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FOREWORD BY THE HON. LORD WOOLMAN SENATOR OF THE COLLEGE OF JUSTICE

The law infiltrates every aspect of our lives. It guides our conduct. It frames our perspective. To say that we live under the rule of law is a deeply held conviction. That remains so, even though we do not know each individual law. Who could claim acquaintance with every provision of the tax statutes?

Comment, analysis and discussion are therefore invaluable. Without scrutiny, our legal system would cease to be a living instrument. Our laws would not reflect changing times. This latest volume of the *Aberdeen Student Law Review* carries on the splendid work of its predecessors. A glance at the table of contents will show the breadth of inquiry. A reading of the articles will establish that we have a new generation of fine lawyers in the making.

Stephen Woolman
June 2019

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TABLE OF CONTENTS

Is the law in relation to negligence of the police satisfactory?	Scott Mackie *Page 1*
Corporate homicide/manslaughter: symbolic or purely instrumental?	Sophie Hofford *Page 37*
The future of the Natura 2000 network in post-Brexit Britain	Bettina Kleining *Page 69*
Are refugees awarded sufficient protections under human rights law?	Borys Biedron *Page 88*
Guidelines for contributors	*Page 95*

Is the law in relation to negligence of the police satisfactory?

SCOTT MACKIE*

Abstract

Currently, the police are not liable in negligence in the same way as other public authorities in the United Kingdom. The purpose of this article is to examine common law negligence liability of the police in the United Kingdom and to judge whether or not it is satisfactory. It will be explored whether the police should in fact be held liable for negligent acts or omissions when they have the means to prevent harm to the public. Recent case law will attempt to shed light on why the police are currently not held liable in negligence. It will be argued that the police, like anyone else, should be held liable for their actions in negligence and they should not be afforded special protection.

Keywords: negligence, police negligence, common law negligence

Introduction

The police in the United Kingdom carry out a special role in society. They provide safety to the public and in turn, the public are obliged to entrust their safety to the police. This relationship is unique compared with that of other public authorities. If the police act negligently and compromise this trusting relationship, should they be held liable for their actions or inactions? Under common law negligence, the police do not owe a duty of care to individuals resulting from their negligent actions when carrying out their main functions of tackling crime.[1] This would, *prima facie,* be surprising

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[1] *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53.

because if the police are negligent towards an individual, like anyone else, they should be liable.

Unfortunately, public policy has dominated this niche part of the law and the courts have consequently been reluctant to impose liability. While there has been plentiful case law coming from England, arguably, the underlying reasons attached to this reluctance are not satisfactory. Duty of care in both English and Scots law is very similar if not identical. Many of the cases, however, reached the House of Lords (now replaced by the Supreme Court) so would have a persuasive impact on the Scots law of duty of care.

It should be observed at the outset that Chief Superintendents and all other Police Superintendents are required to take out indemnity insurance cover and the cost of the premium is paid by their employer. In Scotland, this is carried out by Police Scotland. This is because superintending ranks, i.e. any rank higher than a constable, are held personally liable for major decisions in combatting crime. They possess strategic command responsibility and as such are responsible for authorising police tactics.[2] Obviously, things can go wrong in certain circumstances and decisions made by the police can be questioned and may lead to an investigation. This is why the law of negligence currently provides the police with protection from actions because they are required to make difficult decisions in stressful situations.

This paper seeks to examine whether the law in relation to liability of the police for negligence is satisfactory. Part One will observe the origin of this area of the law and will provide a doctrinal analysis of the case law up until the Supreme Court decision of *Michael v Chief Constable of South Wales Police*.[3] Part Two will critique the Supreme Court decision in *Michael* and the alternative view proposed by Lord Kerr and Lady Hale (in the minority) to see whether liability could be imposed. The '*Caparo* test'[4] will be examined as a possibility to impose liability on the police under this

[2] Police Superintendents' Association <http://www.policesupers.com> accessed 19th March 2018.
[3] [2015] UKSC 2.
[4] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

framework. Finally, Part Three will critique the omissions principle articulated by Lord Toulson in *Michael* and will ultimately provide reasons why the police should be liable in negligence. While some case law from Scotland will be analysed, the majority will come from the English courts as a means of evaluating police negligence.

Part One: The origin of the law

A. The immunity granted to the police in *Hill v Chief Constable of West Yorkshire Police.*

The courts in the United Kingdom have constantly relied on a contentious line of reasoning when public authorities, including emergency services and armed forces, are subjected to actions in negligence, and that is the defence of public 'immunity'.[5] The concept that the police experience a privileged position when they carry out their key function of suppressing and investigating crime was first considered in *Hill v Chief Constable of West Yorkshire Police.*[6] The case concerned a police investigation into a series of attacks against young women by the notorious serial killer Peter Sutcliffe. The police failed to apprehend him when they should have and consequently he murdered more victims. If the police, arguably, had conducted the investigation with the requisite skill and care, Sutcliffe would not have been at liberty to carry out these further crimes. The mother of one of these victims sued the police in negligence for the loss of her daughter. Lord Keith in the House of Lords stated that foreseeability of likely harm is not in itself a sufficient test of liability in negligence.[7] An 'additional ingredient'[8] is desired to establish proximity between the pursuer and the police. Under the auspices of *Dorset Yacht Co Ltd v Home Office,*[9] Lord Keith reasoned that the claimant was one of a vast number of women who might be at risk

[5] Jason Yong, 'Omissions and the mysterious public veil: consideration of the "immunity" of public authorities in negligence claims' (2016) 4(1) LIJ 129, 131.
[6] [1989] AC 53.
[7] ibid 60 (Lord Keith).
[8] ibid.
[9] [1970] AC 1004.

from the killer's activities but was at 'no special distinctive risk in relation to them.'[10] Consequently, the claim was dismissed by the House of Lords due to the lack of proximity between the police and the claimant. The immunity granted in *Hill* would appear only to apply to negligent acts and omissions concerning the investigation and suppression of crime that resulted in a criminal being at liberty to harm the public at large. The House of Lords, however, has come to interpret *Hill* more broadly leading to confusion and injustice.[11]

Instead of concluding the case at lack of proximity, Lord Keith believed there was 'another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case.'[12] To ensure the path was blocked for future claimants, Lord Keith detailed a number of public policy grounds that would deny an action. In particular, he identified four policy grounds concerning the investigation and suppression of crime. But, as will be discussed, there are inherent problems with these policy grounds and while there can be convincing policy reasons against the imposition of liability in certain circumstances, these situations are both 'easily identified and limited in nature.'[13] The policy grounds are:

1. No improvement in police standards;
2. Judicial interference in examining police strategy;
3. Defensive policing; and
4. Diversion of resources.

Lord Keith sought to exclude liability because he opined there would be no improvement in police standards if it were to be imposed because the police ensure their best efforts are carried out motivated by the 'general sense of public duty.'[14] This has been criticised by the UK courts with Lord Steyn observing that

[10] *Hill* (n 6) 62 (Lord Keith).
[11] Greg Gordon, 'Liability of Public Authorities', in Joe Thomson, *Delict* (SULI) (W Green 2009), 20.40; This will be discussed further in Parts 1B and C.
[12] *Hill* (n 6) 63 (Lord Keith).
[13] Claire McIvor, 'Getting defensive about police negligence: The Hill principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 CLJ 133, 134.
[14] *Hill* (n 6) 63 (Lord Keith).

'nowadays, a more sceptical approach to the carrying out of all public functions is necessary'[15] due to the increase in police institutional misconduct. At the time of the *Hill* decision in the late 1980s, the courts tended to adopt a rather 'rose-tinted view of the British police force.'[16] This view is evidenced in the next public policy exclusion that large numbers of decisions should not be subjected to judicial resolve.[17] On the particular facts of *Hill,* it is acceptable to appreciate the merit of Lord Keith's reasoning by not subjecting a complex police investigation to judicial scrutiny. Tofaris and Steel observe that there may, however, be instances in which no policy issues arise, so that it would be wrong to deny a duty of care on that ground.[18]

The main concern, as articulated by Lord Keith, was that imposition of liability could result in some police operations being conducted in a 'detrimentally defensive frame of mind,' and doing so would hinder them in taking difficult operational decisions.[19] This argument has been described by Tofaris and Steel as being 'wholly conjectural.'[20] In some cases, it has actually been suggested that imposing liability would enhance the overall standard among public authorities.[21]

Remarkably, no evidence was provided by the House of Lords in *Hill* supporting the view that the police may be more susceptible to defensive practices than other public authorities.[22] Subsequently,

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[15] *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 at [28].
[16] McIvor (n 13) 133.
[17] *Hill* (n 6) 63 (Lord Keith).
[18] Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police' (2016) 75(1) CLJ 128, 134.
[19] *Hill* (n 6) 63 (Lord Keith).
[20] Stelios Tofaris and Sandy Steel, 'Police Liability in Negligence for Failure to Prevent Crime: Time
to Rethink' (2014) University of Cambridge Faculty of Law, Research Paper No 39/2014, 5.
[21] *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 568; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 672.
[22] This lack of evidence has been criticised by academics. See e.g.: Hanna Wilberg, 'Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims' (2010) 126 LQR 420; and Jonathan Morgan, 'Policy Reasoning

lower courts proceed merely on intuition[23] which 'gravely misrepresents the true position.'[24] The defence of negligence actions against the police would also require a substantial diversion of resources away from investigating and suppressing crime.[25] In theory, imposing a duty of care on the police encourages a more vigilant standard in carrying out their duties and may result in public resources being preserved. There seems to be no reason why this policy concern should not apply to claims against, for example, the National Health Service, yet Tofaris and Steel observe that the courts 'do not place any weight on it in that context.'[26] Lord Keith's analysis has provided the basis for a public policy exception that has provided the police with a broad protection from liability for their negligent failure to investigate or suppress crime, even in circumstances where there was a relationship of close proximity between the parties.[27]

Somewhat surprisingly, Lord Keith did not comment on the possibility of exceptions when formulating the public policy exception in *Hill.* As a result, Walsh notes that subsequent courts have been 'recognising exceptions in an ad hoc manner.'[28] In *Swinney v Chief Constable of Northumbria Police,*[29] the police were held to owe a duty to prevent the identity of one of their informants becoming known to the person on whom she had informed. This was justified on the basis of the public interest in protecting police informers.[30] Furthermore, in *Costello v Chief Constable of Northumbria Police,*[31] it was held that a police officer owed a duty to protect a colleague

in Tort Law: The Courts, the Law Commission and the Critics' (2009) 125 LQR 215, 217.

[23] Lord Dyson, 'The duty of care of public authorities: Too much, too little or about right?' (PIBA Richard Davies Lecture, 27 November 2012) 4.

[24] Tofaris and Steel (n 18) 134.

[25] *Hill* (n 6) 63 (Lord Keith).

[26] Tofaris and Steel (n 18) 135.

[27] Dermot PJ Walsh, 'Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog' (2011) 22 KLJ 27, 29; this will be discussed further in Part 1C.

[28] ibid 36.

[29] [1997] QB 464.

[30] ibid 486 (Peter Gibson).

[31] [1999] ICR 752.

against an attack from a prisoner when he was present for that purpose. This was justified because of the public interest in guaranteeing that the law accords with common sense and public perception.[32] Unfortunately, the courts have not developed these exceptions in a consistent and coherent basis and these cases provide no guidance of how to balance conflicting public policies perhaps due to the *Hill* principle itself not being suitably understood and applied.[33]

B. Interpreting *Hill* in subsequent case law

The resulting judgment in *Hill* meant that the police would not owe a duty of care when investigating and suppressing crime. However, the decision from Lord Keith raises concerns. It has been argued by Palmer that the principle established in *Hill* is 'riven with problems of interpretation since its boundaries have never been properly defined.'[34] The list of policy reasons articulated by Lord Keith appears to suggest that they supersede the role of negligence and consequently the decision in *Hill* has, according to Hoyano, 'recast tort law as the enemy, not the instrument, of public policy.'[35] Accordingly, later decisions refused to impose a duty of care on the police.[36] Treatment of the decision in *Hill* by subsequent courts in the United Kingdom has been further criticised by the European Court of Human Rights.[37] Essentially, the *Hill* principle provides the police with blanket immunity even when 'carelessness has caused an actionable form of damage to the plaintiff.'[38] This argument from

[32] ibid 767 (May LJ).
[33] Walsh (n 27) 37.
[34] Phil Palmer, 'Can the UK Police Ever Be Liable for Negligent Investigation or a Failure to Protect?' (2011) 1 IJPLAP 100, 103. See also Richard Mullender, 'Negligence, Public Bodies, and Ruthlessness' (2009) 72 MLR 961.
[35] Laura Hoyano, 'Policing Flawed Investigations: Unravelling the Blanket' (1999) 62 MLR 912, 912.
[36] *Calveley v Chief Constable of Merseyside Police* [1989] 1 AC 1228; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1989] QB 335.
[37] *Osman v United Kingdom* [1998] EHRR 101; *Z v United Kingdom* [2002] EHRR 3.
[38] Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 303.

Stapleton was refuted by Williams, however, as it is crucial to note that the 'police have no general immunity and may be liable for their own negligent acts that directly harm another.'[39] While the House of Lords has continued to apply the principle developed in *Hill*, it would now appear it does not see it as bestowing an outright immunity on the police.

The distinction between cases encompassed by *Hill* and those which are not can be very narrow. The enlargement of the rule has, according to Gordon, 'muddied the waters somewhat.'[40] In *Hill* itself, for example, the House of Lords recognised that it did not apply to police operational decisions.[41] These are where police officers have caused injury as a direct result of their actions.[42] Accordingly, Lord Keith distinguished an earlier Court of Appeal decision of *Rigby v Chief Constable of Northamptonshire Police*,[43] where the police were held liable in negligence for damage to a gunsmith's shop caused by their use of CS gas canisters to get rid of an intruder. The court in that case took the view that the decision to use the canisters was an operational matter and, as such, not protected by public policy. The decision in *Rigby* should be understood as being an exception because the damage was not caused by the intruder – the police caused the damage and so this case is not within the ambit of the principle reasoned in *Hill.*[44]

Despite the significance and impact of the *Hill* public policy principle, its scope is surprisingly uncertain. The state of the law is not aided by the fact that when the House of Lords has considered exceptions to the *Hill* principle, it has intimated that they will arise only in 'rare and unusual cases.'[45] It has been suggested by McIvor

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[39] Kevin Williams, 'Emergency services to the rescue, or not, again' (2008) 4 JPI Law 265, 268. See also Mark Lunney, *Tort Law: Text and Materials* (4th edn, OUP 2010).
[40] Gordon (n 11) 20.46.
[41] *Hill* [1989] AC 53 *per* Lord Keith at 59.
[42] WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet and Maxwell 2010) 210.
[43] [1985] 1 WLR 1242.
[44] Gordon (n 11) 20.46.
[45] Walsh (n 27) 39.

that the current 'major obstacle to the proper interpretation of *Hill*'[46] lies in the House of Lords decision in *Brooks v Commissioner of Police of the Metropolis* where a victim was involved in a racist attack which killed his friend.[47] While the court in this case acknowledged that the decision in *Hill* is regarded as 'an important decision'[48], Lord Bingham indicated he was 'reluctant to endorse the full breadth of what *Hill* ha[d] been thought to lay down.'[49] The court was even willing to acknowledge that there may be 'exceptional cases where exceptions to *Hill* were justified'[50] and that the principle in *Hill* should be 'reformulated in terms of the absence of a duty of care rather than a blanket immunity.'[51] But somewhat frustratingly, the court was not willing to depart from the central arguments in *Hill*. The court simply applied the policy grounds that exist to deny a duty of care owed to victims of crime in relation to investigation and suppression of crime by the police.[52]

Consequently, in *Brooks* the *Hill* principle was applied to deny a right of action in negligence. The victim alleged the police had mistreated him resulting in psychiatric harm. The incident had been investigated by an independent body which found systematic failings in the police investigation.[53] Nevertheless, the House of Lords unanimously dismissed the case and held the police did not owe the victim a duty of care relying directly on the rationale provided in *Hill*. The interests of the whole community would outweigh those of the claimant. As such, it would not be fair, just and reasonable to impose a duty of care on the police in relation to their primary function of the suppression and investigation of crime.

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[46] McIvor (n 13) 141.

[47] *Brooks* (n 15). A useful summary of the case can be found in Graham Smith, 'Police: duty of care to victims and witnesses' (2005) 69(4) Journal of Criminal Law 318.

[48] ibid [19] (Lord Steyn).

[49] ibid [3].

[50] ibid [6] (Lord Nicholls).

[51] ibid [27] (Lord Steyn).

[52] See Claire McIvor, 'Police immunity and the legacy of Hill v Chief Constable of West Yorkshire' (2005) PN 21(3) 201.

[53] Home Office, *The Stephen Lawrence Inquiry: Report of An Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999).

A crucial oversight of the court, however, was the misinterpretation of the principle enshrined in *Hill* which concerned a third-party liability action against the police and its issues on proximity and public policy are thus specific to that context.[54] Failing to control the conduct of a third party is the central theme here. *Brooks,* by contrast, concerned harm caused by the police themselves to the claimant which, in principle, results in a more straightforward claim. These significant contextual features were totally overlooked by the House of Lords in *Brooks*. Instead, the court decided that the *Hill* principle covered all negligence actions against the police in respect of their duties in investigating and suppressing crime. Lord Steyn sought to justify this by articulating that to have a duty imposed on the police would, in practice, 'ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence.'[55] This would 'tend to inhibit a robust approach'[56] which would result in the police adopting defensive practices. Walsh points out, however, that methods of police investigation that subject individuals to harm are unacceptable under human rights law and also police ethics. Therefore, subjecting the police to liability for a failure to accept these standards is 'hardly an onerous burden to place on the police in a liberal democracy based on respect for human rights.'[57]

Suffice it to say that the main barrier to the correct interpretation of *Hill* lies in the House of Lords decision in *Brooks*.[58] The decision extended the scope of the principle enunciated in *Hill* in a manner that was, according to Gordon, 'wholly unnecessary'[59] and which paved the way for the House of Lords' subsequent decisions in the joint appeal of *Chief Constable of Hertfordshire Police v Van Colle*[60] and

[54] McIvor (n 13) 141; See also Yong (n 4) 132.
[55] *Brooks* (n 15) [30] (Lord Steyn).
[56] ibid.
[57] Walsh (n 27) 41. See also Mandy Shircore, 'Police Liability for Negligent Investigations: When Will a Duty of Care Arise?' (2006) 11 Deakin Law Review 33.
[58] McIvor (n 13) 141.
[59] Gordon (n 11) 20.43.
[60] [2008] UKHL 50.

