

## **The liability of police for failing to prevent crimes in English and South African law**

Paper delivered at Obligations V: Rights and Private Law, St Anne's College, Oxford, 14 July 2010

**Helen Scott\***

### **1. Introduction**

This paper focuses on two similar cases, one English, one South African. The first is *Smith v Chief Constable, Sussex Police*, reported in the House of Lords as one half of *Van Colle and another v Chief Constable of Hertfordshire Police; Smith v Chief Constable of Sussex Police*.<sup>1</sup> The claimant, Mr Smith, had broken off his relationship with his partner, Mr Jeffrey, in December 2000 and moved out of their shared home. During the course of the break-up Jeffrey had assaulted Smith, and was arrested and detained overnight. Subsequently Smith moved away to Brighton. Although Jeffrey wanted to resume the relationship, Smith did not. In January 2003 Jeffrey began sending Smith abusive and threatening messages by phone, text and email. These included death threats. The messages continued throughout January and February 2003. Sometimes there were many on a single day. Eventually on 24 February Smith contacted the Brighton police and informed them of his relationship history and about the threats. Two police officers were assigned to the case, and they visited Mr Smith, but did very little else than putting a trace on the calls, despite the fact that Smith had already given them Jeffrey's home address. The death threats continued unabated, and Smith again reported them, this time at the Saville Row Police Station in London where he had gone since Jeffrey had said he was coming to Brighton. However, the London police told him that the case was being dealt with in Brighton and that Smith should speak to the police there when he returned home. When he returned to Brighton at the beginning of March, Smith once again contacted the Brighton Police, warning them that he believed his life to be in danger. Still, no action was taken. On 10 March Jeffrey attacked Smith with a claw hammer, inflicting three fractures of the skull and associated brain damage which led to continuing physical and psychological harm. Shortly afterwards Jeffrey was arrested and charged, and in March 2004 he was convicted and sentenced to ten years' imprisonment for making threats to kill and for causing grievous bodily harm with intent.

The second case is *Carmichele v Minister of Safety and Security and Another*, or *Minister of Safety and Security and Another v Carmichele*.<sup>2</sup> The plaintiff, Ms Carmichele, was a frequent visitor to the seaside village of Noetzie, near Knysna in the Western Cape. She often stayed with her friend, Ms Gössling, who lived there. Also resident at Noetzie was a young man, Francois Coetzee. Coetzee lived with his mother, Annie Coetzee, who worked as

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\* Associate Professor, Department of Private Law, University of Cape Town, [helen.scott@uct.ac.za](mailto:helen.scott@uct.ac.za)

<sup>1</sup> In the Court of Appeal, [2008] EWCA Civ 39. In the House of Lords, [2008] UKHL 50, [2009] 1 AC 225; [2008] 3 WLR 593; [2008] 3 All ER 997.

<sup>2</sup> The case was heard twice in the High Court, although only the second of these judgments is reported – *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C) – once in the Constitutional Court – *Carmichele v Minister of Safety and Security and Another (Centre for Appeal Legal Studies Intervening)* 2001 (4) SA 938 (CC) [*Carmichele* 2] – and twice in the Supreme Court of Appeal – *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) and *Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA) [*Carmichele* 4]

a domestic servant for Ms Gösling, and so Coetzee knew Gösling and Carmichele, and they him. In March 1995 Coetzee brutally attacked a local 17-year-old girl, Ms Tereblanche, whom he had been walking home from a dance. In her statement Tereblanche described an attempted murder and a rape, or at least an attempted rape. Coetzee admitted to the investigating police officer that he had attacked Ms Tereblanche, and that he could not dispute that he had also sexually assaulted her. He was charged with rape and released on bail. His release was not opposed by the court prosecutor, the investigating officer having recommended that Coetzee be released on his own recognisance, despite the fact – so the Supreme Court of Appeal found – that there was nothing in the docket to justify that recommendation.<sup>3</sup> In the days that followed Annie Coetzee approached a relative of hers, a Detective Sergeant Grootboom, who happened to be stationed at the Knysna police station and said that she was concerned about Coetzee and feared that he might attempt suicide or ‘get up to something’. On 13 March Coetzee did indeed attempt suicide. The next day, 14 May, he was taken by Sergeant Grootboom to see the control prosecutor at the Knysna Magistrate’s Court, Louw. He told her he had suffered ‘deviant sexual behaviour’ for some time – that it was as if supernatural forces overcame him and he could not control himself. She decided to refer him for psychiatric observation, and he was duly sent off to Valkenburg Psychiatric Hospital in Cape Town for observation under s 77(1) of the Criminal Procedure Act, the purpose of which is to ascertain whether an accused person is capable of standing trial. It was found that he had been mentally capable at the time of his attack on the young woman and was fit to stand trial, and after appearing before the Knysna magistrate’s court he was once again he was released. In June 1995 he was caught by the plaintiff, who was staying with Gösling at the time, snooping around the house and apparently trying to get in. Gösling contacted the Knysna police and again spoke to Ms Louw, the prosecutor, whom she knew personally: ‘I said Dian you’ve got to do something about this guy, there must be some law to protect society, not necessarily me or the people at Noetzie...’<sup>4</sup> But Louw said there was nothing she could do, and indeed nothing was done. Finally on 6 August 1995 the plaintiff went to Gösling’s house, where they had arranged to meet, and on entering the house was confronted by Coetzee, who had apparently broken in. He immediately attacked her with a pick handle and a knife: she suffered stab wounds, a broken arm and was badly beaten up before managing to escape. He was subsequently convicted of attempted murder.

