the broader common law.

Whether the police will ever be able to be sued for negligent omissions remains to be seen, but the decision in *Michael* has settled one principle in the common law for the time being: unless expressly advised otherwise, you are relying on the police at your own risk.