Smith v Chief Constable of Sussex Police[61] (hereinafter referred to as *Van Colle* and *Smith*).

C. A chance to deviate from the *Hill* principle?

What emerges from the preceding case law is that the police occupy a privileged status when carrying out their duties that other investigative bodies do not seem to enjoy.[62] Accordingly, this police immunity principle requires reassessment. An excellent opportunity to carry out this re-evaluation was provided in the joint appeal of *Van Colle* and *Smith.* This presented the House of Lords with the issue of what redress, if any, victims of crime should have against the police for failure to protect them from criminal acts committed by third parties. Both cases directly concerned the applicability of the *Hill* principle. In *Van Colle,* the claim was under human rights; in *Smith,* under common law negligence.

Van Colle concerned the failure of the police to protect a witness from being killed by the person against whom he was due to give evidence. Prior to the murder, the victim had been threatened by the accused and reported each incident to the police. However, the police failed to identify the victim was at risk and consequently did nothing to protect him. The deceased's parents brought an action under Article 2 of the European Convention on Human Rights (ECHR). Their Lordships observed that the test for claimants alleging a breach of the right to life under Article 2, through failure of the police to protect victims of crime, was set out by the European Court of Human Rights in *Osman v United Kingdom*.[63] The facts of *Osman* were similar to those in *Van Colle* where the police failed to take action against a teacher who was harassing a student and which ultimately led to the teacher injuring the student and killing his father. The Strasbourg court held that the police would owe a duty where it was established that 'the authorities knew or ought to have

[61] [2008] UKHL 50 – since this was a joint appeal the same citation is used to cite both cases.
[62] Robert Reiner, *The Politics of the Police* (4th edn, Oxford 2010) 7.
[63] *Osman* [1998] 29 EHRR 245.

known at the time of the existence of a real and immediate risk to life of that individual.'[64] The *Osman* test, however, is not easy to satisfy. It has been argued by Burton that, in so far as ECHR claims are concerned, the scope of the *Osman* test remains ambiguous.[65] It has potentially presented the opportunity to attach liability for negligent investigations in circumstances where the victim was not at foreseeable risk of danger.[66]

The House of Lords once again focused on the defensive practice argument provided in *Hill* to deny the action in *Van Colle* and also favoured a restrictive interpretation of the *Osman* test. The warning signs in *Van Colle* were, in Lord Bingham's opinion, 'very much less clear and obvious than those in *Osman*, which were themselves found inadequate to meet the test.'[67] He based this conclusion, on which all their Lordships agreed, on the fact that the Chief Constable could not have been expected to have predicted that a series of fairly minor incidents of intimidation would result in murder. By electing to adopt a restrictive interpretation of the *Osman* test, the House of Lords substantially reduced the protection afforded to victims of crime by the ECHR.[68]

On the other hand, the more controversial case of *Smith* concerned a claimant who was attacked and seriously injured by his ex-partner after a lengthy period of violent threats which he reported to the police on numerous occasions. Despite having copious amounts of evidence to arrest the ex-partner, the police failed to do so. Failure to protect victims from domestic abuse and stalking has been a significant issue that has attracted extensive media coverage.[69] In

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[64] ibid [116].

[65] Mandy Burton, 'Failing to Protect Victims' Rights and Police Liability' (2009) 72 MLR 283, 286.

[66] John Harrison and others, *Police Misconduct: Legal Remedies* (LAG 2005) 269.

[67] *Van Colle* (n 60) [39].

[68] Burton (n 65) 295. See also Claire McIvor, 'The Positive Duty of the Police to Protect Life' (2008) 24 *PN* 27.

[69] Maya Oppenheim, 'Police accused of 'systemic failure' to protect victims of domestic abuse and sexual violence' *The Independent* <https://www.independent.co.uk/news/uk/crime/police-super-complaint-domestic-violence-sexual-violence-centre-for-women-s-justice-a8830366.html> accessed 27th May 2019.

Smith it was entirely foreseeable on the basis of the evidence that the ex-partner presented a specific and imminent threat to the claimant's life. Nevertheless, a majority of 4:1 took the view that the application of the *Hill* principle defeated the claim through the defensive practice argument.[70] As a result, no duty of care was owed by the police to the claimant. Interestingly, however, the court was of the opinion that the present case involved a much closer relationship of proximity than that of *Hill*. In *Smith*, there was one individual seeking protection from the police. *Prima facie,* he presented a credible account of severe threats. The individual was thus not part of an indeterminate group compared to the victim in *Hill*. Consequently, the proximity relationship is very different in *Hill* and *Smith*. Nonetheless, the court refused to undertake any kind of critical assessment of the *Hill* principle, choosing instead to 'bluntly uphold its validity.'[71] Even considering the development in the case law from the decision in *Osman,* the court believed a reassessment of the *Hill* principle was not necessary and placed substantial reliance on the decision in *Brooks* which maintained that the *Hill* principle was still the default authority.

Significantly, however, Lord Phillips admitted that he had arrived at his decision with some hesitation, being of the opinion that the facts of *Smith* came close to being outside the remit of the *Hill* principle.[72] In addition, Lord Carswell conceded that the facts of *Smith* 'tested the principle severely.'[73] It could be argued that Lord Bingham's dissenting judgment was the reason their Lordships expressed these reservations. It is submitted he made a respectable attempt to narrowly confine the *Hill* principle. He would have attached a duty based on what he labelled 'the liability principle' which aimed to address an 'apparent lacuna in the law.'[74] It stated that:

[70] Wilberg (n 22) 442.
[71] McIvor (n 13) 139.
[72] *Smith* (n 60) [101].
[73] ibid [107].
[74] Yong (n 5) 138.

> "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."[75]

Prima facie, the facts of *Smith* would satisfy this test on the basis that the claimant had supplied the police with evidence of threats from an identified third party. In addition, there was a relationship of close proximity between the police and the claimant due to the various face to face meetings, which imposed an assumption of responsibility.

Lord Bingham believed his 'liability principle' was not at odds with the decisions in *Hill* and *Brooks.*[76] While he accepted these decisions were correct on their own facts, he was reluctant to accept that they conferred a blanket no-liability rule. This view resonates with Lord Browne-Wilkinson's confirmation of Lord Bingham's statement in *X v Bedfordshire County Council* that 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied.'[77] Unfortunately, the majority of the Lords did not buy into the 'liability principle.' Lord Phillips adopted an intermediate position. He clearly recognised an injustice and seemed reluctant to apply the rule in *Hill* and *Brooks.*[78] His Lordship, however, was not convinced that the 'liability principle' was the answer. He considered the question of whether the principle would apply if the location but not the identity of the third party were known and asked why the principle was limited to a threat to life, but did not extend to a threat to property.[79] It is submitted that these are relevant weaknesses of the principle which raises the question of whether it can sit alongside the decisions in *Hill* and *Brooks.*

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[75] *Smith* (n 60) [44].
[76] ibid [45].
[77] [1995] 2 AC 633 at 749. See also *Jones v Kaney* [2011] UKSC 13 *per* Lord Dyson at [108].
[78] *Smith* (n 60) [98].
[79] ibid [100].

Nonetheless, it is the present author's opinion that Lord Bingham was correct to establish liability on the facts of *Smith.* The notion of proximity is what should be regarded as significant. Unfortunately, the court in *Smith* did not address the proximity issue directly – though it believed it to be satisfied by the facts – as it focused exclusively on the public policy concerns. It would appear that the idea of proximity is being interpreted in a restrictive manner where victims – who are clearly identifiable as being at risk of immediate harm – are not successful in their claims due to the adherence to policy concerns: mainly the defensive practice argument.[80] Until *Hill* and *Brooks* are meaningfully challenged, claims will remain unsuccessful.

Part Two: *Michael v Chief Constable of South Wales Police:* A useful clarification of the law?

A. *Michael:* An opportunity to extend the duty of care?

Until now, it is clear that the *Hill* principle has been interpreted in a way that has caused numerous cases to fail primarily due to the policy concerns imposed by the courts. The injustices that follow from this adherence are patent in cases such as *Smith*. In 2015, however, there seemed to be a shift from utilising policy rather than principle to dismiss a claim when the Supreme Court delivered its much-anticipated decision in *Michael v Chief Constable of South Wales Police.*[81] This case tackled the situation of whether a duty of care should be owed by the police to a victim of murder due to their negligence in handling an emergency call. Nevertheless, standing in the way of the recognition of a duty of care was *Hill*. However, a key detail in *Michael* distinguishing it from *Hill* was that the police had been advised of the identities of both the murderer and the victim.

[80] See Jenny Steele and David S Cowan, 'The Negligent Pursuit of Public Duty—A Police Immunity?' (1994) Public Law 4; see also Wilberg (n 22).
[81] [2015] UKSC 2.

The court in *Michael* was presented with evidence that the increasing instances of domestic violence could add weight to distinguishing *Hill*.[82] It was, however, held that no exception was to be made to the common law to encompass the facts of *Michael*.[83] Although statistics concerning domestic violence were alarming, they did not compel the court to create a new category of duty of care.[84] The facts of *Michael* are as follows. The victim, Joanna Michael, was killed by her former partner when he discovered she had had an affair. Before the murder, he indicated to Ms Michael that he would return to her home and kill her. Ms Michael called 999, however, although she lived within the remit of South Wales Police, her call was, for some reason, put through to the Gwent Police call centre. Here the call handler indicated to Ms Michael that the call would be passed to South Wales Police and graded at the highest priority with a near immediate response time. For unknown reasons, the call handler at South Wales Police graded the call at a lower priority level leading to a delayed response time in which instance Ms Michael was already dead. Had the call been graded appropriately, the police would have arrived within minutes and Ms Michael would likely not have been murdered.

A majority of five out of seven judges (Lord Kerr and Lady Hale dissenting) believed the police owed no duty of care to the murder victim. Lord Toulson delivered the leading judgment and ultimately reasoned that the common law does not generally impose liability for failing to control the actions of third parties – the police were thus held not to be liable for pure omissions.[85] Lord Toulson, however, did not examine the issue of whether the omissions principle was justified because neither party questioned it. Goudkamp emphasises

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[82] HM Inspectorate of Constabulary, *Everyone's Business: Improving the Police Response to Domestic Abuse* (London: HMIC 2014). Kate Paradine and Jo Wilkinson, *Protection and Accountability: The Reporting, Investigation and Prosecution of Domestic Violence* (London: HMIC 2004).

[83] *Michael* (n 81) [114] (Lord Toulson).

[84] Steve Foster, 'Police negligence and victims of crime: the survival of the rule in Hill' (2015) 20(1) Cov LJ 67, 70.

[85] *Michael* (n 81) [97]. For discussion of the general rule see Natalie Gray and James Edelman, 'Developing the law of omissions: a common law duty to rescue?' (1998) 6 Torts Law Journal 18.

that whether the decision in *Michael* is to be considered the correct one is reliant on the justifiability of the omissions principle.[86] It is, however, tempting to see the court's decision in *Michael* as simply echoing what the House of Lords said in *Hill,* and then again in the joint appeals of *Van Colle* and *Smith,* that the police owe no duty of care to protect potential victims of crime from harm by third parties.[87] These cases all centred on public policy considerations as justifying no duty. Lord Toulson in *Michael*, however, mainly avoided invoking public policy considerations in reaching his conclusion[88] and was insistent that principle, not policy, should ultimately determine the outcome of the case.[89]

In addition, these prior authorities considered the immunity of the police as a rule rather than an exception.[90] The word 'immunity' – initially used by Lord Keith in *Hill* – posed particular difficulties for Lord Toulson when delivering his judgment in *Michael.* He viewed the terminology as 'not only unnecessary but unfortunate.'[91] Lord Toulson reasoned that in *Hill* and indeed *Michael,* the police were not singled out for special treatment which is what he considered the word 'immunity' to suggest. It is submitted that Lord Toulson offered a fairly comprehensive evaluation of the main issues raised in *Michael* as justifying not imposing a duty. Nevertheless, some reasons do not stand up to scrutiny. Analysis is necessary in order for the law to have an opportunity to develop in the future.

First of all, the idea that an individual is not liable for the conduct of third parties carries with it two notable exceptions. The first is where the defendant was in a position of control over the third party, liability will follow;[92] the second is where the defendant assumes

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[86] James Goudkamp, 'A Revolution in Duty of Care?' (2015) 131 LQR 519, 524. A discussion of the omissions principle will be provided in Part 3.

[87] Nicholas McBride, 'Michael and the future of tort law' (2016) 32(1) PN 14, 15.

[88] *Michael* (n 81) [121] – [122].

[89] ibid [115] – [116]. However, this return to principle has not boded well with some: see Tofaris and Steel (n 17). The arguments in this paper will be discussed further in Part 3.

[90] Yong (n 5) 136.

[91] *Michael* (n 81) [44].

[92] Lord Toulson referenced *Dorset Yacht Co Ltd v Home Office* (n 9) as a classic illustration of this exception: *Michael* (n 81) [100].

responsibility for the claimant.[93] This situation encompasses a duty to take positive action in such relationships of contract or between employer and employee.[94] Applying the first exception to the facts in *Michael,* the former partner never came under the control of the police so this was dismissed. Lord Toulson held that the second exception was also not satisfied as the call handler had not given any mention as to how quickly the police would arrive.[95]

Building on this point, it would appear that the circumstances where someone will assume responsibility for another individual are, according to Goudkamp, 'far narrower than has previously been thought.'[96] On behalf of Ms Michael, it was submitted that a relationship of proximity existed between the police and Ms Michael because she relied on them to protect her as there existed an immediate threat to her life. Lord Toulson, however, rejected this line of argument and believed the police neither knew nor ought to have known of the imminent risk to the life of Ms Michael – it was not apparent on the basis of the phone call. Thus, the call handler's statement to Ms Michael that she should keep the line open did not, according to Lord Toulson, amount to an undertaking that help was on its way.[97] The case is very different from *Kent v Griffiths*[98] where the call handler gave misleading assurances that an ambulance would be arriving shortly. This distinction between the two cases seems superficial however. Regardless of which emergency service is required by an individual, they are relying on the service in their time of need, often when there are no other alternatives. Yong specifies that it would be unfair to the public if the law recognised that the emergency services could 'effectively shirk off its duties to respond quickly by omitting any reassurances in its call.'[99] What appears to have emerged from *Michael* is that the police will assume responsibility when an explicit statement is provided that the police

[93] The principle articulated under *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465 was used as the fundamental example: *Michael* (n 81) [100].
[94] Lord Toulson acknowledged the list was not exhaustive: *Michael* (n 81) [100].
[95] *Michael* (n 81) [138].
[96] Goudkamp (n 86) 523.
[97] *Michael* (n 81) [138].
[98] [2001] QB 36.
[99] Yong (n 5) 137.

will arrive soon. It is argued here, however, that this is problematic. Whether an assumption of responsibility is owed will depend on the nature of the words used. Consequently, Goudkamp believes the assumption of responsibility concept is restricted 'within very narrow bounds.'[100] Lord Toulson's approach seems to leave the assumption of responsibility exception 'hostage to the precise words used.'[101] Ms Michael surely understood police officers would arrive speedily, thus it is submitted the requirement is unsatisfactory.

The judgment from Lord Toulson appears to favour protecting the police from defending actions rather than providing victims with adequate protection under law. It is obvious that the 'fear of the floodgates looms large.'[102] In other words, allowing the action to succeed in *Michael* would encourage many claimants to take action against the police in like circumstances. However, this seems contrary to an area of case law which has been developing which does not accept the argument of the fear of litigation in prohibiting the courts from imposing liability. For example, solicitors have had immunity removed after decades of protection.[103] Lord Toulson rejected extending the duty of care to encompass Ms Michael's position because he felt uncomfortable deciding how resources should be allocated for victims of domestic violence that might impact on other areas of spending. It has, however, rightly been pointed out by Brooman that Parliament could step in and overturn the court's decision if it decided it were necessary.[104] Lord Toulson's decision not to extend the duty owed by the police based on Ms Michael's circumstances is a serious setback for domestic violence victims and the protection afforded to them.

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[100] Goudkamp (n 86) 523.
[101] ibid.
[102] Simon Brooman, 'Domestic Violence, Judicial Austerity and the Duty of Care' (2015) 31(3) PN 195, 197.
[103] *White v Jones* [1995] 2 AC 207.
[104] Brooman (n 102) 197.

i. An alternative to the financial prudence approach

An alternative to the 'austerity policy approach'[105] adopted in Lord Toulson's judgment was provided by Lord Kerr who represented the minority in *Michael*. He took the view that a duty imposed on the police should be recognised and that they must 'take action to protect a particular individual whose life or safety is, to the knowledge of the police, threatened by someone whose actions the police are able to restrain.'[106] He detailed a refined version of Lord Bingham's 'liability principle' first developed in *Smith* which provided that if an individual supplied personalised information about an imminent attack to anyone, the police would owe a duty of care to that victim because they had been made aware of specific information and therefore had the capability to prevent the attack.[107] Specific and personalised information extracted from the facts of each individual case is what is essential in order to establish the degree of proximity between the police and the victim.[108] It is submitted that this was crucially lacking in Lord Bingham's 'liability principle.' Lord Kerr believed that the fact that the identity of the ex-partner was known, and that Ms Michael was his sole victim, was enough to satisfy the proximity relationship between Ms Michael and the police.[109] The circumstances in *Michael* were thus entirely avoidable so there appears to be no reason why the police should not be held responsible following their actions – or lack thereof – in the name of justice. It is submitted that the focus on proximity by Lord Kerr should be commended. The factual relationship between the police and the claimant would be the guiding factor resulting in the policy considerations not being the prominent consideration to decide the case. The overarching problem with Lord Kerr's test is, however, its high fact dependency meaning a close examination of the circumstances is needed.[110] This is perhaps, *prima facie*, not a

[105] ibid 198.
[106] *Michael* (n 81) [175].
[107] *ibid* [168].
[108] Yong (n 5) 138.
[109] *Michael* (n 81) [173].
[110] Richard Hyde, 'The Role of Civil Liability in Ensuring Police Responsibility for Failures to Act After Michael and DSD' (2016) 22(1) EJoCLI 1, 18.

definite weakness as it would allow more cases to have a greater chance to succeed. It would alter the result in *Michael* and *Smith* but arguably not *Hill.*

Lord Toulson, however, refuted this test of proximity and believed it was circular in the sense that it requires it to be established that the relationship between the parties has sufficient proximity to amount to one of proximity.[111] Consequently, it 'provides no yardstick for answering the question that it poses.'[112] Lord Kerr sought to defend his test and, while he acknowledged the circularity of the test, he specified that circularity affects 'any test of proximity and…many other bases of liability.'[113] Yong believes this is perhaps an indication that the test 'retains utilitarian value for determining liability'[114] so should not be dismissed solely on this point. It is submitted, however, that Lord Kerr's justification for his test is disappointing. If proximity cannot be defined without circularity, then the test should be discarded. As pointed out by Goudkamp, the existence of other circular tests should not justify the adoption of a new circular test.[115] Despite strong support from Lord Kerr, it seems unlikely that a proximity test of this nature will be embraced in the near future. The other dissenting judgment from the court came from Lady Hale who supported the analysis of Lord Kerr. She believed that the policy reasons said to preclude a duty in a case such as this are diminished by the fact that the police already owe a common law, positive duty in public law to protect members of the public from harm caused by third parties.[116] The fact, however, that two members of the Supreme Court dissented from the majority decision does not settle the matter entirely.[117]

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[111] *Michael* (n 81) [133].
[112] *ibid* [134].
[113] ibid [145].
[114] Yong (n 5) 138.
[115] Goudkamp (n 86) 522.
[116] *Michael* (n 81) [195].
[117] Joanne Conaghan and Clare Torrible, 'Policing, professionalism and liability for negligence' (2017) 33 PN 86, 88.