There are of course significant differences between the facts of the two cases, and in any event there was no trial of fact in the *Smith* case, the matter having been decided on the basis of the facts pleaded by Smith. Nevertheless, it is remarkable that whereas Ms Carmichele ultimately succeeded in her claim to hold the Minister of Safety and Security vicariously liable for the acts and omissions of his employees (including both prosecutors and police officers), absolution from the instance having initially been granted by the High Court on the grounds that the plaintiff had failed to make out a *prima facie* case of wrongfulness, an appeal to the Supreme Court of Appeal dismissed, a further appeal to the Constitutional Court successful and the claim then remitted to the High Court for trial, and the matter then finally decided in her favour after a second round in the SCA, Mr Smith’s claim was struck out by the High Court, restored by the Court of Appeal, and again struck out by the House of Lords, with Lord Bingham the only dissenter, on the grounds that no duty of care could possibly have been owed on the facts alleged. Why did the claims suffer such different fates?

I think there are three main reasons. The first has to do with the analytical structure of negligence in each of these two jurisdictions. The second has to do with the role played by

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<sup>3</sup> *Carmichele* 4, para 12.

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human rights instruments in shaping the law of negligence in each jurisdiction: the European Convention on Human Rights and Human Rights Act of 1998 on the one hand, and the Constitution of the Republic of South Africa of 1996, on the other. And the third has to do with the nature of the rule against liability for omissions by the state in each of these two jurisdictions.<sup>5</sup>

## **2. The analytical structure of negligence**

### *English law*

Following Lord Atkin in *Donoghue v Stevenson* in 1932, the elements of a claim in negligence are of course the existence of a duty of care owed to the claimant by the defendant; the breach of that duty by the defendant; and damage suffered by the claimant as a result of the defendant's breach of duty. When will such a duty arise? In modern law, this is expressed in terms of the so-called *Caparo* test, adopted by the House of Lords in *Caparo Industries plc v Dickman* in 1990.<sup>6</sup> According to Lord Bridge:

...in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

There are plenty of sceptics about the existence of any real distinction between the second and third limbs of the test, proximity and 'fair, just and reasonable' respectively.<sup>7</sup> However, in my view the English courts do generally distinguish between two types of reasoning in the duty context. On the one hand, they use 'proximity' to express moral judgements about the defendant's behaviour: whether the defendant, having foreseen the harm to the claimant, was truly responsible for it. On the other hand, the third leg of the *Caparo* test allows the courts to grapple with policy arguments about the wisdom of imposing liability.

In what sort of cases, then, will a duty of care arise? Where the defendant could reasonably have foreseen that his actions might cause a physical injury to the person or property of the claimant, the existence of a duty is relatively uncontroversial. In other words, liability turns on the first leg of *Caparo* only. However, outside such straightforward cases the courts deal with pockets of liability only: in cases involving omissions or nervous shock or pure economic loss, to take some obvious examples, the assumption is against liability, rather than for it. Both the second and third legs of the *Caparo* test have to be actively demonstrated before liability will be imposed.

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<sup>5</sup> The first two reasons have already been well explored by Professor Francois Du Bois in 'State Liability in South Africa: A Constitutional Remix' *Tulane European and Civil Law Forum* 25 (2010) 1.