B. The '*Caparo* test' as a framework to impose a duty of care on the police

The courts have often sought to utilise a broad encompassing formula to justify attaching liability. Inevitably, there are situations where it is not justifiable to impose a duty, or a particular set of circumstances is forcibly applied to the formula which produces anomalies and unfairness. In *Michael,* Lord Toulson acknowledged the value of seeking 'some universal formula or yardstick.'[118] He cited the well-known case of *Caparo Industries Plc v Dickman*[119] where Lord Bridge identified a three-part test, namely:

1. damage must be reasonably foreseeable as a result of the defendant's actions;
2. there must be a relationship of proximity between the parties; and
3. it must be fair, just and reasonable to impose liability on the defendant.[120]

Policy concerns have traditionally been included at the fair, just and reasonable stage. The preceding case law discussed in this paper relied to a large extent on policy concerns and the *Hill* principle as justification not to impose liability on the police. Thus, the *Caparo* test was subsequently not utilised to impose a duty of care. It is submitted, however, that since the policy concerns advocated by Lord Keith in *Hill* do not stand up to scrutiny and occasionally no policy concerns even arise in certain circumstances, perhaps the *Caparo* test can develop the law away from primarily focusing on policy concerns to strike out a claim.

Lord Bridge, however, opined in *Caparo* that there exists no single general principle that can be applied to all situations to determine

[118] *Michael* (n 81) [103].
[119] *Caparo* (n 4).
[120] ibid 617-618 (Lord Bridge).

whether a duty of care is owed.[121] As a result, if a case is brought with different facts, the courts should be cautious to apply rules from previous comparable cases. Lord Toulson in *Michael* understood Lord Bridge as suggesting that these parts of the test were 'little more than labels'[122] in deciding whether a duty of care is to be owed. Unfortunately, the test formulated by Lord Bridge has been interpreted as a 'blueprint' for deciding cases despite his stressing that it was not intended to be such a thing.[123]

Ultimately, there are two interpretations as to Lord Toulson's treatment of the *Caparo* test in *Michael*. Perhaps he believed the test should be discarded altogether. Another less sweeping interpretation by Goudkamp is that it 'should be applied much more cautiously than it has been to date.'[124] Either way, the fact that Lord Toulson did not invoke the test in reaching his conclusion in *Michael* is significant considering the impact the test has had on many previous cases. *Caparo* was decided 28 years ago so for Lord Toulson to provide this treatment of the test is a welcome development in the law. This will hopefully encourage future courts to focus on previous authorities other than the *Caparo* test as a starting point. Purshouse believes if Lord Toulson's judgment modifies this long-standing interpretation of *Caparo*, it is an historic opinion in its own right.[125]

A prime example of a court opining that the three-part *Caparo* test should be applied in every case concerning whether a duty of care should be owed was the Court of Appeal's decision in *Robinson v Chief Constable of West Yorkshire Police*.[126] This case concerned injury to a claimant by a positive act by the police and is an indication of how, by misinterpreting *Caparo*, the court managed to reach a

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[121] *ibid* 617. See also Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 PN 206, 206 where he states, 'the days of a general conception of duty identified by a simple "test" are over.'
[122] *Michael* (n 81) [106].
[123] *ibid*.
[124] Goudkamp (n 86) 521.
[125] Craig Purshouse, 'Arrested Development: Police Negligence and the Caparo 'Test' for Duty of Care' (2016) 23 Torts Law Journal 1, 16.
[126] [2014] EWCA Civ 15.

decision 'inconsistent with authority, principle and policy.'[127] Lady Justice Hallett held that all cases determining whether a duty of care exists require consideration of the three-stage *Caparo* test as the starting point.[128] She sought to justify her view by stating that the *Caparo* test is generally applied in all recent authorities.[129]

While many cases have used the *Caparo* test, this is acceptable because they raise novel legal issues. *Smith v Ministry of Defence*[130] is an example of such a case. Here the defendant had not caused personal injury but had rather failed to provide protective equipment to British soldiers. Previously, no liability attached but the claimants in this case sought to recognise a duty in this respect. Consequently, it is justified for the Supreme Court to consult the *Caparo* test in such circumstances in order to ascertain whether a duty is to be owed. Lady Justice Hallett's reference to the aforementioned case thus fails to support her argument that the three-stage test in *Caparo* was suitably used in *Robinson*.[131] A defendant clearly owes a duty of care to avoid causing physical injury to an individual by a positive act provided the damage was foreseeable so an analysis of the *Caparo* criteria was unnecessary in this case. Post-*Robinson,* the *Caparo* test continued to be misapplied by the courts.[132]

Thankfully, at this time, the Court of Appeal's ruling in *Robinson* has been reversed by the Supreme Court.[133] Lord Reed stated that the *Caparo* test does not apply to all claims in negligence.[134] He reinforced the understanding that it only applies in novel cases, where established principles do not provide an answer. Consequently, the courts would need to establish whether it was 'fair, just and reasonable' in the particular circumstances.[135] Since

[127] Purshouse (n 125) 8.
[128] *Robinson* (n 126) [40].
[129] *ibid* [41].
[130] [2014] AC 52.
[131] Purshouse (n 125) 11.
[132] *Davis v Commissioner of Police of the Metropolis* [2016] EWHC 38 [106] (Nicol J).
[133] *Robinson* (n 126).
[134] *ibid* [21].
[135] *ibid* [27].

Robinson drew on established principles of negligence, there was no need to apply the *Caparo* test.[136] This is a welcome judgment which clears up the confusion caused by the Court of Appeal in deciding whether to apply *Caparo.* Since this question has reached the Supreme Court, hopefully the issue will now be put to rest.

Returning to *Michael,* the apparent shift from policy to principle as expressed by Lord Toulson could suggest a deviation from dismissing a case solely under policy considerations to focusing instead more on the principles of the law – namely, that the police are not liable for omissions. The procedure in order to decide whether a duty is to be owed by the police was correct in *Michael* in so far as Lord Toulson considered the principle of the law – namely liability for pure omissions – before considering any public policy considerations. In the next section, however, it is submitted that the omissions principle perhaps is not a sufficient mechanism to curb liability as has previously been thought. Once these issues are clarified, the law may be able to develop and provide future claimants with a remedy under the law of negligence.

Part Three: Time for Change?

A. Difficulties associated with the omissions principle

Under current law, litigants are prevented from successfully claiming against the police in negligence for two reasons. It is not only the *Hill* principle that denies a duty of care; such a duty is also rejected by the omissions principle discussed by Lord Toulson in *Michael.* The present author agrees with Lord Kerr in *Michael* that the rules relating to liability for omissions should not restrain the law's development in this regard.[137] Subsequently, it will be argued that the omissions principle should not apply equally to private

[136] *ibid* [30].
[137] *Michael* (n 2) [175].

individuals and public authorities despite Lord Toulson in *Michael* opining that the principle applies equally to both.[138]

Omissions liability – in particular liability of third parties – has always been a problematic area of law for the English courts as it involves imposing liability on the wrong party.[139] In these cases, there is always someone more blameworthy than the defendant – the actual harm-doer.[140] The omissions principle is neatly defined by Tofaris and Steel[141]: Person A is not under a duty to prevent harm occurring to person B through a source of danger not created by A. There are exceptions to this including where A has assumed responsibility to protect B. In the context of the police, A will be under a duty where A's status creates an obligation to protect B from that danger. The police, arguably, possess a special status in society and satisfy this exception as they are the 'specialist repositories for the state's monopolisation of legitimate force in its territory.'[142]

The omissions principle in relation to individuals has raised prominent discussion in English courts. In *Yuen Kun Yeu v A-G of Hong Kong*, Lord Keith stated that it would be absurd to impose liability in negligence on 'one who sees another about to walk off a cliff with his head in the air and forbears to shout a warning.'[143] While society does encourage selfless behaviour to aid others, the law does not punish those who choose not to act in this way.[144] It is fair to say that individuals are primarily responsible for what they do and not for what others do. If individuals are held legally responsible for failing to prevent the actions of others, this distinction is compromised.[145]

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[138] ibid [101].
[139] Ever since Lord Atkin's neighbourhood test was proposed in *Donoghue v Stevenson* [1932] AC 562, 580 the courts have struggled with this.
[140] McIvor (n 13) 141.
[141] Tofaris and Steel (n 18) 128.
[142] Robert Reiner, *The Politics of the Police* (4th edn, Oxford 2010), 7.
[143] *Yuen Kun Yeu v A-G of Hong Kong* [1988] AC 175, 192.
[144] Yong (n 5) 130.
[145] Tofaris and Steel (n 18) 131.

In support of the omissions principle, Lord Hoffmann in *Stovin v Wise* said that 'it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect.'[146] Tofaris and Steel questioned this in relation to public authorities where they negligently fail to assist an identified individual who is at risk of harm. A private individual's freedom is paramount in allowing them to continue to lead an independent life. By contrast, a public authority's freedom is dependent on fulfilling its functions in society – in the case of the police, protecting the public from the actions of third parties.[147] Such protection of autonomy for private individuals thus should not apply to the police whose duty it is to safeguard the public. The police's significant resources and specialist training in comparison with those of the general layperson should distinguish them from being protected under the omissions principle.[148]

Lord Hoffmann, however, further sought to defend the omissions principle in *Stovin v Wise* by formulating the 'why pick on me?' argument.[149] This states that it is unjust to single out one person for failing to protect another when there are others who equally failed to do so. While Lord Hoffmann did acknowledge the difficulties of this argument in relation to public authorities[150], it is submitted that the argument has inherent flaws. It does not apply where only one person has negligently failed to provide assistance as there would be no other person to turn to. In addition, why should the number of wrongdoers affect the responsibility of any particular wrongdoer? For many public authorities, there is a justified reason to single them

[146] *Stovin v Wise* [1996] AC 923, 943. For an in-depth analysis of the case, see Jane Convery, 'Public or Private? Duty of Care in a Statutory Framework: Stovin v Wise in the House of Lords' (1997) Modern Law Review 559.

[147] Tofaris and Steel (n 18) 130. In *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270, the House of Lords held that the police have a duty to take all steps which appear necessary for keeping the peace, for preventing crime and for protecting from criminal injury. This was a duty recognised by the common law rather than imposed by statute.

[148] Dermot PJ Walsh, 'Liability for Garda Negligence in the Prevention and Investigation of Crime' (2013) 49 Irish Jurist 1, 19.

[149] *Stovin* (n 146) 944.

[150] ibid 946.

out where they have been tasked by statute with taking steps to prevent harm to an individual.[151]

B. Ineffectiveness of the current law and attempts at reform

The discussion in the preceding subsection thus illustrates that the omissions principle should not equally apply to private individuals and public authorities. However, the definitive question of whether or not a duty of care should be imposed on the police under the common law of negligence is still left open for discussion. While the *Hill* policy concerns continued to take centre stage until *Michael,* it is submitted that they should no longer hold as much weight. The current landscape of policy is constantly changing and the concerns expressed by Lord Keith in *Hill* should not continue to define the issue. Instead, the courts should consider policy factors that arise on the facts of the specific case.[152] Yong has argued that not considering the individual features of a case is a 'betrayal of the first priority of the law to seek to rectify wrongs.'[153] When the police have been furnished with specific information and there exists a sufficient degree of proximity allowing them to prevent the attack, it seems odd that the law is constrained by its own rules to provide a remedy.[154]

As mentioned previously, the status of the police in society is a vital aspect in discharging their main functions. The police and an individual occupy a different type of relationship from that of an individual with any other public authority, or even other branches of the state.[155] Consequently, it could be argued perhaps the police should not be included with other public authorities providing services due to the nature of their functions when considering whether negligence principles should apply. The law, however,

[151] Tofaris and Steel (n 18) 133.
[152] ibid 152-153.
[153] Yong (n 5) 135.
[154] ibid 139.
[155] Walsh (n 148) 19.

compels an individual to entrust their safety to the police which has been labelled by Tofaris and Steel as a 'relationship of dependence' between the police and any person who requires assistance.[156] But if a remedy is not readily available, this may encourage 'self-help' by individuals in their time of need.[157] This relationship further emphasises the special status of the police in society and thus negligence liability should attach if they have failed in honouring their side of the relationship.

Claims against the police are more appealing for victims of crime as the police are guaranteed to have substantial finances in order to fulfil a claim. The third party individual may, in many instances, not be worth suing due to limited finances.[158] This places the police 'at risk of speculative litigation in a manner which most individuals and private-sector companies are not.'[159] It is submitted, however, that this does not lead to the conclusion that the police should never have a duty imposed on them. While Lord Kerr's proximity test in *Michael* was circular, the idea of utilising proximity and considering the nature of the information available to the police as the benchmark in assessing claims coupled with the police's special status means that there is no reason why liability should not exist in these circumstances. The police, like individuals, owe a moral duty to take practical steps to prevent reasonably foreseeable, avoidable physical suffering.[160]

One of the main functions of tort law in relation to public authorities is to hold them to account for their actions. The same is true for an action against the police.[161] Chamberlain stipulates that the police must explain, in public, their conduct relative to the facts

[156] Tofaris and Steel (n 18) 146.
[157] Walsh (n 148) 20.
[158] Tofaris and Steel (n 18) 141.
[159] Basil S Markesinis and others, *Tortious Liability of Statutory Bodies* (Oxford 1999), 86.
[160] Tofaris and Steel (n 18) 142.
[161] ibid.

of a case and as part of the adversarial process.[162] Spencer believes often the real reason why victims and relatives raise an action in tort is the 'desire for a proper investigation into what went wrong, with the possibility of a public condemnation at the end.'[163] The alternative remedies to tort available to a claimant include seeking compensation from the Criminal Injuries Compensation Scheme. This compensation is, however, considerably smaller in comparison with tort damages and does not lead to the police acknowledging their failures.[164]

Another possibility for a claimant is to pursue a statutory remedy under the Police Reform Act 2002, amended by the Police Reform and Social Responsibility Act 2011. This allows individuals to complain about the conduct of police officers.[165] Most of the claims, however, are dealt with internally with the result that the process lacks the independence of judicial analysis.[166] Consequently, Clayton and Tomlinson observe that the chances of an individual being successful in raising this complaint are substantially lower than succeeding in a civil action.[167] Lord Steyn in *Brooks* also acknowledged that this statutory remedy is inferior to the remedy in negligence.[168] It is thus patent that individuals will not receive an adequate remedy for police negligence if a duty is not imposed on the police. As a side note, it is perhaps important to observe that since the creation of Police Scotland in 2014, a new independent body called the Police Investigations and Review Commissioner (PIRC) was set up. This is specific to Scotland and is not connected to

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[162] Erika Chamberlain, 'Negligent Investigation: Tort Law as Police Ombudsman' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Oxford 2009) 283.

[163] JR Spencer, 'Suing the Police for Negligence: Orthodoxy Restored' (2009) CLJ 25, 26–27.

[164] Tofaris and Steel (n 18) 138.

[165] Richard Clayton and Hugh Tomlinson, *Civil Actions Against the Police* (3rd edn, Sweet & Maxwell 2004), part 2 provides detailed information of this remedy. See also Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn, Cambridge 2012) 417.

[166] Robert Stevens, *Torts and Rights* (Oxford 2007) 2. See also Graham Smith, 'Police Complaints and Criminal Prosecutions' (2001) 64 MLR 372.

[167] Clayton and Tomlinson (n 165) 74.

[168] *Brooks* (n 15) [31].

the police and so could offer greater independence than that enjoyed by investigations south of the border.[169]

The courts are thus faced with the arduous task of balancing the interests of a victim of crime seeking a remedy in negligence against the police on the one hand and allowing the police appropriate protection from carrying out their main functions on the other. The special status of the police creates inherent difficulties that other public authorities do not have to contend with when considering how to balance the competing interests. Since they operate for the interests of the whole community, some decisions may be taken in the 'heat of the moment in response to dangers.'[170] Lord Toulson in *Michael* suggested that any reform in this area of the law should be left to Parliament.[171] Allowing the common law to develop on its own terms would inevitably introduce uncertain rules and different judicial interpretations.[172]

In contrast to Lord Toulson's opinion, leaving this matter in the hands of legislative bodies has proven to be unsuccessful in the past. In 2008, the Law Commission published a Consultation Paper which detailed that the underlying rationale of negligence to provide compensation to those who suffer loss should apply equally to public authorities and private individuals.[173] Although the Paper activated a substantial body of academic and professional interest, it was ultimately considered there was no empirical support of the defensive practice argument in relation to the police carrying out their main functions. The Paper was criticised by Walsh as 'failing to engage with the available research.'[174] Its evidence-based approach, however, has been praised by Morgan as offering an alternative to

[169] Police Investigations and Review Commissioner <https://pirc.scot> accessed 19th March 2018.
[170] Walsh (n 148) 18.
[171] *Michael* (n 2) [130].
[172] Yong (n 5) 140.
[173] Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 187, 2008).
[174] Walsh (n 148) 8.

the blunt approach of the courts.[175] In a subsequent paper published in 2010, the Law Commission decided to abandon its attempt to provide guidance for reform in this area because the Government was 'firmly opposed' to its recommendations.[176] This decision was noted in the case of *Mohammed v Home Office* where Sedley LJ deemed it troubling that the Law Commission was forced to abandon this project simply because it would require difficult decisions for the government to make.[177] It is an unfortunate reality that any reform in this area proposed by the Law Commission is unlikely to be instigated in the foreseeable future.