<sup>6</sup> [1990] 2 AC 605 (HL) 617-618 (Lord Bridge) Note that this is not a general clause from which the courts reason deductively. Rather, it is an attempt to capture or reflect the way in which the courts do reason in negligence cases, and thus a mechanism for guiding judicial reasoning in novel cases. This is made explicit by Lord Bridge in the *Caparo* case itself (617-618) although of the views expressed by Lord Bingham in the *Smith* case at paras 42 and 60.

<sup>7</sup> E.g. Nicholas McBride and Roderick Bagshaw *Tort Law* (3<sup>rd</sup> edn Pearson 2008) 56-71, especially 58, who argue that proximity in particular is superfluous, and that once foreseeability of harm is established, the only question remaining is whether it is fair just and reasonable to impose liability.

## South Africa

As for the South African law of negligence, or Aquilian liability, this has long been a battlefield between the competing forces of our civilian tradition and the powerful influence of the English common law. Although the treatment afforded the *lex Aquilia* by Roman Dutch writers such as Grotius suggested an extremely generalised approach – essentially a principle of *damnum culpa datum*, loss culpably caused – this has been offset by the influence of the duty of care approach of the English law.<sup>8</sup> However, in the last quarter of the twentieth century the civilian tradition strongly reasserted itself, and South African law settled on the general principle that the defendant is liable for all loss culpably caused. *Culpa* (fault) is a meaty inquiry, depending on the two-stage test outline in *Kruger v Coetzee*: would a reasonable person (*bonus paterfamilias*) in the position of the defendant (reasonably) have foreseen the harm to the claimant and would he have taken (reasonable) steps to avert it?<sup>9</sup> Thus certain considerations that would tend to be addressed by English law under the head of proximity arise in South African law at the second stage of the *Kruger v Coetzee* test. However, South African law recognises also a separate requirement of wrongfulness or unlawfulness, one which operates as a limitation device on this general principle. One can be liable for negligence only if one was under a legal duty to act without negligence.<sup>10</sup> Thus wrongfulness functions as a gate-keeper or a long-stop, depending on your view. Generally speaking, whereas negligence is concerned with whether the defendant acted unreasonably, their conduct being judged *ex ante* rather than with the wisdom of hindsight, wrongfulness is concerned with the reasonableness of imposing liability.<sup>11</sup>

As in English law, where the defendant has through a positive act inflicted harm to person or property, wrongfulness will have little work to do. However, there are some cases at least where the duty to act without negligence will be entirely excluded, or will at least require to be specifically justified by the claimant. Like England, South Africa recognises pure economic loss and omissions and nervous shock as discrete problem areas. In these difficult areas, a legal duty will arise only where that is required by ‘legal policy’ or ‘the legal convictions of the community’. This term – an approximation of the *boni mores* criterion used in the Roman sources on *iniuria* – accommodates a range of arguments of principle and policy, arguments about both the reasonableness of the defendant’s conduct and the reasonableness of imposing liability which are not always clearly distinguished.<sup>12</sup> Speaking very generally, however, cases in which liability is excluded – such as cases involving

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<sup>8</sup> Although see e.g. Innes CJ in *Cape Town Municipality v Paine* 1923 AD 207 at 217 for a robustly civilian view.

<sup>9</sup> 1966 (2) SA 428 (A) 430.

<sup>10</sup> E.g. *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) 837, as cited by Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 12. See further Anton Fagan ‘Rethinking Wrongfulness in the Law of Delict’, (2005) 122 *South African Law Journal* 90, 110-115

<sup>11</sup> See Fagan ‘Rethinking Wrongfulness’ 106-110. But cf the view of e.g. J Neethling, JM Potgieter and PJ Visser *Law of Delict* (5<sup>th</sup> edn Butterworths 2006) 49 – 68, to the effect that wrongfulness depends on the reasonableness of conduct judged with hindsight, *ex post facto*.