Although the efforts of the Law Commission appear to be dormant for now, it is submitted that the law should develop on a case by case basis and not through statutory intervention. This would result in much-needed improvements in the law in areas such as domestic abuse.[178] Legislation would provide strict rules and a degree of certainty but unfortunately this would be at the expense of numerous individual cases. Affording judges a degree of flexibility in considering relevant policy concerns, previous authorities and whether the case raises a novel duty of care issue would undoubtedly enable them to achieve justice in individual cases.[179] The continued resort to policy has proven to be unnecessary and unjust to a multitude of claimants most crucially in *Brooks* and *Smith*. The decision in *Hill* has expanded the protection of the police in an unprecedented manner and it is time for the rule to be contained within its boundaries. Lord Toulson's fleeting discussion of policy concerns in *Michael* is a welcome deviation. While the decision in *Michael* has perhaps delayed any further cases dealing with negligence of the police, it is submitted that the issue is far from over.

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[175] Jonathan Morgan, 'Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics' (2009) 125 LQR 215.

[176] Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, 2010), para 1.3. Lord Hoffmann, 'Reforming the Law of Public Authority Negligence' Bar Council Law Reform Lecture (17th November 2009) was also firmly against the proposal.

[177] [2011] 1 WLR 2862 at [23].

[178] *Michael* (n 2) [198] (Lady Hale).

[179] Walsh (n 27) 52.

In the future, there will undoubtedly be a challenge to this area of the law.

While this paper is fundamentally focused on common law negligence of the police, it is important to note that a claim under human rights appears to offer an avenue for individuals of crime to claim against the police. While the court in *Van Colle* ruled out a claim under Article 2 of the ECHR, the very recent Supreme Court ruling in *Commissioner of Police of the Metropolis v DSD*[180] appears to suggest an action under Article 3 (freedom from degrading and inhuman treatment) is available in certain circumstances. This appeal found the police liable to the victims of serial rapist John Worboys for serious operational failures in their investigation. While the case was concerned with human rights, the court considered the common law of negligence briefly and still maintained that a claim should be unsuccessful under this action. In addition, Lord Kerr believed the no-liability common law rule should not extend to Convention rights.[181] This issue was considered more fully by the court in *Smith*.[182] Lord Brown observed that Convention rights have different objectives from civil actions. Whereas civil actions are intended to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards. The difference in purpose of the two has led to different time limits and different approaches to damages and causation.[183] The strength of opposition by the English courts against harmonisation suggests that it will not be considered soon due to the differing functions of the actions.

If the common law is not going to develop on the Convention rights to enable actions to succeed, this is not a worrying issue. It has been submitted throughout this paper that the common law rule of no-liability for the police is unsatisfactory. The unfounded evidence on which the policy reasons rely coupled with the fact that the police

[180] [2018] UKSC 11.
[181] *ibid* [66] – [72].
[182] *Smith* (n 60) [81] - [82] (Lord Hope) and [98] - [99] (Lord Phillips).
[183] *Smith* (n 60) [138]. For a more thorough discussion of the interaction between the two causes of action see Jenny Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' [2008] CLJ 606.

undertake a special role in society to safeguard the wellbeing of the public should allow claims to succeed. Albeit the courts need to be aware of speculative litigation, this can be easily contained by undertaking an investigation, on the facts of each case, of the proximity between the police and the individual. If there is sufficient proximity and there exists specialised information relevant to the threats and whereabouts of the criminal, there is no reason why the police should not owe that individual a duty to protect them from crime.

Conclusion

The law in relation to negligence of the police can only be described as unsatisfactory. The preceding discussion has indicated that the *Hill* principle has been unnecessarily enlarged to cover cases that should not have been decided under the principle. *Brooks* and *Smith* are stark examples of this. The principle unfortunately clouded this area of law through a blunt upholding of public policy to strike out a claim. Many of the policy grounds do not stand up to scrutiny and many academics hold this view. While some aspects of police investigations require protection, they must be fact specific and only policy concerns that arise should be considered.

Michael was a momentous opportunity for the law to be clarified in this area and while there has been some degree of clarity, the underlying message that there will be no liability for the negligent actions of police officers when carrying out their main functions is clear. This was an excellent occasion to break free from the shackles of *Hill* and develop the law. The facts of *Michael*, *prima facie*, would seem appropriate to attach liability in the circumstances as the police have a duty to protect individuals from crime and when they fail to do this, this does not accord with justice.

Lord Kerr and Lady Hale (in the minority) offered a valiant attempt at opening up the possibility of attaching liability. The court in *Michael* and indeed in the previous authorities are cautious as to opening up the opportunity for speculative claims to be heard. It is submitted that this should not be a driving consideration for courts as an examination of the specific facts coupled with the ordinary

principles of negligence are enough in itself to afford justice to aggrieved claimants. The '*Caparo* test' should only be considered when novel legal issues arise and so should not be the starting point in deciding whether a duty of care is to be owed in all circumstances.

The police operate a special role in society as the body that protects and actively prevents crime and harm to the public. If they fail in carrying out their main functions, they must be held accountable. The omissions principle, therefore, should not apply equally to the police and private individuals. The functions of the police are dependent on fulfilling their role in society so there is no invasion to their freedom if liability for omissions attaches. While it is submitted that private individuals should not be liable for omissions, in the case of the police, it is justified for liability to be imposed on them.

The law of medical negligence duty of care has built up over the years since the fundamental duty of care case of *Donoghue v Stevenson* and, as such, a higher standard of care for doctors is imposed.[184] Perhaps the time has come for the courts to treat the police differently and impose a duty of care of a higher standard on them. In 2018, it could be possible to formulate an argument that the 'neighbourhood principle' enunciated by Lord Atkin in *Donoghue* could have been intended to cover police officers at common law.[185] After all, this case started the concept of duty of care. Lord Atkin's argument could be interpreted as being sufficiently wide to cover a duty of care between the police and a victim of crime. He defines 'neighbour[s]' as 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected'.[186] If the police are furnished with credible evidence that an individual is in danger, it would appear this principle could apply to the police. If this is accepted, a duty of care could be established at the outset with determination on whether the actions or inactions of the police amount to a breach. Claimants will have a greater chance of being successful in their actions and a long-

[184] This area of the law dates back all the way to *Hunter v Hanley* [1955] SC 200. The decision has since been followed by English cases whose decisions were very persuasive in subsequent Scots law.
[185] *Donoghue* (n 139) 580.
[186] *ibid*.

standing problem with the law will have moved on towards a satisfactory conclusion.

Corporate Homicide/Manslaughter; Symbolic or Purely Instrumental?

SOPHIE HOFFORD*

Abstract

The unlawful killing of a human being usually results in a criminal prosecution. However, rarely is anyone held liable for deaths that have been the result of a company's negligence. The previous regulatory approach by means of Health and Safety Regulations did little to ensure the safety of workers. This article looks to show that the introduction of the Corporate Manslaughter and Corporate Homicide Act 2007 has done equally little to bring companies back into line with safety regulations. The 2007 Act is unenforceable in practice and this article reveals that it faces the same issues that the criminal law of culpable homicide, gross negligence and involuntary manslaughter found when trying to prosecute corporations. The structure of a company makes it difficult to impose criminal sanctions on individuals within it who have made decisions resulting in death. Therefore, a new approach is needed. This article introduces and explores two potential changes; the introduction of more significant penalties, specifically targeting reputation, and the introduction of equity fines.

Keywords: corporate homicide, corporate manslaughter

> "It is forbidden to kill; therefore, all murderers are punished, unless they kill in large numbers and to the sound of trumpets." – Voltaire.[1]

The killing of another human being, whether intentionally, negligently or recklessly, is high on the list of worst offences. If convicted, an individual who kills another will always, with few

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[1] François-Marie Arouet (November 21, 1694 – May 30, 1778), famous for using the pen name Voltaire, was a French writer, deist and philosopher.

exceptions, be punished with a lengthy prison sentence. Companies can also be guilty of unlawful killing, but there are difficulties inherent in the process. Companies, particularly those with complex structures, are often able to take advantage of weaknesses in the law. For example, the Health and Safety regulations under the civil law often result in relatively benign penalties to deter companies from seeking to achieve their goals by risky, unlawful behaviour and practices. Moreover, the criminal law of culpable homicide or manslaughter appears to be inadequate and incapable of enforcement in its application to companies. It was not until the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) that legislation existed to deal with these issues, albeit the Act has achieved a disappointing level of use and successful application.

Over time, health and safety regulations have increasingly imposed themselves and they continue to do so, often being the favoured method by which companies are held to account. The Health and Safety at Work Etc Act 1974 (HSWA 1974) was designed to protect individuals from companies who cut costs by not maintaining standards and not enforcing costly safety procedures. Regulatory law has forced breaches of health and safety that resulted in death into a category where they are not to be regarded as 'pure' crimes and consequently the penalties are proportionately less. Companies have sometimes reached the view that the opportunity cost of breaking regulations is not as great as the cost of complying.

The criminal sanctions already in place (culpable homicide or manslaughter) tend to be unenforceable in the context of corporate responsibility. Many organisations escape responsibility due to the presence of the identification doctrine, which requires a "controlling mind"[2] to be identified behind the offence. Within a large, complex organisation, this has often been unattainable. After a trail of disasters and deaths and very few successful prosecutions, it became apparent that a new criminal

[2] *Transco PLC v HMA* (2004) SCCR 1.

offence was necessary to hold companies accountable for their actions. The CMCHA was enacted to increase penalties and deter companies from ignoring safety. However, there is serious doubt as to whether the 2007 Act has achieved any of those goals. The Act came into force in 2008 but has seen very little use. Little more than ten years have passed since its implementation, but reform of the 2007 Act would already appear well overdue. A key aspect identified in the 2007 Act as an area of improvement is the need for the identification of 'senior management' to be re-evaluated. The wording it has produced appears to lead to the same place, namely a specific individual or group of individuals who are to blame. Furthermore, penalties need to be more punitive and made to fit the resulting human loss of life and a greater regard must be had to those areas that companies respond to: for example, targeting the reputation of the company itself may increase deterrence.

Part 1: The Historic Evolution of Workers' Rights

Built between 1882 and 1890, the Forth Rail Bridge is an iconic structure that has come to symbolise the hard beauty of Scotland. Not so edifying is the fact that 57 bridge workers died during its construction and a further 13 died on the approaches.[3] Of these persons, 38 died as a result of falling; 9 were crushed; 9 were drowned; 8 were struck by falling objects; and 3 died in a fire.[4] More than a century later, one life was lost during the construction of the Queensferry Crossing, just the length of a large tanker further east along the Firth of Forth. Had as many lives been lost in the construction of the Queensferry Crossing, one might well have asked: would the construction company responsible have been held liable in a way that they had not been in the nineteenth century? As

[3] 'Facts And Figures, Forth Bridge, The Forth Bridges' (*Theforthbridges.org*, 2018) <https://www.theforthbridges.org/forth-bridge/facts-and-figures/> accessed 9 January 2018.

[4] 'Facts And Figures, Forth Bridge, The Forth Bridges' (*Theforthbridges.org*, 2018) <https://www.theforthbridges.org/forth-bridge/facts-and-figures/> accessed 9 January 2018.

the years have passed, health and safety regulation, largely for the benefit of construction workers, has stepped to the forefront, but there was once a time when each worker took responsibility for their own safety, until it became apparent that large multinational companies with substantial worth should not be allowed to use the workforce as if it were a collection of replaceable machines, whose lives were easily expended in the pursuit of ever greater profits.

The past attitude that employees assume the risk of their occupation has clearly changed. Corporations and their managers and directors can now theoretically be held liable for work activities which result in death.[5] It can come about through the regulatory approach under the HSWA 1974 and the criminal approach under the common law of culpable homicide in Scotland. More recently the CMCHA has lent its weight to the fight for corporate responsibility.

A. Regulatory approach by means of Health and Safety Regulations

In 20th century Britain, the neglect of health and safety in the workplace had begun to emerge as a cause for concern. There are arguments as to whether this is an issue of the law itself or an issue with enforcement of the law. It is apparent that regulation does not always protect the health and safety of the worker to an adequate degree: large corporate organisations continue to prioritise productivity over costly safety measures. Whilst there are regulations in place that serve to protect the worker, often the punishment for breaching these regulations is less than the cost of complying with procedures and regulations. For the offence of culpable homicide, the party at fault for the negligent death of another person will face severe consequences. For a corporate entity, the faceless management is often exposed to little greater sanction than an easily absorbed monetary fine.

Where companies do not comply with specific health and safety regulations they can be punished by the imposition of

[5] Any activity during the course of employment that inflicts injury or death on an employee, individual or anyone owed a duty of care by that employer.

monetary penalties.[6] It has been argued that the existing system of health and safety regulation offers no real retributive action on corporations as a monetary fine will usually leave them largely unscathed. It appears to some that while a successful prosecution may be achieved under the HSWA 1974 there is a lack of adequate punishment to meet the gravity of the offence. The consequence of this is that companies all too often fail to comply fully with safety regulations until the inevitable catastrophe has occurred.

In 1973, the United Kingdom joined the European Economic Community and in doing so it acknowledged the deference of UK law to European Community law, a step that brought with it an evolution of health and safety regulation.[7] With the advent of the Single European Act in 1987, the UK was obliged to implement a host of health and safety Directives into its own law. Despite the advent of more comprehensive UK legislation and the gradual implementation of European Community directives, disasters continue to occur. In July 1988 the Piper Alpha disaster transformed a multi-million-pound oil platform into a charred wreck beneath the sea. In so doing, it became a turning point for health and safety regulation in the North Sea. This was one of the biggest failures in the management of safety regulation ever witnessed in the UK. In just two hours, 167 offshore workers perished.[8] In the course of the Cullen Inquiry that followed, it became apparent that the platform operator – Occidental, a multinational Texan oil company - had run roughshod over a variety of maintenance and safety procedures.[9] Whilst the principal cause of the disaster was the leak of gas through an untightened valve, there was a catalogue of failings that came together that night, most of which involved some level of poor safety regulation. As with many disasters, it was the concatenation of multiple management failings that resulted in the carnage that

[6] HSWA 1974: for breaches of s 33 the penalty is an unlimited fine.

[7] John Paterson, 'The Evolution Of Occupational Health And Safety Law On The UK Continental Shelf, 1964–2006' (2007) 27 (First Series) Northern Scotland, 147-149.

[8] Kenneth Miller, 'Piper Alpha and The Cullen Report' (1991) 20 Industrial Law Journal 180-181.

[9] ibid 182.

followed. It revealed an environment in which safety had come to take second place, usurped by economic and operational imperatives.[10]

The quality of safety management is fundamental and, in order to work, it must be adopted at all levels and not just within the top tiers. The endemic failure of management to take control of safety regulation and procedures led to a wholesale downsizing of the safety culture within the corporate management organisation, leading to shortcuts taken in the pursuit of increased profits. Lord Cullen stressed in his report that the regulations themselves were not the issue and the HSWA was in fact good law. It was the management and enforcement of the regulations that Cullen considered to have precipitated the disaster. Lord Cullen concluded that leaders of corporations must remember that what they emphasise as important can change the goals within the company:[11] workers will listen to what they say and follow. Lord Cullen examined this effect on attitude in "process safety," in which the consequences were found to be very serious.[12] In many of the disaster cases the general attitude and priority was keeping the process open and running and everything else came second. On Piper Alpha, in simplified terms, there was a blockage of gas which resulted in the failure of Pump B. This would halt all offshore production on the Piper Oilfield unless it (or Pump A) could be restarted. This pressure ultimately forced Piper Alpha workers to reactivate Pump A. The loose valve leaked gas which ignited and exploded moments later.[13] Any safety standards in place were disregarded due to the conflict they had with keeping the rig working. Money took priority.

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[10] William Cullen, 'Piper 25 Conference' (2013).

[11] ibid.

[12] William Cullen, 'Piper 25 Conference' (2013).

[13] National Aeronautics and Space Administration, 'The Case For Safety: The North Sea Piper Alpha Disaster' (NASA 2013) <https://sma.nasa.gov/docs/default-source/safety-messages/safetymessage-2013-05-06-piperalpha.pdf?sfvrsn=3daf1ef8_6> accessed 26 March 2018.

B. The Criminal Approach: culpable homicide, gross negligence and involuntary manslaughter

Under the criminal law there *is* and has been for some time the potential to prosecute corporations. This raises the question as to why there is still an issue of weakening compliance with health and safety regulation? In theory, the offence of culpable homicide in Scotland and involuntary manslaughter in England is available in order to prosecute those in positions of corporate responsibility who appear to have paid lip service to health and safety regulation. However, in practice it is rarely invoked and even less often does it result in conviction. Between 1996 and 2005, the Scottish Government commissioned an Expert Group Report.[14] The report highlighted that there was an issue with the current criminal prosecution system, as it failed to convict any companies that could not already be prosecuted successfully under the Health and Safety regulations. The evidence is that in Scotland from 1996 to 2005 an average of thirty workers, employed and self-employed, were killed at work each year.[15] In the same time period an average of nine members of the public died of work-related activities and there were several hundred deaths a year caused by commercial food poisoning, asbestos exposure, sea fishing industry related accidents and road deaths whilst at work.[16] It is a rarity for anyone ever to be criminally prosecuted for such deaths. It is suggested that the reason behind this failure in the criminal law to attach the crime to a corporate body is due to the legislation being over-reliant on the necessity of identifying the wrongdoing of an individual person.

The difference that exists between companies and individuals is not written into the law. The individual human offences are not tailored to encapsulate the characteristics of an organisation. Corporations are a fairly new concept as it is. In Kyd's Treatise on

[14] Scottish Executive, 'Corporate Homicide Expert Group Report' (Scottish Executive 2005).
[15] ibid.
[16] ibid 2-3.

the Law of Corporations,[17] it is identified that corporations could only act in the capacity for which they were established, and most importantly could not be considered as a moral agent subject to moral obligations, "having neither soul or body."[18] The suggestion was that a corporation could have no moral fault or *mens rea*. Edward, First Baron of Thurlow put it eloquently when he inquired: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"[19]

Frequently, this absence of moral personality has been used as a defence to the casting of any blame upon corporations, albeit behind every company there is a controlling mind: there are individuals making decisions. Nevertheless, those making the decisions are completely detached from the consequences because they will rarely be held solely - and individually - responsible. Between 1992 and 2005 there have been 34 corporate manslaughter prosecutions and only seven have been successful.[20] The requirement of the identification doctrine has been pinpointed as the main obstacle to successful prosecution.

C. The Identification Doctrine

One of the main issues that arises with every prosecution is the need to make an effective identification of the person responsible. Currently, the *actus reus* of culpable homicide requires *mens rea*, a mental element of intention or recklessness. It has become increasingly evident that a non-natural person cannot be guilty of culpable homicide if the *mens rea* or "guilty mind" requirement cannot be proved. *Transco plc v HM Advocate*[21] concerned a gas

[17] Stewart Kyd, *A Treatise on the Law of Corporations*, Vol. 1 (Printed for J Butterworth 1793) 291.
[18] ibid at 107.
[19] John C Coffee, '"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into The Problem Of Corporate Punishment' (1981) 79 Michigan Law Review.
[20] Alexandra Dobson, 'The Corporate Manslaughter and Corporate Homicide Act 2007: A Symbolic Response' (2009) 17 Asia Pacific Law Review 193.
[21] (2004) SCCR 1.

explosion which killed 4 people.[22] Transco was charged with contraventions of sections 3 and 33(1) of the HSWA as well as culpable homicide, this was the first culpable homicide prosecution of a corporation in Scotland. The Crown case was that Transco, through its various committees, had shown a complete disregard for safety, seeking to develop the common law by establishing guilt by aggregation. The court ruled that Transco had shown "complete and utter disregard for the public."[23] However, a charge of culpable homicide was held irrelevant on appeal, when it was decided that under Scots law "a non-natural person could not in any circumstances be guilty of the common law crime of culpable homicide."[24] The decision in *Transco* established that an individual or group of individuals must be identified in order to constitute a body that exists as the 'controlling mind.' This was a difficult standard to achieve in any prosecution and the court rejected the notion that what Lord Hamiltion called an "aggregation of states of mind" could ever amount to the necessary *mens rea* of culpable homicide.[25] Nevertheless, the decision in *Transco* does not rule out the possibility of a corporation being found guilty of culpable homicide; but it does suggest that it will be difficult or even impossible where the corporation is large and complex, where the "directing mind and will" is difficult to identify. Transco illustrated that, whilst corporate prosecution under the criminal law is theoretically possible, in practice a conviction is almost impossible to achieve.

The ICL Plastics Ltd[26] disaster ('Stockline') concerned an explosion at a plastics factory in Glasgow in 2004 and it reopened the debate as to whether there was a need for a more rigorous corporate homicide law in Scotland. Albeit 9 people were killed and 33 were injured, the case was tried under the health and safety legislation allowing the court to impose only a fine for 35 years of failure,

[22] James Chalmers, 'Corporate Culpable Homicide: Transco Plc v HM Advocate' (2004) 8 Edinburgh Law Review.
[23] ibid.
[24] *Transco plc v HM Advocate* (2004) SCCR 1.
[25] *Transco plc v HM Advocate* (2004) JC 29 para 61(Lord Hamilton).
[26] *ICL Plastics Ltd, Petitioner* (2005) SLT 675.

leading Lord Brodie to describe it as an "inadequate response" to such a tragedy.[27]

The Bradford City Stadium Fire in 1985, resulted in 56 deaths and 265 people being injured.[28] Warnings had been given about the build-up of litter below the wooden stadium seating and the stand itself had already been condemned by the authorities. Despite this knowledge, a game was allowed to take place and a small fire quickly engulfed the entire stand. In part because of the lack of successful criminal prosecutions in the past, the Coroner did not direct the jury towards a manslaughter verdict and accepted a verdict of death by misadventure.[29] Inadequate legislation and weak enforcement of the law has discouraged any attempt at a criminal prosecution.

The identification doctrine also created a two-tier justice system.[30] For the reasons stated in the Transco case, large, often complex corporations have become practically exempt from prosecution for corporate homicide because of the difficulty in isolating individuals and holding them responsible. Smaller companies, whose directors are closer to the day-to-day running of the company, are more easily targeted. *R v Kite and OLL Ltd*[31] was the first company in England to be convicted of manslaughter. The case involved two instructors taking eight children and two teachers canoeing. The instructors were reported to be totally incompetent,[32] the canoe capsized, and 4 children died. A conviction was obtained - four counts of manslaughter against the managing director and the company.[33] This was the first occasion on which it had been

[27] Brian Gill, 'The ICL Inquiry Report Explosion at Grovepark Mills, Maryhill, Glasgow 11 May 2004' (The Stationery Office 2009) <http://www.theiclinquiry.org/documents/documents/HC838ICL_Inquiry_Report.pdf> accessed 25 March 2018.

[28] Terry Frost, *Bradford City* (Breedon Books Sport 1988).

[29] ibid.

[30] Neil Cavanagh, 'Corporate Criminal Liability: An Assessment Of The Models Of Fault' (2011) 75 The Journal of Criminal Law 418.

[31] (1996) 2 Cr App R 295.

[32] ibid.

[33] ibid.

sufficiently clear who had the directing mind in order to pass the identification test. This was entirely due to the fact the company was so small, and therefore the controlling mind was obvious.

Although this was a successful prosecution, it has to be noted that cases against small companies tend to have little influence beyond themselves.[34] Large, complex companies know they have a different and impenetrable structure in which obscuring and protecting the controlling mind can be achieved by diversifying the decision-making across a range of people and groups of individuals. These companies are the targets and yet they are untouchable. The fact that ordinarily, only small companies are vulnerable to punishment suggests to large corporations that they have nothing to fear.

Part 2: The criminal approach and the arrival of the CMCHA 2007

It has become apparent that Health and Safety Regulations are being used more often than the criminal law to prosecute companies for death resulting from gross management failures. Criminal charges are brought against corporate bodies and prosecutions commence only to result in failure. It appears from the recurring human catastrophes that the system is failing. Victims are left with only one route by which to obtain justice – regulatory fines. The HSWA 1974 occupies a quasi-criminal category, but charges under this legislation do not carry the same weight and stigma that attach to a 'true' or purely criminal offence.[35]

Some of the more recent disasters may suggest that a criminal prosecution would be a foregone conclusion. The Kings Cross London Underground Fire in 1987 resulted in 31 deaths; in 1988 the

[34] Allan Stuart, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (Offences) Act 2008: Corporate Killing and The Law' (PhD, The University of Glasgow 2018) 18.
[35] Paul Almond, *Corporate Manslaughter And Regulatory Reform* (Palgrave Macmillan 2013) 256-257.

Clapham Junction train crash killed 35; the Hillsborough disaster in 1989 resulted in 96 deaths; the sinking of the Marchioness on the River Thames in 1989 resulted in a further 51 people losing their lives. In the aftermath of this series of humanitarian disasters, it is of concern that no criminal prosecutions were instigated or resulted in conviction in any of these cases. The main failure of regulatory punishment appears to be the lack of any deterrent effect on companies to dissuade them from safety breaches - even when their actions result in multiple deaths.

A. Attitude towards regulatory punishments

The 'Herald of Free Enterprise' case[36] had a major impact on the public attitude towards regulation. 188 lives were lost when a ferry capsized moments after leaving the Belgian port of Zeebrugge.[37] It was concluded that there were a number of operational failures and there was a catastrophic failure by an employee to ensure the bow doors were properly closed. There were accounts of sleeping through the muster call and the captain sailing from Zeebrugge without first ensuring that the vessel was safe. The coroner returned verdicts of unlawful killing and thereafter seven P & O employees were charged with gross negligence and manslaughter. A case for corporate manslaughter was also brought against the company but it was ultimately unsustainable: the court instructed the jury to acquit the company because the various acts of negligence could not be attributed to a 'controlling mind.' The Department of Transport had established that at "all layers of management, top to bottom, the body corporate was infected with the disease of sloppiness."[38] The case collapsed, and P&O went unpunished. As a consequence of this,

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[36] *R v P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[37] Justice Sheen, 'The Merchant Shipping Act 1894: M v Herald Of Free Enterprise' (Her Majesty's Stationery Office 1987) <https://assets.publishing.service.gov.uk/media/54c1704ce5274a15b6000025/FormalInvestigation_HeraldofFreeEnterprise-MSA1894.pdf> accessed 16 February 2018.

[38] 'Lords Hansard Text For 19 Dec 2006 (Pt 0003)' (*Publications.parliament.uk*, 2018) <https://publications.parliament.uk/pa/ld200607/ldhansrd/text/61219-0003.htm> accessed 2 January 2018.

prosecutors will often take the health and safety regulatory route for its better prospects. Whether or not the victims' families see a regulatory fine as a more successful outcome is a different matter: it is their loved ones who have been killed by a failure to implement a safety regime that would have prevented their deaths. In that event, the imposition of only a modest monetary penalty might appear to rub salt in the wound.

Fatal incidents continue to occur because no real deterrence follows from a regulatory fine. In 1997 in the Southall train crash, a train passed a series of warning signals resulting in a major collision and the death of seven passengers and many other injuries. The court dismissed the seven counts of manslaughter against Great Western Trains because the prosecution was unable to establish a proper identification of those responsible.[39] Instead, they were subsequently prosecuted under the HSWA and were fined £1.5 million.[40] The fine had little deterrence. In 2000, the Hatfield train crash[41] saw a similar disregard for safety standards. The risk of damaged tracks was largely ignored, resulting in four deaths.[42] The weapon of criminal prosecution has fallen into disuse simply because it does not work. The consequence is having to settle for the regulatory system which is weak in its attempt to mirror the negative stigma a criminal sanction will have on deterring companies from making the same mistakes.

B. Criminal v Regulatory

The approach taken in the case of a criminal offence is different to that which is applied to a regulatory breach. Under the regulatory law, the focus is on breach of duties and standards against a measure

[39] Professor John Uff, 'The Southall Rail Accident Inquiry Report' (Health and Safety Commission (HSC) 2000) <http://www.epcresilience.com/EPC/media/MediaLibrary/Knowledge%20Hub%20Documents/F%20Inquiry%20Reports/Southall-Rail-(2000).pdf?ext=.pdf> accessed 11 February 2018.

[40] ibid.

[41] *R v Balfour Beatty Infrastructure Services Ltd* (2007) 1 Cr App R (S) 370.

[42] ibid.

of good and fair practice. This can be seen in a range of areas, stretching from the workplace to the environment. On the one hand, it may be regarded as odd that the law should liken companies polluting the ocean or failing to reduce greenhouse gas emissions to companies that breach health and safety standards directly resulting in death. On the other hand, a criminal prosecution is designed to allow responsibility to fall upon an individual where there has been a wrongful act causing death. In some sense, the regulatory approach dilutes the seriousness of the offence, whilst the criminal approach recognises its seriousness but fails to offer an effective route to a successful prosecution.

Fines are the most common method of increasing deterrence. They can be relatively substantial: Transco was fined £15 million,[43] the highest fine ever imposed in the UK for a health and safety breach. The Hatfield rail crash resulted in a fine of £13.5 million in 2005.[44] Nevertheless, it has become increasingly clear that perhaps the single most effective deterrent is to attack a company's reputation. A fine suggests that offenders can pay for their crimes. It trivialises death whereas criminalising a corporation will have a greater impact even if the actual penalty is only monetary. Steve Tombs,[45] states that there is a need to conceptualise deaths in the context as criminal.[46] There needs to be a shift so that it is recognised that death is inflicted and it does not occur spontaneously. There should be no argument that death as a consequence of a total disregard of a duty of care is a direct infliction and not a tragic accident. The main flaw in current regulation is the lack of stigma that attaches to guilt.[47] The stigma attached to a criminal conviction is part of the deterrence from committing the crime in the first place as well as deterring others from continuing down the same route. Criminal law is a deserved response to culpable wrong-doing, where

[43] *Transco plc v HM Advocate* 2004 SCCR 1.
[44] *R v Balfour Beatty Infrastructure Services Ltd* (2007) 1 Cr App R (S) 370.
[45] Professor of Sociology, Centre for Criminal Justice.
[46] Steve Tombs, 'Enforcing Safety Law In Britain: Beyond Robens?' (2001) 3 Risk Management.
[47] Andrew Ashworth, *Principles Of Criminal Law* (6th edn, Oxford University Press 2009).

"one person suffers to instil fear in others."[48] Criminalising a company will allow corporations to be receptive to normative influences.[49] As was said by the court in the Transco case:[50] "if... Parliament considers that a corporate body, in circumstances such as the present, should be subjected, not only to potentially unlimited financial penalties, but also to the opprobrium attaching to a conviction for culpable homicide, then it must legislate."[51] And legislate it did.

C. The Corporate Manslaughter and Corporate Homicide Act 2007

For almost 25 years there had been discussion of the need for a specific corporate manslaughter or corporate homicide offence. It was not until 1994 in the case of *R v OLL Ltd*[52] that there was a successful prosecution of a corporate body for the criminal offence of manslaughter. The prior failure to bring successful prosecutions clearly suggested that further legislation was required. In 1994 the Law Commission produced its paper "Criminal Law: Involuntary Manslaughter"[53] in which it considered the potential for a specific corporate manslaughter offence. This was one of many attempts by public bodies to take active steps to improve the ineffective system of corporate prosecution.[54] Finally, in 2007 Parliament enacted the CMCHA 2007. The only precedent for such an offence was

[48] ibid.
[49] Almond (n 35) 465.
[50] (2004) SCCR 1.
[51] Aisha Anwar, 'Killing In Company: The Journal Online' (*Journalonline.co.uk*, 2018) <http://www.journalonline.co.uk/Magazine/52-9/1004503.aspx> accessed 17 March 2018.
[52] (1996) 2 Cr App R 295.
[53] Law Commission, 'Criminal Law; Involuntary Manslaughter' (HMSO 1994) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-1jsxou24uy7q/uploads/2016/08/No.135-Criminal-Law-Involuntary-Manslaughter-A-Consultation-Paper.pdf> accessed 16 January 2018.
[54] In 1996 there were further Law Commission proposals, amongst which was "Legislating the criminal code: Involuntary Manslaughter Report". In 2000, the Government delivered its proposals "Reforming Law on Involuntary Manslaughter". In 2005 "Corporate Manslaughter: The Governments Draft Bill for Reform," was published.

Australia's Crimes (Industrial Manslaughter) Act 2003.[55] Against a backdrop of a legal system and legislature that had made very little effort to criminalise corporate bodies, here finally were the teeth to bring about corporate accountability. It was a response to a growing political will to recognise that legal systems must provide an effective means to deal with work-related deaths[56] – a response that should adequately reflect the gravity of the harm done.[57] After many years, it appeared that the UK was moving corporate homicide into a place where corporations would be held accountable.

The 2007 Act came into force on 6 April 2008. Section 1 states that, "An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised - causes a person's death; and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."[58] There is no traditional advertent fault element.[59] Simply, the fatality must be caused by a gross breach of a relevant duty of care owed by the corporation or organisation to the deceased, where the way in which the activities of the organisation were managed or organised by senior management was a substantial element in that breach.[60] The act abolishes the common law offence of gross negligence manslaughter in application to companies[61] and appears to dispense with the problematic identification doctrine. Instead, the senior management test takes its place. The shift was significant as it was the first attempt to impose "direct" liability on corporate bodies,

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[55] Crimes (Industrial Manslaughter) Amendment Act 2003 <http://www.legislation.act.gov.au/a/2003-55/20040301-10529/pdf/2003-55.pdf> accessed 12 January 2018.

[56] A work-related death involves a worker (employee, self-employed person, or other person engaged in work) or member of the public who is killed as a result of an event which has arisen out of or in connection with work activity, whether or not they are at work themselves.

[57] Almond (n 35) 30.

[58] Corporate Manslaughter and Corporate Homicide Act 2007, s 20.

[59] Almond (n 35) 337.

[60] 'Killing In Company: The Journal Online' (*Journalonline.co.uk*, 2018) <http://www.journalonline.co.uk/Magazine/52-9/1004503.aspx> accessed 17 March 2018.

[61] Corporate Manslaughter and Corporate Homicide Act 2007, s 20.

rather than individuals, for offences that involved "explicit moral censure".[62]

D. The impact of the 2007 Act

The aim of the 2007 Act was a) to impose a duty of care to act; b) to replace the largely unenforceable existing criminal law; and c) to give judges more options by way of penalties. The 2007 Act and the HSWA 1974 are designed to work in tandem. It would be for the jury to consider breaches of health and safety when determining any issue of corporate homicide.[63] The 2007 Act was designed to complement, not to replace the existing health and safety regulations.[64]

i) Duty of care

It is apparent that many work-related deaths are foreseeable: companies appear to overlook the warnings and sidestep the complaints they receive. It is often the case that if the warnings had been heeded, the disaster would never have occurred. Section 2 of the 2007 Act[65] states that the relevant duty of care is any duty owed by a corporation or organisation under the law of negligence. The question of whether a relevant duty exists in a situation is a question of law and, therefore, is one for the court to establish. The jury is then under instruction to reach a decision on whether a gross breach of duty has occurred – an issue that is decided by a consideration of specific factors that are referenced in section 8.

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[62] ibid (n 54) at 72.

[63] Health and Safety Executive 'Corporate Manslaughter – Frequently Asked Questions' (*Hse.gov.uk* 2018) <http://www.hse.gov.uk/corpmanslaughter/faqs.htm#when> accessed 22 March 2018.

[64] Alexandra Dobson, 'The Corporate Manslaughter And Corporate Homicide Act 2007: A Symbolic Response' (2009) 17 Asia Pacific Law Review 186.

[65] Corporate Manslaughter Corporate Homicide Act 2007 s2.

Under section 8(3)(a),[66] the jury may consider the extent to which the evidence shows that there were "attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it."[67] Instead of the requisite *mens rea* being something in the mind of an individual, it is something to be found in the corporate culture.[68] In terms of the Act, corporations and organisations are to be liable where it is apparent that they have taken risks and failed to follow required safety procedures and this issue is not acted upon by senior management.

ii) The Senior Management Test

The requirement to identify 'senior management' is set out in section 1(3).[69] Liability will only attach where the failure has occurred at the strategic management level. The test focuses on a failure to ensure safety in the management or organisation of the corporation's activities. Similarly to Australia's corporate culture test, its UK equivalent requires that the deficiencies should be within the collective body and not the individual.[70] Under the 2007 Act, there is no individual liability on directors or other individuals who have senior management roles in the company or organisation.[71] However, section 1(3) states that this breach of duty must be "substantially caused by the way in which those corporate activities are managed or organised by senior managers"[72] thus confirming the need to establish a clear connection between the action itself and

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[66] Corporate Manslaughter Corporate Homicide Act 2007, s 8(3)(a).
[67] ibid.
[68] Australia Law Reform Commission, *Civil and Administrative Penalties in Australian*
Federal Regulation, Discussion Paper 65 (2002).
[69] Corporate Manslaughter Corporate Homicide Act 2007 s 1(c).
[70] David Ormerod and Richard Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' (2008) Crim LR 589 at 590.
[71] 'HSE: Corporate Manslaughter – Frequently Asked Questions' (Hse.gov.uk, 2018) <http://www.hse.gov.uk/corpmanslaughter/faqs.htm#when> accessed 22 March 2018.
[72] Corporate Manslaughter Corporate Homicide Act 2007, s 1(3).

whether senior management participated in coordinating that action. This test has been likened to a qualified version of the aggregation doctrine. The aggregation doctrine "combines all the acts and mental elements of the various relevant persons within the company to ascertain whether in total they would amount to a crime if they had all been committed by one person."[73] There is, therefore, less of an evidential burden within the 2007 Act than existed under the identification doctrine. It is arguable that the outcome in cases such as the Herald of Free Enterprise could have been very different under this test where the obvious and serious risks could not be proven to have been known by any one of senior management. Arguably, the evidential uncertainty of who was at fault would not have been an issue. If the potential risks, which were pointed out to management, could have been aggregated it would prove a system of bad practice was knowingly in place. Therefore, senior management could be proven to be at fault.