<sup>12</sup> Re. omissions see first *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597: ‘It appears that the state of development has been reached wherein an omission is regarded as unlawful conduct also when the circumstances of the case are of such a nature that the omission not only excites moral indignation but also that the legal convictions of the community demand that the omission should be considered wrongful and that the loss suffered should be made good by the person who neglected to take positive action.’ (translation by D Hutchison *Southern Cross: Civil Law and Common Law in South Africa* (R Zimmermann and D Visser eds OUP 1996) 626 and *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) para 19: ‘To find the answer the court is obliged to make what in effect is a value judgment based *inter alia* on its perceptions of the legal convictions of the community and on considerations of policy.’

omissions – are seen as policy-based exceptions to the general principle of the Roman- Dutch law.<sup>13</sup> In *Minister van Polisie v Ewels* in 1975 the Appellate Division accepted that that an omission would be treated as unlawful where the legal convictions of the community demanded this, and in Cape Town *Municipality v Bakkerud* in 1997 it was held that the previous practice of recognising liability for omissions only exceptionally had been wrong.<sup>14</sup> In this sense the modern South African law is rather close to the test for duty of care recognised by the House of Lords in *Anns v Merton London Borough Council*<sup>15</sup> in 1977, according to which reasonable foreseeability generated a presumption of liability which could then be restricted on policy grounds at the second stage.

### **3. The influence of human rights instruments**

A further difference between these jurisdictions is to be found in the content and application of the human rights instruments which have (relatively) recently become part of their law. In the case of England, there is the Human Rights Act of 1998, which incorporated the ECHR into UK law. In the case of South Africa, the Bill of Rights in the Constitution of 1996. Both these instruments incorporate inter alia rights to life: Art 2 of the ECHR, S 10 of the SA Constitution. However, there is considerable divergence in the way these rights are to be enforced against the state.

#### *South African law*

Although South African law recognises the possibility of constitutional damages in respect of an infringement of an individual's constitutional rights, the courts have so far tended to shy away from recognising claims for compensation arising directly from the Bill of Rights.<sup>16</sup> Rather, our practice has been to rely heavily on S 39 (2), which requires our courts when developing the common law to promote the 'spirit, purport and objects' of the Bill of Rights. Indeed, in the second *Carmichele* case the Constitutional Court went further, holding that the existing common-law position regarding the existence of a legal duty in omissions cases had to be scrutinised and if necessary developed in light of the right to life in S 10 *inter alia*. More specifically, the Constitutional Court held that the Supreme Court of Appeal ought to have made its determinations as to the reasonableness of the policemen and prosecutors' conduct, and the reasonableness of imposing liability for that conduct, only after taking account of the 'constitutional duty [on the state] to protect the public in general and women in particular against violent crime'.<sup>17</sup> This scrutiny and development was later carried out by Nugent JA in

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<sup>13</sup> According to Anton Fagan, '[T]he factors that have been taken into account in order to determine the wrongfulness of negligent omissions and negligently caused pure economic loss ... [include]... "the convenience of administering the rule" ("the rule" being the rule created by the imposition of liability), "the objection of limitless or indeterminate liability", the "floodgates" risk, the availability of an alternative remedy, the possibility that the imposition of liability would hamper or disrupt the efficient functioning of a public authority or public officials, and whether the defendant or plaintiff is best placed to protect himself against loss (by insuring against it, for example).' Anton Fagan 'Rethinking Wrongfulness' 109. See also the recent treatment of this question by Francois Du Bois 'State Liability in South Africa: A Constitutional Remix' Tulane European and Civil Law Forum 25 (2010) 1, 20-27. But cf the factors listed by Neethling, Potgieter and Visser at pp 51 to 68, which include e.g. control of a dangerous object and a special relationship between the parties.

<sup>14</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Cape Town Municipality v Bakkerud* [2000] 3 All SA 171 (SCA) For a fuller discussion of this point see Du Bois *State Liability in South Africa* 24-27.

<sup>15</sup> [1978] A.C. 728; [1977] 2 All ER 492 (HL)

<sup>16</sup> See e.g. the recent account in M Loubser, R Midgley et al *The Law of Delict in South Africa* (OUP 2010) Chapter 2.

<sup>17</sup> Anton Fagan 'Reconsidering *Carmichele*' (2008) 125 *South African Law Journal* 659, 661, quoting *Carmichele* 2, 952 and also 962.

*Minister of Safety and Security v Van Duivenboden*,<sup>18</sup> decided after the *Carmichele* case had been remitted to the High Court for trial by the Constitutional Court in *Carmichele 2* but before it had returned to the Supreme Court of Appeal in *Carmichele 4*. The SCA in the *Van Duivenboden* case held that the rights to dignity, life and security of person embodied in Ss 10, 11 and 12 of the Bill of Rights, together with the constitutional norm of accountability embodied in particular in S 7 which obliges the state to ‘protect, promote and fulfil the rights in the Bill of Rights’, required that a legal duty in negligence be recognised, since there was no other effective way to hold the state to account.<sup>19</sup> This analysis was heavily relied upon in the final *Carmichele* decision.