However, the aggregation doctrine was rejected in the UK in *R v HM Coroner for East Kent*[74] because it made the scope of those who could be prosecuted too wide. The *Transco* case reached a similar conclusion in Scotland. Hence, the 2007 Act is still restricted by the agency-based model that has held onto much of the existing law and its approach to liability by reference to individual actions. Clarkson points out that the senior management test seems, "unduly restrictive"[75] and "threatens to open the door to endless arguments in court"[76] as another element of whether certain persons do or do not constitute senior managers must now also be considered. Moreover, corporations and organisations come in different shapes and sizes: who is to say which groups constitute senior management and which do not? The problem remains of a large company being able to argue that the management failure did not take place at a sufficiently senior level, and it can do this far more easily than a small company. Ormerod and Taylor have suggested that this

[73] C. M. V. Clarkson 'Corporate Manslaughter: Yet more Government Proposals', (2005) Criminal Law Review.
[74] (1989) 88 Cr App R 10.
[75] ibid (n 100) at 683-684.
[76] ibid at 260.

requirement still manages to direct the inquiry "back onto the issue of identifiable individuals."[77] It appears to fall within the same restrictive and evidential obstacles that were faced by the application of the criminal law to corporations. The 2007 Act may have removed one evidential obstacle and replaced it with another.

iii) Increased penalties

Insignificant fines offer no deterrence. However, significant fines put innocent parties at a loss. The CMCHA 2007 attempts to impose penalties which also target the reputation of the company as a means of deterring and punishing a guilty company.

The court does have the power under sections 9 and 10 of the 2007 Act to issue remedial orders requiring the convicted company to take specified steps to address the causes of the breach, and publicity orders requiring the company to publicise its conviction in a particular manner. "In many ways, these publicity orders represent the most innovative development in the whole Act."[78] This exposure remedy is focusing punishment not on monetary value but on hurting the reputation of the company. This may well be more painful and, therefore, more of a deterrent.

Although the HSWA 1974 and CMCHA 2007 have the same "unlimited fine" penalty, the criminal stigma and remedial order or publicity order will attach an extra punitive effect because corporations are affected by – and respond to – public opinion. Crime provokes public interest and disapproval of the corporation or organisation at fault.[79] It makes it difficult for companies to camouflage their errors from public view. Wells confirms that "It's difficult to really penalise a big corporation in monetary terms, so the only thing that's going to penalise it is a loss of reputation. That loss is going to be much greater if it's got the label manslaughter attached

[77] ibid (n 97).
[78] Almond (n 35) 88.
[79] Celia Wells, 'Corporations And Criminal Responsibility' (OUP Oxford 2001) 35.

to it."[80] Publicly condemning the corporation for its perpetration of criminal offences may have a significant effect on enhancing deterrence.

Part 3: Has the 2007 Act achieved its aims?

The CMCHA 2007 was designed to target corporations that exercised a reckless and dangerous approach in their activities and corporate management. It created a new means by which corporations could be prosecuted and brought to account so as to avoid the need to seek a criminal prosecution of culpable homicide or gross negligent manslaughter, which was rarely achievable.

The CMCHA 2007 bypasses the identification doctrine. It creates a more enforceable law against corporate abuses whilst still maintaining criminal status and avoids the need to rely solely on establishing regulatory health and safety breaches. It is targeted at all corporate entities and organisations, but even if this legislation can bring to account all companies – small and large – the real difference may be seen in what penalties can be imposed as a deterrent. A penalty has to be sufficient to deter a company from breaching regulations, rather than allow the cost to be low enough that breaching regulations and paying the price later is the better alternative. Being brought into the domain of the criminal law and out of the civil law the penalty may be a heavier burden because of its effect on the reputation of the company. Nevertheless, when sentencing, judges will aim to achieve a balance between a punitive approach resulting in an effective deterrence whilst also avoiding a disproportionate effect on less culpable parties. This has often put a limit on the value of the fines issued.

[80] Chris Warburton, 'Corporate Manslaughter: In Deep Water - Health And Safety At Work' (*Healthandsafetyatwork.com*, 2017) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> accessed 23 March 2018.

A. How would CMCHA 2007 respond today?

In the case of Piper Alpha - an oil platform owned by a large international corporation named Occidental - there were many layers of management and a plethora of contractors and sub-contractors. Despite the many breaches of safety that had undoubtedly occurred, Occidental could not have been held accountable had there been a prosecution for culpable homicide; instead it was subjected to fines for its breach of HSWA 1974 regulations. Lloyds of London paid out more than £1 billion,[81] making it the largest insured man-made disaster. Occidental escaped all criminal and civil sanctions and no single member of the corporation was held personally liable for the many deaths that were caused by the accident. Whilst the cases brought by survivors and the families of the deceased resulted in 'transatlantic' settlements at figures well in excess of what would normally have been paid out in the UK – approximately £66 million[82] – Occidental nevertheless, sought to recover its losses from the contractors on the platform. On appeal, Occidental won back the sums paid out as well as obtaining a full recovery of lost profits and petroleum tax offsets. It was clearly a problem with Piper Alpha that there was some confusion as to who had effective control over the working practices.[83] It was a disaster resulting from the concatenation of many different, individually insignificant elements happening at the same time. It appears that there was no definite cause that could be said to have caused the conflagration to occur[84] and therefore the finger of blame could not be pointed at any individual or group of individuals.

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[81] '1988 The Piper Alpha Explosion - Lloyd's - The World's Specialist Insurance Market. Also Known As Lloyd's Of London; Is A Market Where Members Join Together As Syndicates To Insure Risks.' (*Lloyds.com*, 2018) <https://www.lloyds.com/about-lloyds/history/catastrophes-and-claims/piper-alpha> accessed 24 March 2018.

[82] Terry Macalister, 'Piper Alpha Disaster: How 167 Oil Rig Workers Died' (*the Guardian*, 2013) <https://www.theguardian.com/business/2013/jul/04/piper-alpha-disaster-167-oil-rig> accessed 24 March 2018.

[83] William Douglas Cullen of Whitekirk, *The Public Inquiry Into The Piper Alpha Disaster* (Her Majesty's Stationery Office 1990).

[84] ibid.

If the 2007 Act had been applied to the Piper Alpha disaster it is arguable that the outcome would not have been any different. Section 1 of the CMCHA 2007 seeks to impose a relevant duty of care. Whether there has been a breach of such a duty is a matter decided by the judge. Also, under section 1(1)(b) CMCHA, the breach of the duty must be a "gross breach." The alleged conduct must fall far below what can be reasonably expected of the organisation in the circumstances.[85] It would appear that these requirements could be substantiated and established by proof in the normal way. It seems clear that Occidental owed a duty of care to its workers. In terms of section 8(4)(b) CMCHA, the acceptance of bad practice or attitudes and policies that likely encouraged the failure could amount to any breach of duty being categorised as a 'gross' breach of that duty in this section. On Piper Alpha, the immediate cause of the disaster was a failure in the permit to work system which caused a breakdown in communications.[86] This led to the use of machinery which was under maintenance and in respect of which there was a valve that had not been fully tightened. Many men on the platform were unfamiliar with the layout of the platform and had not been trained properly for emergency procedures.[87] The emergency systems on the platform were, at best, inadequate. The rescue arrangements also failed: Lord Cullen criticised the fact that the standby vessel, Silver Pit, was essentially unsuitable for the purpose of rescuing survivors.[88] Lord Cullen blamed the owners, Occidental, for "adopting a superficial attitude to the risk of major hazards."[89] Occidental did not have acceptable practices in place to respond to the foreseeable dangers that are inherent in oil and gas production. Occidental had already been prosecuted under sections 3(1) and 33(1)(a) of the 1974 Act in September 1987 for not ensuring that employees were not exposed to unnecessary risk.[90] It was reasonably apparent that safety standards were not being

[85] CMCHA, s 1(4)(b).

[86] William Douglas Cullen of Whitekirk, *The Public Inquiry Into The Piper Alpha Disaster* (Her Majesty's Stationery Office 1990).

[87] ibid.

[88] Kenneth Miller, 'Piper Alpha And The Cullen Report' (1991) 20 Industrial Law Journal 182.

[89] ibid.

[90] ibid.

maintained on the platform and the fact that they had already broken safety regulations prior to the disaster was at least indicative of a lackadaisical attitude to health and safety on the platform. On one view, all this together could represent nothing less than there having been a gross breach of duty by Occidental and one might have thought that any jury would have reached that conclusion.

Section 1(4)(c) of the 2007 Act requires "senior management" to have played a substantial part in the activities. Even by moving away from the identification requirement, it is again difficult to prove that management had a significant role in the activities that were causally connected to the fatal accident. On the face of it, Occidental was clearly at fault as problems had been flagged up and they had failed to act appropriately. However, as Lord Cullen makes clear in his report, the Department of Energy and its enforcement arrangements also bore a large responsibility for what had happened.[91] Their inspection of the platform was "superficial."[92] The point is that if the regulator was satisfied that the operation of the platform was safe, then it would be accepted by all concerned and the platform would be permitted to operate on the UKCS.[93] Once again, there is significant difficulty in identifying which faults could be attributed to Occidental senior management and which could not, due to the amount of failure that had occurred across the board. The legislation has once again been shown to be too narrow in its application and once more, we are left with the thorny issue of the identification principle and proper assignation of responsibility.

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[91] Miller (n 91) at 177-184.

[92] John Paterson, 'The Evolution Of Occupational Health And Safety Law On The UK Continental Shelf, 1964–2006' (2007) 27 (First Series) Northern Scotland 140-141.

[93] John Paterson, 'Health and Safety at Work Offshore' in Greg Gordon, John Paterson and Emre Üşenmez (eds), *Oil And Gas Law: Current Practice And Emerging Trends* (2nd edn, Edinburgh University Press 2010).

B. *Is the CMCHA 2007 just more hollow legislation?*

The reasoning behind the legislation was clear but equally there is a perception that the 2007 Act is rarely used and, to date, has displayed a lack of success in bringing corporate homicide prosecutions to a successful conclusion. The use of the law is a particularly useful tool of social control due to its highly visible and public means of responding to political risk. "It implies the needs of citizenry have been dealt with decisively."[94] The purpose is to show that the problem is under control. Nevertheless, sometimes it appears that there is no deep concern for what measures are in place and how they are enforced: the concern is to ensure that the government produces something that sends a message to the public to convey that it is dealing with the problem. Political risk is powerful in the sense that it forces action. However, no legislation can be better than bad legislation. Arguably, the CMCHA 2007 has made little difference to improving health and safety attitudes within organisations; rather it serves to mask the problem by suggesting that health and safety standards are in place to protect employees and individuals who are owed a duty of care. Not for the first time does this suggest that the public is easily lulled into a false sense of safety and trust in corporate management and systems.

C. *What should be done next?*

No matter how much legislation for corporate homicide is brought to bear, the criminal law will never be easily applicable to companies or organisations. The criminal law is inextricably bound to notions of *mens rea* and *actus reus* being the tenets of any criminal offence. However, once the law is established, and all companies realise they may be caught by it, the main focus for legislators should be on deterrence. The task is to ensure that companies pay more than lip service to health and safety and that the cost of causing death is higher than the cost of compliance.

[94] Almond (n 35) at 329.

Broadly, it is suggested that there are two possible solutions to these issues:

i) Introduce more significant penalties that target reputation as this will act as a big deterrence due to the "amoral calculator" operated by companies;
ii) Introduce equity fines i.e. a monetary penalty that will hurt the company itself and not directly impact the employees and victims.

i) More significant penalties

The Health and Safety Act 2008 amended the HSWA 1974 by inserting a new Schedule 3A which introduced more onerous consequences for companies that committed various health and safety offences. There is now an increased mandate for courts to impose penalties which carry increased custodial sentences.[95] The sentencing guidelines report found an increase in company directors and senior management being prosecuted under health and safety law from an annual average of 24 in the five previous years to 46 in 2015-2016.[96] The new sentencing capability also makes it more likely that managers and directors will be prosecuted and punished where there has been a flagrant disregard or "blind-eye" mentality shown.[97] This is all a step closer to Australia's system of heavily targeting corporate culture where wilful blindness is no longer a legitimate excuse. The seriousness of corporate homicide has also led judges to

[95] Allan Stuart, 'The Corporate Manslaughter And Corporate Homicide Act 2007 Or The Health And Safety (Offences) Act 2008: Corporate Killing And The Law' (PhD, The University of Glasgow 2018) 206-207.

[96] 'Twice As Many Directors Prosecuted Under S37 As Recent Yearly Average | Health And Safety At Work | Directors' Duties' (October 2016) (*Healthandsafetyatwork.com*, 2018) <https://www.healthandsafetyatwork.com/directors-duties/prosecutions-double-senior-managers-hse> accessed 15 March 2018.

[97] IOSH and Osborne Clarke LLP, 'Health And Safety Sentencing Guidelines One Year On: The Rise In Fines And The Actions Companies Can Take To Prevent Them' (IOSH 2017) <http://www.iosh.co.uk/sentencingguidelines> accessed 3 March 2018, 5.

impose higher fines. The average fine for a corporate manslaughter offence in the ten years since 2007 is £328,820; this figure has risen to £528,571 since the sentencing guidelines were introduced in 2016.[98]

> "While you cannot put a value on human life, the level of fines now being handed out recognises society's disapproval of serious corporate failures that lead to injury, illness and death."[99]

Since February 2016 "technical" health and safety offences have indeed attracted substantially higher penalties due in part to the introduction of the sentencing guidelines. The first year of operation of the new sentencing guideline (commencing 1st February 2016) has seen 19 fines of £1m or more. This contrasts with three fines of £1m or more in 2015 and none in 2014. Four of these fines were also over £3m.[100]

The 2007 Act has made subtle yet positive changes. The first prosecution under the 2007 Act was in the 2008 case of *R. v Cotswold Geotechnical Holdings Limited.*[101] Alexander Wright, a junior geotechnical engineer was collecting soil samples. He died when he entered a trench and the inadequately supported sides collapsed. After an investigation, it was established that Cotswold Geotechnical Holdings had disregarded concerns raised by employees and had failed to follow industry guidance,[102] thereby knowingly exposing employees to a recognised safety risk. This was an avoidable, highly culpable example of work-related death. The jury returned a verdict of corporate manslaughter and Cotswold Geotechnical Holdings Ltd was fined £385,000.[103] Cotswold sought to appeal the conviction and

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[98] ibid.

[99] Tej Thakkar, 'Increase in sentences for breaches of health and safety' (2018) <https://www.leathesprior.co.uk/news/increase-in-sentences-for-breaches-of-health-and-safety> accessed 15 March 2018.

[100] Sentencing Council, 'Health And Safety Offences, Corporate Manslaughter And Food Safety And Hygiene Offences Definitive Guideline' (2016). <https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-Safety-Corporate-Manslaughter-Food-Safety-and-Hygiene-definitive-guideline-Web.pdf> accessed 3 Feb 2018.

[101] (2012) 1 Cr App R (S) 26.

[102] ibid.

[103] ibid.

the level of fine as it was likely the company would fall into liquidation; the judge commented that although liquidation was unfortunate this seemed inevitable and refused the appeal.[104] This sent out the message that the potential failure of a business would be an insufficient reason to avoid a heavy fine and was certainly not an acceptable response to a charge of causing death.

It does appear that the judiciary is no longer bound to choose between following the regulatory framework and insignificant monetary penalties or trying to fight a losing battle with culpable homicide. The hiked-up fines and use of publicity orders has a direct effect on reputation and means a company's ensuing notoriety has to be actively managed. However, with this comes the negative of putting a company in jeopardy – including the innocent parties and the economy as a whole. This spillover effect will often temper the magnitude of the fine which judges are willing to impose – often making the fine less of a liability.

ii) The solution: equity fines?

As has been noted, heavy fines may deter but they can also put businesses in fatal jeopardy especially where judges are unaware of the company's equity and background. An exceptionally large monetary fine will only mean the cost is spread among a larger group of people who are likely to be innocent parties with no power over the management or decision-making involved in formulating company policies. Guilty corporations are allowed to choose what revenue will be used to pay for the fine.[105] The payment can originate from anywhere within their operating costs.[106] This means the cost is often passed on to workers and consumers in the form of wage cuts,

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[104] ibid.

[105] Scottish Parliament, 'Criminal Sentencing (Equity Fines) Bill' <http://www.parliament.scot/S3_MembersBills/Draft%20proposals/CriminalSentencingEquityFinesConsultation.pdf>

[106] ibid.

poorer services and price increases.[107] Ironically, it was these groups that the CMCHA 2007 was designed to do justice for.

The fines that are imposed, at current levels, are usually insufficient to deter. Since the successful Cotswold case where the threat of insolvency was not enough to appeal the large fine under health and safety offences the SGC has endorsed a practice in the Guidelines at B11.[108] B11 outlines aggravating and mitigating factors when deciding on a sentence; these factors can include the degree of risk, the extent and duration of the breach, the company's resources and the effect of a fine on the company.[109] Similarly, judges in Canada under the "Westray" Bill have been instructed to consider "the need to keep an organisation running and preserve employment"[110] when deciding the size of a monetary fine.

An equity fine could allow a substantial penalty to be made as it would not impose the burden on innocent parties, acting as a deterrent as well as a punishment. This would include a court order being issued against a convicted company obligating that company to issue a set number of new shares. The proceeds of those shares would then be handed over to the State as payment of the fine. The fine would be imposed on the running value of the firm rather than on its running costs.[111] This system would punish those who benefit the most from the offences committed, for example the shareholders and owners rather than the employees and consumers. An equity fine would dilute the investment of the shareholders in the company and would depress the company's share price but it would be less likely to impact significantly upon its operational status.

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[107] ibid.

[108] 'Guideline Judgments Case Compendium' (*Sentencingcouncil.org.uk*, 2005) <https://www.sentencingcouncil.org.uk/wp-content/uploads/web_case_compendium.pdf> accessed 22 March 2018.