### *English law*

In England, on the other hand, claimants may found directly on the ECHR rights themselves in an action for damages. Indeed, in the case joined with *Smith* in the House of Lords, the *Van Colle* case, the claimants brought their action against the police under Art 2 ECHR. However, *Smith*’s claim under the ECHR was time-barred, which explains why he proceeded exclusively under the common law. At least two of the Law Lords took the view that there was no obligation on the House to develop the common-law duty of care test in line with the rights recognised in the ECHR.<sup>20</sup> The two regimes ran in parallel, and indeed the existence of the human rights regime relieved the Lords of the responsibility to develop the common law.<sup>21</sup> This is to be contrasted with the view taken by Lord Bingham,<sup>22</sup> and by Pill LJ and Rimer LJ in the Court of Appeal.<sup>23</sup>

## **4. Taking stock**

We are now in a position to understand at least two of the three reasons why the *Smith* and *Carmichele* cases were decided differently in England and South Africa.

The first reason has to do with the analytical structure of negligence in these two systems. Essentially, South African law is analytically predisposed to recognise liability in omissions cases. The rule against omissions liability is seen as a restriction on the general principle, liability for loss culpably caused, and thus requires justification. In English law, on the other hand, the presumption is the other way. *Caparo* commits English law to finding reasons for liability, rather than reasons for non-liability.

Secondly, there is the fact that whereas the South African Bill of Rights has been allowed to exert a profound influence on the legal duty question, in *Smith* and other recent decisions the House of Lords (now the Supreme Court) has made it clear that there is a Chinese wall dividing the regime set up by the Human Rights Act from the common-law tort of negligence.

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<sup>18</sup> *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 17 ff.

<sup>19</sup> See para 17 in particular: ‘In applying the test that was formulated in *Minister van Polisie v Ewels* the “conviction of the community” must now necessarily be informed by the norms and values of our society as they have been embodied in the 1996 Constitution’, as well as paras 18-22.

<sup>20</sup> See paras 81-82 (Lord Hope) and paras 136-138 (Lord Carswell)

<sup>21</sup> See also *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, especially 32-34 per Lord Hoffmann, and the comments of Robert Stevens in *Torts and Rights* (OUP 2007) 241-2.

<sup>22</sup> [2008] UKHL 50, para 58.

<sup>23</sup> [2008] EWCA Civ 39.

## **5. The nature of the rule against liability for omissions by the state in English and South African law**

This brings me to my third point, namely, the nature of the rule against liability for omissions by the state in English and South African law.

### *South African law*

As we have seen, in South African law the rule excluding liability for omissions in general is mainly a matter of policy. In other words, the rule centres on the reasonableness of imposing liability. According to Nugent JA, discussing in particular omissions by the state, ‘the imposition of legal duties on public authorities and functionaries is inhibited...by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability.’<sup>24</sup> Also mentioned was the ‘need for effective government’<sup>25</sup> However, as we have seen, these policy concerns – previously regarded as compelling<sup>26</sup> – were quickly dismissed after the decision of the Constitutional Court in the *Carmichele* case, or at least held to have no application to the facts of cases such as *Van Duivenboden* and *Carmichele* itself.<sup>27</sup> This is unsurprising. It is not the purpose of this paper to evaluate this aspect of the South African law, i.e. whether the courts in *Van Duivenboden* and *Carmichele* were correct in deciding that the omissions of the defendants in those cases were indeed wrongful.<sup>28</sup> Nevertheless, given how contingent these arguments against liability were in the first place, it should at least not surprise us that they were easily displaced by the plaintiffs’ rights to human dignity, to life, and to security of the person.

### *English law*

However, the English view of the rule against liability for omissions by the state is very different. Not only does English law deal only with particular duties of care, as explained above; it justifies the exclusion of liability for omissions by the state not on grounds of policy – whether it would be ‘fair, just and reasonable’ to impose liability – but on grounds of principle – whether there is a sufficient relationship of proximity between the parties.

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<sup>24</sup> *Van Duivenboden*, para 19.

<sup>25</sup> Here Nugent JA cited *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238: *Van Duivenboden*, para 22.

<sup>26</sup> See e.g. *Du Bois State Liability in South Africa* 23-24.

<sup>27</sup> As Justices Ackermann and Goldstone said in *Carmichele 2* at para 49, ‘[f]ears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity.’ (by which they presumably meant fault and wrongfulness). See further *Van Duivenboden*, para 19-22; *Carmichele 4*, 40-43.

<sup>28</sup> Another important issue side-stepped in this paper is the question of the degree to which the vicarious liability of the state for the acts and omissions of its employees should be influenced by individuals’ rights against the state itself. It has been widely assumed by the South African courts that plaintiffs’ Constitutional rights against the state, as well as the norm of state accountability, should play a role in determining not only direct but also vicarious state liability: see esp. the *Van Duivenboden* and *Carmichele (2)* and (4) cases. But commentators have argued that plaintiffs’ Constitutional rights against the state can have no application in cases where the liability of individual employees is merely vicariously attributed to it: see e.g. Anton Fagan ‘Reconsidering *Carmichele*’ (2008) 125 *South African Law Journal* 659 esp 669 ff as well as Stephen Wagener ‘*K v Minister of Safety and Security* and the increasingly blurred line between personal and vicarious liability’ (2008) 125 *South African Law Journal* 673 and Anton Fagan ‘The Confusions of *K*’ (2009) 126 *South African Law Journal* 154. See further n. 41 below.

Admittedly, this is not always clear in the speeches of the House of Lords. For instance, in the *Smith* case itself the majority of the Lords relied heavily on what they described as the ‘core principle’ in the case of *Hill v Chief Constable of West Yorkshire*,<sup>29</sup> subsequently recapitulated by Lord Steyn in 2005 in *Brooks v Commissioner of Police for the Metropolis and others*.<sup>30</sup> The essence of this principle is that the police cannot be held liable for failing to catch criminals because, first, this would lead them to act defensively, and, second, it would take divert resources away from policing and into litigation. But in fact, as English tort lawyers such as Robert Stevens, Nicholas McBride and Roderick Bagshaw have argued, the real reason for non-liability in the *Smith* case (and indeed the *Hill* case) is not specific to the police at all, nor is it even an argument of policy. Rather, it is the broad argument that in the absence of specific moral reasons (generally expressed under the aegis of the proximity requirement), no-one is under a duty to confer a benefit on anyone else, or to keep anyone else from harm.<sup>31</sup> This applies just as much to public authorities and their functionaries as to private individuals. The prohibition on liability for omissions is itself the general principle of English negligence. It requires no justification.

One finds this general principle fully and clearly expressed in the recent decision of the House of Lords in *Mitchell and another v Glasgow City Council*,<sup>32</sup> which concerned a council tenant who, on being evicted by the defendant council, attacked and killed another tenant, the father and son of the pursuers respectively, against whom he had a history of violence, known to the Council. According to Lord Scott at para 39,

1. It is a feature of the common law both of England and Wales and of Scotland that liability in negligence is not imposed for what is sometimes described as a "mere" omission... Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 referred at 580 to the duty to,
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3. "...take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (emphasis added).

4. Yet it is accepted in both jurisdictions that the Pharisee who passed by the injured man on the other side of the road would not, by his failure to offer any assistance, have incurred any legal liability. A legal duty to take positive steps to prevent harm or injury to another requires the presence of some feature, additional to reasonable foreseeability that a failure to do so is likely to result in the person in question suffering harm or injury. The Pharisee, both in England and Wales and in Scotland would have been in breach of no more than a moral obligation.

5.

The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a wide variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk

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<sup>29</sup> [1989] AC 53, [1988] 2 All ER 238.

<sup>30</sup> [2005] UKHL 24.

<sup>31</sup> See McBride and Bagshaw at 206 and Stevens *Torts and Rights* ch 10 esp 233-235, as well as their specific comments on the House of Lords’ decision in the *Smith* case at:

[http://wps.pearsoned.co.uk/ema\\_uk\\_he\\_mcbride\\_tortlaw\\_3/94/24174/6188755.cw/-/6188756/index.html](http://wps.pearsoned.co.uk/ema_uk_he_mcbride_tortlaw_3/94/24174/6188755.cw/-/6188756/index.html)

And:

<http://www.ucc.ie/law/odg/messages/080731c.htm>

<sup>32</sup> [2009] UKHL 11, [2009] All ER (D) 182.

of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant : (eg. employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (eg. a fire on the defendant's land as in *Goldman v Hargrave* [1967] 1 AC 645). Sometimes the additional feature may be found in the assumption by the defendant of responsibility for the person at risk of injury (see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 per Lord Goff of Chieveley at 272). In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or lessened the injury to the victim, the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission.