[109] *R v Friskies Petcare* (UK) Ltd (2000) 2 Cr App R (S) 401 as set out in *R v Howe & Sons (Engineers) Ltd* (1999) 2 All ER 249 and *R v Balfour Beatty Infrastructure Services Ltd* (2007) 1 Cr App R (S) 370.

[110] 'Criminal Liability Of Organizations. A Plain Language Guide To Bill-C45' (*Justice.gc.ca*, 2005) <http://www.justice.gc.ca/eng/rp-pr/other-autre/c45/c45.pdf> accessed 23 March 2018, 8.

[111] ibid.

Given that the equity penalty is mainly targeted at shareholders, this may be perceived as unfair as some shareholders will be distant from the company and insignificant to its existence and may not be at all aware of the day to day management of the company. However, the main point is that shareholders are beneficiaries: they benefit from the management and the way in which management asserts control over the company. When something good happens, they benefit financially. Equally, when something bad happens, they ought to suffer loss. This new system may also force shareholders to become more active in holding directors to account for their actions. Rather than passively bury their heads in the sand and enjoy the benefits of grossly negligent behaviour, shareholders would feel it necessary to assert themselves and ensure questions were asked about safety standards and whether they were being met. The new system would allow them to take steps to protect the value of their investment by ensuring that lives were not put at risk for greater profit.

Conclusion

As of September 2017, there have only been 25 convictions for Corporate Manslaughter, and a handful of acquittals and dismissals.[112] The paucity of prosecutions raises the question as to whether there is any real need for a separate corporate homicide offence or whether existing regulations adequately hold corporations accountable. Does the lack of corporate prosecutions suggest that current legislation is ineffective and that there is a need for further legislation?

Conviction under existing health and safety regulations and consequent fines fail to deter companies from offending. The crime of corporate homicide singularly fails to produce successful

[112] Victoria Roper, 'The Corporate Manslaughter And Corporate Homicide Act 2007—A 10-Year Review' (2018) 82 The Journal of Criminal Law.

prosecutions. And now the CMCHA 2007 lies largely dormant in Scotland.

Currently the 2007 Act still has a focus on individuals and 'senior management' whose actions must be instrumental in the company's failure to ensure compliance with health and safety regulations which has resulted in death. This senior management test is similar to the aggregate test. Adopting the aggregation test as a method to prove that a bad corporate culture is in place could create a fully functioning corporate homicide law to prosecute a company whose conduct has been grossly negligent. As has become apparent, there is a recurring theme in the causes of death. Management and people with significant control have been warned of failures in the system, of bad and dangerous practices, of matters that should have been dealt with sooner. Yet, more often than not, no action is taken, and innocent lives are lost; lives that could have been saved at a small monetary cost. By reforming the 2007 Act to include a provision where liability can arise through the acceptance of a bad corporate culture and whether bad practices, dangerous situations and risk hazards were brought to the attention of the relevant people, we could more easily attach liability.

The Grenfell tower block fire is only the most recent tragic example of a web of small failures that have resulted in catastrophe.[113] The enquiry is yet to report on what breaches may or may not have occurred, but protests are already being heard that senior management responsible is seeking to hide from the consequences of their actions.[114] Residents of the Grenfell Tower had reportedly been raising fire safety concerns for several years prior to the blaze.[115] The Grenfell Action Group produced documents on the

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[113] 'Corporate Manslaughter: In Deep Water | Health And Safety At Work' (*Healthandsafetyatwork.com*, 2018) <https://www.healthandsafetyatwork.com/corporate-manslaughter/ten-years-on> accessed 14 February 2018.

[114] 'Corporate Manslaughter Warning Over Grenfell' (*BBC News*, 2018) <http://www.bbc.co.uk/news/uk-40747241> accessed 26 March 2018.

[115] 'Tower Residents Raised Fire Risk Fears' (*BBC News*, 2018) <http://www.bbc.co.uk/news/uk-england-london-40271723> accessed 23 March 2018.

most recent Fire Risk Assessment. It has shown that fire safety equipment had not been tested for 12 months and fire extinguishers had been labelled "condemned" and not tested since 2009.[116] Nevertheless, under the 2007 Act it seems unlikely "senior management" will be proven to have had a significant causal effect. However, if a corporate culture test were in place it would be more likely that a conviction of guilt could be proven, as the aggregation of all the safety procedures that were highlighted and not acted upon may amount to having significantly helped to kill the occupants.

Large companies, as well as small companies, will be aware that not implementing a good corporate culture will render them liable for deaths that are subsequently caused. The focus should *then* be on deterrence. Ensuring that companies guilty of corporate homicide will suffer notoriety for their actions will deter others. By imposing equity fines, the company and not the other innocent parties involved within a company will be the ones bearing the cost. This will mean the effect on innocent parties will be less of a concern for judges when imposing higher fines. There has always been a desire to make the offence attach a criminal stigma to the company as it provides a punitive measure, tainting the company's reputation, as well as a deterrent to those companies which do not adopt an adequate safety approach.

[116] 'Another Fire Safety Scandal' (*Grenfell Action Group*, 2013) <https://grenfellactiongroup.wordpress.com/2013/02/21/another-fire-safety-scandal/> accessed 23 March 2018.

The future of the Natura 2000 network in post-Brexit Britain

BETTINA KLEINING*

Abstract

Natura 2000 is Europe's signature biodiversity conservation network governed by the Habitats and the Birds Directive. However, after Brexit, the question arises what will become of its British part. An option for the British could be to retain Natura 2000 after exiting the European Union and evolve it to tackle some of its flaws, one of them being the lack of scientific information about the biodiversity it aims to protect. This argument will be developed using a parallel situation in India as an example. When India became independent from the British, it decided to keep some aspects of the British judicial system. Motivated by environmental necessity, India evolved the inherited judicial structure and created a new tribunal, the National Green Tribunal. It operates under innovative procedural rules and holds the prospect to tackle systemic weaknesses in India's nature conservation reality. By retaining Natura 2000 post-Brexit the UK, as well, could develop a given system further – the nature conservation network Natura 2000. A viable option could be the testing of innovative data gathering solutions to tackle the problem of existing scientific knowledge gaps.

1. Introduction

After more than four decades of membership, the UK is about to leave the EU. Many questions arise in the context of this planned separation. One regards a topic that seems rather far down the Brexit agenda: the Natura 2000 network. Natura 2000 is a coherent nature

conservation network based on two European nature directives, the Birds Directive[1] and the Habitats Directive.[2] It is, to date, Europe's most extensive and best-functioning conservation network.[3] However, the fate of the British Natura 2000 sites is uncertain once Brexit takes effect.[4] Since the degree to which the UK will be bound to post-Brexit Europe is not yet certain, it is possible that the network may be subject to severe changes with detrimental consequences for its fauna and flora. New nature conservation regulations, possibly based on devolved UK governance, might result in fragmentation of the network and deterioration of biodiversity.

This article will explain how the Natura 2000 network is designed to work within the EU and the greater international environmental law and policy context. It will then draw a parallel between the UK's current departure from the EU and India's past secession from the British Empire. While, at first, India's independence and Brexit may not appear comparable, this paper will demonstrate that the UK could take India as an exemplar regarding a specific aspect of its future independence from the larger unit of the European Union – the retention of effectively functioning standards.

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[1] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L20/7 (Birds Directive).

[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (Habitats Directive).

[3] Colin T Reid, *Nature Conservation Law* (3rd edn, W Green/Thomson Reuters 2009) 323; Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases, and Materials* (OUP 2013) 926; Theo van der Sluis and others, 'How Much Biodiversity is in Natura 2000?: The "Umbrella" Effect of the European Natura 2000 Protected Area Network' 9; Commission, 'Environment Action Programme to 2020' <http://ec.europa.eu/environment/action-programme/> accessed 30 March 2018; Commission, 'Commission Staff Working Document; Fitness Check of the EU Nature Legislation (Birds and Habitats Directive) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora' (Fitness Check of the EU Nature Legislation) 7.

[4] Hendrik Schoukens, 'Habitat Restoration on Private Lands in the United States and the EU: Moving from Contestation to Collaboration?' (2015) 11 Utrecht Law Review 33, 33-35.

The Natura 2000 Network is such a standard and should thus be retained post-Brexit. Using the Indian example, the article will further reason that flexibility regarding structural legacies might even result in innovative approaches to problems that still exist in the original system the standard derives from. This insight could prove useful regarding some remaining weaknesses of Natura 2000.

2. The European Natura 2000 Network

The explicit goal of the EU's Birds and Habitats Directives is to ensure biodiversity throughout the EU through the preservation, conservation and improvement of natural habitats, fauna and flora. While both directives are not very recent,[5] they remain among Europe's principal legislative tools regarding the conservation of the natural environment.[6] Biodiversity is the foundation of the sustainable and resilient existence of humanity on earth; both directives thus strive to protect it by forming a regulatory backbone for a coherent European nature conservation network – Natura 2000. The network ensures that Europe has high biodiversity by preserving 'variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.'[7] This objective is crucial for preserving species and genetic resources for future generations as well as for the delivery of ecosystem services such as, for example, water provisioning, carbon sequestration and flood prevention.[8]

Since they are directives, the Birds and the Habitats Directives have had to be adopted as national law by each Member State. While the directives provide for common levels of wildlife and habitat protection throughout Europe, the Member States may use a certain

[5] The Birds Directive originally dates from 1979, the Habitats Directive from 1992.
[6] Habitats Directive (n 2) art 2 (1); Birds Directive (n 1) arts 1, 3.
[7] UNEP, 'Convention on Biological Diversity (CBD) 1992, art 2.
[8] UNEP-WCMC and IUCN, 'Protected Planet Report 2016: How Protected Areas Contribute to Achieving Global Targets for Biodiversity' (2016) 13.

amount of discretion in adopting the directives' provisions into national law.[9] However, all Member States are required to designate special protection areas[10] and special areas of conservation[11] which form the Natura 2000 network where natural habitat types and species are protected.[12] In total, Natura 2000 currently covers about 18 per cent of European terrestrial and marine territory and thus forms a large coherent conservation area.[13] Within the network, various rules apply for maintaining and restoring the numbers and quality of protected animal and plant species and habitats. For instance, economic developments are generally restricted on Natura 2000 sites and can only occur if an assessment has concluded that species and habitats are not depleted or disturbed.[14] Only a few exceptions are applicable under this general conservation rule, such as the existence of 'imperative reasons of overriding public interest'[15] which require a certain development in a Natura 2000 region notwithstanding its possible detrimental effects on biodiversity.[16] However, in that case, the concerned Member State must ensure that appropriate compensation counterbalances any adverse effects of such development.[17]

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[9] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 288.

[10] Birds Directive (n 1) art 4 (1).

[11] Habitats Directive (n 2) art 4 (4).

[12] Habitats Directive (n 2) art 4 (4); Birds Directive (n 1) art 4 (1); Jane Holder and Maria Lee, *Environmental Protection, Law, and Policy: Text and Materials* (2nd edn, CUP 2007) 637; Reid, *Nature Conservation Law* (n 3) 325; Gregory Jones and Ned Westaway, 'How to Deal with Candidate SACs and Potential SPAs' in Gregory Jones (ed), *The Habitats Directive: A Developer's Obstacle Course?* (Hart Pub 2012) 77; Fisher, Lange and Scotford (n 3) 923.

[13] Reid, *Nature Conservation Law* (n 3) 323; Fisher, Lange and Scotford (n 3) 926; van der Sluis and others (n 3) 9; Commission, 'Environment Action Programme to 2020' (n 3).

[14] Habitats Directive (n 2) art 6 (1-3).

[15] ibid art 6 (4).

[16] ibid art 6 (4).

[17] For more information regarding the complex system of permitted developments on designated sites and compensatory measures cf Commission, 'Guidance Document on Article 6 (4) of the 'Habitats Directive' 92/43/EEC' 3-4; Jan H Jans and Hans H B Vedder, *European Environmental Law* (3rd edn, Europa Law Publ 2008) 462; Ludwig Krämer, 'The European Commission's Opinions under Article 6 (4) of the Habitats Directive' (2009) 21 Journal of Environmental Law 59, 62;

While this approach sounds convincing, the assumption that the given conservation system is the perfect solution to biodiversity deterioration in Europe would be incorrect. Critics argue, inter alia, that creating a network of sites might result in the creation of 'islands of nature' unable to cross-fertilize, as well as an attitude among the Member States and industry that all non-designated land is free to exploit.[18] Also, problems regarding the correct designation and management of Natura 2000 sites still exist due to a lack of scientific knowledge about the functioning and needs of the natural environment.[19] While such concerns contain some truth, the Natura 2000 network has, nonetheless, led to a conservation status that Europe would probably not have attained without it.[20] The Commission's recent Regulatory Fitness and Performance Programme (REFIT) Fitness Check of the EU's nature legislation confirms this.[21] Fitness Checks are part of the Commission's Smart Regulation policy to keep all EU legislation under constant review. It aims to make EU law simpler and less costly. For this purpose, it provides an evidence-based critical analysis of whether the legislation is proportionate to its objectives and its outcomes are as expected. REFIT fitness checks cover all fields of EU policy, including environmental legislation. The evaluation of the nature directives started in 2015, with the results published in 2016. The Fitness Check evaluated the effects of the Birds and Habitats Directives on European biodiversity since their implementation,

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Rebecca Clutten and Isabella Tafur, 'Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6 (4) and the IROPI Exception' in Gregory Jones (ed), *The Habitats Directive: A Developer's Obstacle Course?* (Hart Pub 2012); Fisher, Lange and Scotford (n 3) 954; Moritz Reese, 'Habitat Offset and Banking – Will it Save our Nature?' in Charles-Hubert Born (ed), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015).

[18] Holder and Lee (n 12) 616; Colin T Reid, 'Towards a Biodiversity Law: The Changing Nature of Wildlife Law in Scotland' (2012) 15 Journal of International Wildlife Law & Policy 202, 209; Fisher, Lange and Scotford (n 3) 923.

[19] Olivia Woolley, *Ecological Governance: Reappraising Law's Role in Protecting Ecosystem Functionality* (CUP 2014) 21.

[20] Ludwig Krämer, *EU Environmental Law* (7th edn, Sweet & Maxwell 2012) 192; Reese (n 17).

[21] Commission, 'Fitness Check of the EU Nature Legislation' (n 3).

assessing their effectiveness and added value to the EU in achieving their objectives. It confirmed their overall success but also acknowledged some remaining implementation difficulties.[22] In its final report, the Commission underlined that 'the status and trends of bird species, as well as other species and habitats protected by the directives, would be significantly worse in [the directives'] absence and improvements in the status of species and habitats are taking place where there are targeted actions at a sufficient scale.'[23] In particular, regarding the directives' added value to the EU, the Commission emphasized that 'the directives have established a stronger and more consistent basis for protecting nature than existed in Europe before their adoption.'[24] Moreover, 'EU action has created a more consistent, fair and integrated approach to nature conservation and delivery of ecosystem services across the EU, generating opportunities while at the same time addressing transboundary concerns (…).'[25]

These conclusions are in line with the latest Environmental Performance Index (EPI) results of 2018.[26] The EPI was developed by Yale and Columbia Universities and by the World Economic Forum. It evaluates individual countries' environmental performance on an international index by using various sub-categories, amongst them the sub-category 'biodiversity and habitat'.[27] The individual rank of a country shows how far it has achieved international targets of sustainability in each sub-category and in total.[28] Among the 180 states analysed, European countries occupy 17 of the top 20

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[22] Commission, 'Refit - Making EU Law Simpler and Less Costly' <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en> accessed 30 March 2018.

[23] Commission, 'Fitness Check of the EU Nature Legislation' (n 3) 5.

[24] ibid 7.

[25] ibid.

[26] Yale Centre for Environmental Law & Policy, 'Global Metrics for the Environment' <https://epi.envirocenter.yale.edu/> accessed 30 March 2018.

[27] ibid.

[28] Yale Centre for Environmental Law & Policy, 'Introduction: The Logic of Environmental Metrics' <https://epi.envirocenter.yale.edu/2018-epi-report/introduction> accessed 30 March 2018.

positions; the UK ranks sixth overall scoring 79.89 out of 100 points.[29] The UK performs even better in the biodiversity and habitat sub-category, ranked fourth with a score of 96.69 out of 100 points.[30] While this excellent ranking does not necessarily indicate that the UK's environmental performance is solely due to its EU membership, it probably has some influence.[31] This conclusion may be supported by the fact that other environmental performance leaders include several EU Member States such as Germany, Luxembourg, Poland, Belgium and Spain. All of these countries are part of the Natura 2000 network, so it is reasonable to conclude that European nature conservation legislation has significantly impacted upon the UK's high performance in the EPI evaluation.[32]

Irrespective of Member States' overall positive performance in the REFIT Fitness Check and EPI, it must be acknowledged that the Natura 2000 system is not free from flaws. As indicated above, the Commission's Fitness Check has shown that improvements in the status of species and habitats have only taken place with targeted actions on an EU-wide scale.[33] The implementation of these actions entails excellent scientific knowledge about the distribution, numbers and actual conservation needs of protected fauna and flora on Member States' territory. However, during the Fitness Check evaluation period, many Member States disclosed that they lacked the required scientific information regarding species and habitats, and thus could not adequately target conservation actions such as, for instance, the designation and management of Natura 2000 sites.[34] Indeed, many Member States suffer severe knowledge gaps, especially precise knowledge of the distribution and location of

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[29] Yale Centre for Environmental Law & Policy, 'Results' <https://epi.envirocenter.yale.edu/2018/report/category/hlt> accessed 30 March 2018.

[30] Yale Centre for Environmental Law & Policy, 'Biodiversity & Habitat' <https://epi.envirocenter.yale.edu/2018-epi-report/biodiversity-habitat> accessed 30 March 2018.

[31] Chris Hilson, 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship' (2018) 7 Transnational Environmental Law 89, 99.

[32] Yale Centre for Environmental Law & Policy (n 30).

[33] Commission, 'Fitness Check of the EU Nature Legislation' (n 3) 5.