What are the values underlying this general principle? In my view this question is best explored through the decision of the House of Lords in *Tomlinson v Congleton Borough Council*, apparently a very different case from *Smith*.<sup>33</sup> The facts were as follows. Mr Tomlinson, a young man, had dived into a shallow lake in a public park belonging to the defendant Council and broken his neck. The Court of Appeal had held that the Council was in breach of its duties under the Occupiers Liability Act of 1984 because it had failed to put up a sign warning that the lake was a shallow one (there was a sign saying that swimming was prohibited) However, that decision was overturned by the Lords. In his speech, under the heading 'free will', Lord Hoffmann took the view that,

I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land.<sup>34</sup>

And further:

6. A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2000] 1 AC 360).

These dicta of Lord Hoffmann make explicit the link between the prohibition on omissions liability in English law and the values of freedom and autonomy. Admittedly, autonomy is most obviously relevant in cases involving self-harm, whether intentionally or carelessly inflicted, as in the *Reeves* case on the one hand and *Tomlinson* and *Gorringe v Calderdale MBC* on the other.<sup>35</sup> One respects the self-harmer's autonomy insofar as one does not impose liability on others for failing to prevent it except in cases where there was no genuine and informed choice, or some lack of capacity. However, these values appear to play a role in cases involving harm inflicted by others also. Here too, the values of autonomy and freedom require that responsibility and thus liability rests in the first instance with the person who

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<sup>33</sup> [2004] 1 AC 46.

<sup>34</sup> *Tomlinson*, para 44.

<sup>35</sup> *Reeves v Commissioner of Police* [2000] 1 AC 360; *Gorringe v Calderdale MBC* [2004] UKHL 15.

inflicts the harm carelessly or intentionally.<sup>36</sup> Following Lord Hoffmann’s logic, there could be liability on someone other than the person who inflicted the harm only if the victim were forced to run the risk of harm by that someone, or if he or she were especially vulnerable and therefore required looking after, and then only by someone with whom he or she had a pre-existing relationship.<sup>37</sup>

Of course the autonomy at issue here cannot be that of the defendant. It is true that ‘a duty not to do  $x$  is far less intrusive on individual liberty (because it leaves the person subject to it free to do anything but  $x$ ) than a duty to do  $x$  is (because the person subject to a duty to do  $x$  is not free to do anything except  $x$ ).’<sup>38</sup> Indeed, the autonomy interest of defendants plays an important role in justifying the general prohibition on omissions liability in the common law. But it is equally obvious that this justification can have no application to cases where the state is the defendant, since the state can have no autonomy interest requiring protection. Rather, the autonomy we are interested in here is that of the claimant. In cases such as *Tomlinson* and *Gorringe*, the claimant is in a sense repudiating her own autonomy, in that she is asserting that someone else – the state – should have taken steps to protect her from her own carelessness. The same would be true in cases involving harm inflicted by others. According to the logic of the common law, just as we are not generally entitled to expect others to save us from ourselves, so we are not entitled to ask them to save us from others.

How do Lord Hoffmann’s arguments about autonomy and freedom in the *Tomlinson* case play out in the context of the *Smith* case? Following Lord Hoffmann’s logic, it was Smith’s assailant – Jeffrey – who had to take full responsibility for what happened to him.<sup>39</sup> The Chief Constable’s employees had played no part in creating the risk posed by Jeffrey to Smith. There had been no assumption by the Chief Constable’s employees of responsibility for Smith’s welfare. Finally, like *Tomlinson*, Smith lacked the special vulnerability necessary to engender an affirmative duty of care on the part of someone else. He was not a child, who was incapable of recognising danger and therefore required to be looked after by his guardians. Nor was he a prisoner, as in the *Reeves* case, who required protection by his gaolers either from himself or from others.

## **6. Conclusion**

Two conclusions may be drawn from this analysis. First, even if a majority of the House of Lords had taken a different position on the second question I posed above – i.e. even if they had believed, like Lord Bingham, that the rights enumerated in the ECHR should be taken into account in determining the duty of care question – in fact, the kind of arguments deployed by English law against imposing liability for omissions by the state would have been almost impossible to displace in this way. As the South African experience shows, if the prohibition on affirmative duties on the part of the state is rooted in specific policies, such as

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<sup>36</sup> See further Lord Hoffmann’s speech in *Gorringe v Calderdale MBC* [2004] UKHL 15, in which he explicitly applied his remarks in the *Tomlinson* case to such a third-party situation (para 35-36). According to Lord Hoffmann in the *Gorringe* case, careless drivers like Mrs Gorringe ‘must take responsibility’ for the harm they cause.

<sup>37</sup> For fuller accounts of the reasons for the prohibition on omissions liability in English law, both in the context of the state and more generally, see e.g. J Stapleton ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 LQR 301; Roderick Bagshaw ‘The Duties of Emergency Service Providers’ [1999] LMCLQ 71.

<sup>38</sup> McBride and Bagshaw, 61.

<sup>39</sup> Of course the cases are significantly different in that the *Tomlinson* case was decided under the Occupiers Liability Acts of 1957 and 1984.

the need to avoid defensiveness on the part of the police force or the need not to divert police resources into litigation, then it is relatively easy for that prohibition to be displaced by an argument based on individual rights against the state: the outcome depends on the weight attached to those policies relative to the claimant's rights. On the other hand, where that prohibition is deeply rooted in political values such as freedom and autonomy, it is very difficult to displace it, even if the claimant is asserting a particular right – in this case the right to life – against the state as defendant.<sup>40</sup> There simply isn't sufficient flexibility in the system to permit an accommodation with a rights instrument such as the ECHR. In order to displace the prohibition, one would have to root out the fundamental liberal principle articulated by Lord Hoffmann in the *Tomlinson* case. The only way forward would be the distortion of the common law. So it seems that the majority in *Smith* were correct as a matter of English law.

However, here a difficulty becomes apparent. *Smith* may have been able to recognise danger – indeed, he was acutely aware of the danger he was in – but he was unable to protect himself from that danger, other than by fleeing. This was because it is not open to individuals in a modern state to use violent self-help: *Smith* could make no pre-emptive strike, nor could he arm himself. In fact he did the only thing open to him as a law-abiding citizen: he reported the threat to the police, who were the only ones empowered to intervene.<sup>41</sup> Once this is appreciated, the autonomy justification for non-liability for omissions begins to look rather weak. In fact, it seems to point the opposite way, towards liability. Just as the defendant Council in the *Tomlinson* case couldn't be liable because the claimant had freely and autonomously brought the injury on himself, so, according to the same rationale, the police in *Smith* should have been liable, at least under certain conditions, because the police force had a monopoly on the power needed to save the claimant from the obvious risk posed by his assailant, leaving the claimant himself powerless to do so. Thus taking the English prohibition on omissions liability seriously – as a fundamental and systemic commitment to liberal values – should not necessarily lead to a more restrictive regime than the one applied in South African law. Instead, it requires English lawyers to scrutinise the applicability of those liberal values in individual cases. The English principle might be one which coheres profoundly with the values of the common law, and it might have been correctly applied in many cases against the state, including the *Tomlinson* case. But *Smith* may be the case that proves the rule. It seems that cases involving the failure of the police to prevent crimes may be required by the very autonomy values that underpin the common law to be decided differently, according to special principles, rather than in accordance with the general rule that there can be no liability for failing to confer a benefit.<sup>42</sup>

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<sup>40</sup> Again, it must be emphasised that the state itself cannot assert any autonomy interest: see the remarks of Nugent JA in the *Van Duivenboden* case at para 19 and the remarks in n 35 above.

<sup>41</sup> In fact, this point was made in passing by Lord Bingham in his dissenting speech in the *Smith* case (at para 60) and subsequently in an article published in the 2010 *Journal of European Tort Law*: 'Living in a society where violent self-help and private vengeance are contrary to law, he did what his duty as a citizen required of him: he reported the threats to the police and sought their help and protection as the public service whose duty it is to provide it.' Lord Bingham of Cornhill 'The Uses of Tort' (2010) 1 *JETL* 3, 12.

<sup>42</sup> The force of this argument – and indeed the force of arguments based on individuals' fundamental rights against the state – is of course logically affected by whether the claim brought against the police force is direct or vicarious: see n. 28 above. Where the state has failed through its servants to exercise care, then the state's monopoly on violence must surely be a crucial factor in determining the existence of a duty of care on the state (direct liability). On the other hand, where the liability alleged is vicarious, as in the *Carmichele* and *Smith* (?) cases, the relevance of such arguments is less clear at least. Yet it seems to this author that the state's monopoly on violence must nevertheless constitute a relevant consideration, even where the case has been pleaded as an instance of vicarious liability. After all, the omissions alleged in the *Carmichele* and *Smith* cases involved the failure of individual police officers to exercise not only distinctively public powers but also (again) powers monopolised by the state.