[34] ibid 38.

species and habitats which limits the effectiveness of the nature directives.[35] It thus makes sense that the Commission has concluded that the general objective of the nature directives – the conservation of European biodiversity at a favourable level – has not yet been fully achieved.[36] However, even with this caveat, the Natura 2000 network overall provides a benchmark nature conservation standard.[37]

3. Brexit and the Perils for the Network

During the course of the Brexit referendum, one of the most common arguments used by those in favour of leaving the EU was that it would enable the UK to 'take back control' and become sovereign again.[38] Although this idea may not be realized to the extent envisioned by some 'Leave' campaigners, and connections to the rest of Europe will remain, some changes will occur after 29 March 2019. It is currently still uncertain how exactly Brexit will occur.[39] Politics are shifting between various options, accompanied by frequent changes in the personnel responsible for delivering Brexit.[40] Whatever the final Brexit decisions will be remains to be seen. Nevertheless, some concerns regarding the future of British nature conservation law can already be expressed.[41] Theresa May, in her speech on the environment on 11 January 2018, claimed that the UK

[35] ibid 59, 112.
[36] ibid 38.
[37] Reid, *Nature Conservation Law* (n 3) 323; Fisher, Lange and Scotford (n 3) 926; van der Sluis and others (n 3) 9; Commission, 'Environment Action Programme to 2020' (n 3).
[38] Hilson (n 31) 103.
[39] All references to Brexit and its implications reflect the status quo at the time of writing (September 2018).
[40] BBC, 'Boris Johnson Quits: Profile of Ex-Foreign Secretary' (2018) <https://www.bbc.com/news/uk-politics-44737667> accessed 3 August 2018; BBC, 'Brexit Secretary David Davis Resigns' (2018) <https://www.bbc.com/news/uk-politics-44761056> accessed 3 August 2018.
[41] Charlotte Burns, Andy Jordan and Viviane Gravey, 'The EU Referendum and the UK Environment: The Future Under a 'Hard' and a 'Soft' Brexit' 3-5.

would not lower its environmental standards when it leaves the EU.[42] However, the Draft Agreement on the withdrawal of the UK from the European Union and the European Atomic Energy Community, dated 19 March 2018, does not mention incorporating or keeping existing environmental legal standards in the UK's national legal system.[43] Of course, it may still be too early to assess this because negotiations are ongoing. However, the distinct risk remains that the UK will disengage from various European environmental obligations, including those related to Natura 2000. Although the Birds and the Habitats Directives have been transposed into its legal system, the UK will be free to change its corresponding national laws post-Brexit. Against a background of increased economic pressure, after Brexit has taken place, conservation obligations might pose a constraint to national industry that the British might consider necessary to remove.

However, most environmental legislation, including nature conservation legislation, works best if approached transnationally: The very nature of habitats is to spread beyond political borders and for species to dwell and migrate beyond them.[44] Such environmental realities are why the EU implemented a coherent approach to nature conservation by creating Natura 2000 rather than let individual countries adopt their own approaches.[45] The UK, however, might soon have its own national conservation approaches. As the environment is a devolved matter in Great Britain, even the idea of a national centralized environmental policy dictated by Westminster will most likely not please the devolved governments.[46] It is conceivable that Scotland, Wales, Northern Ireland and England might, in the future, manage 'their' parts of the Natura 2000 network

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[42] Theresa May, 'Transcript of Speech on the Environment' (2018) <www.gov.uk/government/speeches/prime-ministers-speech-on-the-environment-11-january-2017> accessed 28 March 2018.

[43] Commission, 'Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland for the European Union and the European Atomic Energy Community'.

[44] Hilson (n 31) 104.

[45] Commission, 'Fitness Check of the EU Nature Legislation' (n 3) 7; Hilson (n 31) 112.

[46] Hilson (n 31) 107-08, 113.

individually.[47] This might include a political decision to diminish or resolve Natura 2000 on devolved territory. As the UK is a large and to some degree isolated territory due to its geographic location on several islands, one might be tempted to assume that the transboundary argument of retaining a nationally coherent Natura 2000 network might not have the same impact as it would have in mainland Europe. Nevertheless, post-Brexit UK will have a land border with the EU via the Irish Republic. It will also continue to be surrounded by water; hence, all that has been said so far will apply to the marine Natura 2000 network. Furthermore, migratory birds protected under the Birds Directive on their way from Northern Europe to, for example, Africa would be in distinct danger of losing their feeding and breeding grounds in the UK due to housing, farming or industry developments on un-designated previous Natura 2000 sites, should the network fall victim to a policy that favours economic interests over conservation.[48]

One could, however, believe that international law might offer some relief to that situation. And indeed, the UK is a signatory to various international conventions dealing with biodiversity conservation such as the Bern Convention on the Conservation of European Wildlife and Natural Habitats, the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals. Even without EU member status, the UK will continue to be bound, as a signatory, by these conventions. However, international rules are weaker than their European counterparts. The treaties are phrased very generally and vaguely to attract as many signatories as possible. None of them have established a conservation network where specific rules and restrictions apply that are comparable to the European Natura 2000 network.[49] In addition, most of these treaties and conventions do not

[47] Cf The Scottish Government, 'Environmental Governance in Scotland on the UK's Withdrawal from the EU: Assessment and Options for Consideration: A Report by the Roundtable on Environment and Climate Change'.

[48] Stuart E Newson and others, 'Long-Term Changes in the Migration Phenology of UK Breeding Birds Detected by Large-Scale Citizen Science Recording Schemes' (2016) 158 International Journal of Avian Science 481, 483.

[49] Although the Bern Convention's 'Emerald Network' partly consists of Natura 2000 sites.

contain enforcement mechanisms but rely on trust and international relations as sufficient for the signatory parties to comply with their requirements. Once the UK is only bound by international nature conservation obligations, its nature conservation standards may be profoundly weakened because the international law may, but does not need to, be transferred into domestic law. Accordingly, although the UK can hardly 'take back control'[50] as if it had never been an EU Member State, it will most likely not be bound to Europe as strongly after 29 March 2019. If its central government or devolved governments then wish to change domestic nature conservation law, they most likely can. If they decide to disobey international obligations, they also can. These options might have enormously detrimental consequences for British biodiversity.

4. India's National Green Tribunal

The connection of the above-stated with India might not, at first, be obvious. India is a developing nation with a rich culture, a vibrant daily life, a rapidly developing economy with a growth of 7.5 per cent, and an enormous population of approximately 1.32 billion.[51] It was a British colony until its declaration of independence in 1947.[52] After becoming an independent state, it decided to incorporate some features of the British system such as, for example, railway infrastructure as well as the administrative, parliamentary and judicial system.[53] It is not possible in this paper to explore India's

[50] Hilson (n 31) 103.

[51] Gitanjali N Gill, 'Courting Environmental Justice: The Adjucatory Dimensions of the National Green Tribunal India', Presentation at the University of Aberdeen, 28 February 2018, see <https://abdn.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?tid=d8919b0f-e88a-4862-901c-a8a10122cfd7> accessed 29 March 2018.

[52] David Washbrook, 'The Indian Economy and the British Empire' in Douglas M Peers and Nandini Gooptu (eds), *India and the British Empire* (OUP 2012) 48.

[53] David Scott, 'Colonial Governmentality' (1995) 43 Social Text 191, 195; Norbert Peabody, 'Knowledge Formation in Colonial India' in Douglas M Peers and Nandini Gooptu (eds), *India and the British Empire* (OUP 2012) 46, 75.

reasons for keeping these structures, and it is not its intention either to argue that British colonialism brought all infrastructure to India – India had an advanced society before British rule commenced and its current system is a mix of Indian and British influences.[54] In addition, this author is in no position to judge whether British rule was more or less advantageous for India, its infrastructure, development, or culture, as the details of colonial rule are incredibly complex and elaborating on them would go far beyond the scope of this paper.[55] Notwithstanding this, it can be stated that India acknowledged some aspects of British influence within its system and decided to retain them. This includes fundamental principles of the British judicial system which India has incorporated into its contemporary national legal system.[56]

Today, various factors are putting a strain on India's flora and fauna. Amongst them are the strains of a growing population in connection with rapid economic growth, partly due to foreign investment in the Indian economy, regardless of the consequences for the natural environment.[57] Consequently, the EPI currently ranks India 177th in its overall environmental performance, scoring 30.59 out of 100 points, and 139th regarding the conservation of biodiversity and habitats, scoring 49.46 out of 100 points.[58]

Instead of accepting this rather sobering fact the Indian government has decided to face its environmental problems and established a dedicated environmental tribunal, the National Green

[54] Niall Ferguson, *Empire: How Britain Made the Modern World* (Penguin Books 2004) 369.

[55] For an overview regarding the various opinions on the effects of British rule in India cf Ferguson (n 52); Douglas M Peers and Nandini Gooptu (eds), *India and the British Empire* (OUP 2012); Shashi Tharoor, *Inglorious Empire: What the British did to India* (Hurst & Company 2017).

[56] Ferguson (n 52) 197, 369; Michael Mann, *South Asia's Modern History: Thematic Perspectives* (Routledge 2015) 93; Tharoor (n 53) 89-90, 95.

[57] Gill (n 49).

[58] Yale Centre for Environmental Law & Policy (n 29); Yale Centre for Environmental Law & Policy, 'India' <https://epi.envirocenter.yale.edu/epi-country-report/IND> accessed 5 April 2018.

Tribunal, on 18 October 2010.[59] This tribunal is the third in the world to deal exclusively with environmental matters and be operationally independent.[60] Australia and New Zealand took the lead[61] and India followed as the first developing nation.[62] The National Green Tribunal became operational on 5 May 2011 and has original, appellate and special jurisdiction over all civil cases where a substantial environmental matter is involved; examples are air and water pollution, national forests conservation and, of course, the protection of India's biodiversity.[63] A special feature of the tribunal is that, while its central bench is in Delhi, it has branches in Bhopal, Chennai and Kolkata as well as Pune, and a mechanism for circuit benches.[64] This structure ensures that people who live remotely can also access the court, which is important for such a large country with limited travelling options.[65] This detail is especially vital since a significant proportion of India's population live in rural areas or are tribal people with no or limited opportunity to travel far to file a claim.[66] This characteristic also supports the tribunal's understanding of 'aggrieved party', which is very liberal.[67] Everybody who is directly or indirectly affected by an environmental issue which impacts on their life has legal standing and can thus file a case, with costs being low.[68] As a result of these peculiarities, numerous environmental infringement cases have already been brought before the tribunal for a hearing, including several cases dealing with the

[59] Gitanjali N Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5 Transnational Environmental Law 175, 186.
[60] George W Pring and Catherine Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UN Environment 2016) 2.
[61] Environment Court of New Zealand and The Land and Environment Court of New South Wales.
[62] Art 21 of the Indian constitution; The National Green Tribunal Act 2010 (NGT Act) 2010.
[63] NGT Act (n 60). art 14 (1); Swapan K Patra and Venni V Krishna, 'National Green Tribunal and Environmental Justice in India' (2015) 44 Indian Journal of Geo-Marine Science 445, 448; Gill (n 57) 186.
[64] Gill (n 57) 186.
[65] Patra and Krishna (n 61) 447.
[66] Gill (n 49).
[67] NGT Act (n 60) arts 14-16.
[68] Court costs are the equivalent to $ 10 cf Gill (n 49).

conservation of biodiversity.[69] Furthermore, claimants enjoy rather fast proceedings. The National Green Tribunal's decision-making process is much faster than that of other Indian courts and tribunals, taking from six months to two years to decide a case.[70] While this still may sound like a long time, litigation in India usually takes much longer. Currently, there are about 200,000 cases pending and another 63,000 cases filed per day at the Supreme Court, and its decision-making may take up to 20 years.[71] Some lower national courts are still dealing with cases that were filed during the British Raj.[72] In comparison, the National Green Tribunal works at a remarkable speed. This feature is often crucial to decisions not coming too late to protect endangered flora and fauna effectively.

The most exciting feature, however, is that the tribunal's panels consist of scientists as well as judges. The former are experts from either the physical or life sciences such as environmental sciences, technology, ecology, forestry, plant sciences, soil sciences or zoology, and specialize in the fields of environmental affairs that are dealt with in the individual cases.[73] They are fully-employed members of the bench, and their votes rank equally with those of the judges, resulting in both scientifically and legally founded decisions.[74] This interdisciplinary approach is a welcome innovation. Especially regarding nature conservation legislation, it makes much sense to incorporate scientists into the decision-making process. Although scientific views can, of course, differ or be proven wrong at later points,[75] incorporating them is an excellent start to judgements that can recognize and address environmental problems, and up-to-date scientific knowledge is an essential asset for assessing possible

[69] For example *Forward Foundation & Ors v State of Karnataka & Ors* (Judgement 7 May 2015); *Narmada Khand Swabhiman Sewa v State of Madhya Pradesh* (Judgement 1 October 2014).
[70] Gill (n 49).
[71] ibid.
[72] The British Raj is another term for the period of British rule in India. It existed between 1858 and 1947 see Tharoor (n 53) 95.
[73] Gill (n 57) 177.
[74] NGT Act (n 60) arts 4, 5; Patra and Krishna (n 61) 447; Woolley (n 19) 21.
[75] Lance H Gunderson, 'Ecological Resilience: In Theory and Application' 31 Annu Rev Ecol Syst 425, 433.

perils for biodiversity that are related to economic actions.[76] As the scientific background can become very complex in environmental cases having scientific experts in the panels of the National Green Tribunal thus means that the decision-makers themselves can genuinely understand and check scientific data that is presented during the proceedings. This is a great advantage compared with the situation before the tribunal existed (and the situation in many other countries to date) where judges needed to interpret scientific information on their own or depend on the interpretation of scientific experts that had been advanced by one party.[77] This effect is reinforced by the fact that judicial and scientific members of the board work in collegial cooperation, with no apparent hierarchy or disciplinary priority. The common objective in each case is to achieve environmental justice by combining academic areas of expertise.

Furthermore, Indian developers and other economic stakeholders such as the government, local authorities or multinational corporations must now answer to scientific as well as legal experts in case of proceedings. Knowing that might not only restrain them in implementing economic development plans that are of negative effect for the surrounding ecosystems; it might also ensure better scientific assessments of possible detrimental effects on biodiversity before any development takes place at all as they know they might need to defend their development decisions at the tribunal. Therefore, the complex and constantly changing interrelations between species and within ecosystems might eventually be monitored and analysed better to ensure compliance with nature conservation legislation and avoid future tribunal proceedings. In consequence, this might lead to a better scientific understanding of the natural environment and corresponding actions – an objective that is desirable not only in India but throughout the world.

Of course, the inclusion of scientific expert members does not render the tribunal flawless. Scientists, like judges, are capable of taking varying positions on the same case, for example on the effect

[76] Woolley (n 19) 21.
[77] Gill (n 57) 180, 185.

of a particular development on a particular ecosystem. Especially regarding the highly sensitive and poorly understood balance of ecosystems, the outcomes of any disturbances highly depend on the individual case, and scientific predictions may be erroneous.[78] This, in consequence, can result in wrong judgements which, for example, stop a development although it would not have any negative effects on the natural environment or vice versa. Nevertheless, the innovative approach of the tribunal often leads to scientifically as well as legally satisfying results.[79] Above all, however, the example of the National Green Tribunal shows that India has adopted an existing and, generally speaking, functioning British standard: its judicial system. Instead of just keeping it running, however, it has also worked flexibly to develop it into something different. The result is an innovative tribunal which operates within the broad rules of the inherited judicial system but has identified and eliminated several procedural weaknesses that would be detrimental to the environmental cause, such as limited standing, a fixed seat, and long proceedings.[80] The most remarkable reform, however, is the implementation of a symbiotic relationship between scientific and legal experts in decision-making that makes the tribunal work more efficiently in its area of expertise – possibly even leading to prevention of damage to biodiversity due to increased knowledge levels on the site of developers.

5. The Future of Nature Conservation in the UK

Coming back to Brexit, the UK can draw conclusions from this Indian example. As the UK is also about to separate from a larger unit, the EU, it will be in a somewhat comparable situation to India after its separation from the British.[81] While British rule in India and

[78] Sheila Jasanoff, 'Just Evidence: The Limits of Science in the Legal Process' (2006) 34 The Journal of Law, Medicine & Ethics 328, 339; Woolley (n 19) 21.
[79] Patra and Krishna (n 61) 452.
[80] Tharoor (n 53) 95; Gill (n 49).
[81] Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern

being a Member State of the EU are, of course, not identical, the Indian example still demonstrates possible advantages of adopting standards that function well from a system that a country may wish to leave. While the UK will have to restructure its administrative and legal organisation, it might consider keeping some European infrastructures that it incorporated during its time as an EU Member State. As in the example of India, the EU has not introduced all infrastructure into the UK but did add some features to it and ameliorated it in places. Being an EU Member State for more than 40 years has resulted in changes in various fields of the British political and legal systems that have been influenced by European policy and legislation. The rules about nature conservation established by the Birds and Habitats Directives are a good example. The Natura 2000 network and its associated management rules have greatly contributed to the conservation status of British fauna and flora. As shown by the REFIT Fitness Check and the EPI, complying with these directives' obligations has set remarkable nature conservation standards in the UK. To avoid neglect of these standards after Brexit, the UK could take India as an example and acknowledge the European nature conservation regulations as overall functioning standards and thus decide to retain the Natura 2000 network.[82] While it might still be moot if nature conservation should be governed on a national or devolved level, retaining this network would be a positive step towards maintaining existing biodiversity quality as it currently is. Of course, many factors need consideration first in order to continue operating the British Natura 2000. After March 2019, the UK will be stripped of some key institutional capacities for environmental governance that it had due to its membership in the EU as well as independent judicial review by the ECJ. These need to be tackled first to clarify on what legal basis Natura 2000 will, if at all, be administered and operated nationally.[83]

Ireland to the European Economic Community and to the European Atomic Energy Community [1972] OJ L73/5 1972 art 2; Colin T Reid, 'Brexit and the Future of UK Environmental Law' (2016) 34 Journal of Energy & Natural Resources Law 407, 407; Burns, Jordan and Gravey (n 40) 3.

[82] John McCormick, *British Politics and the Environment* (Earthscan 2009) 46, 149.

[83] Cf, for example, for Scotland The Scottish Government (n 46).

However, after that, the UK might even evolve its Natura 2000 network. As elaborated by the Commission's Fitness Check, the implementation of the nature directives at Member State level is not yet completely satisfactory. The designation and management of the network still suffer from a lack of scientific knowledge at the Member State level which sometimes hinders targeted conservation actions. The European legislative mills grind slowly, so this issue has not yet been tackled at an EU level. However, with the UK's coming exit, it might consider the Indian example of establishing a National Green Tribunal tailored to the individual needs of the country. Once the UK becomes a smaller unit, it might have more flexibility in its law-making as it will no longer have to consider European politics and legislation. Accordingly, it could take the European standard of Natura 2000 and further improve it to fill its existing gaps in scientific knowledge.[84] Possible approaches have already been discussed in literature and academia and include innovative data-gathering ideas such as accessing grey data, or involving the population in the accumulation and analysis of relevant data using citizen-science models.[85] Even the creation of a national British green court or tribunal consisting of judges as well as scientific experts, similar to the Indian National Green Tribunal, would then be possible in case the British desire it. Ideas like these could be tested on a national level in the UK and, if successful, eventually even be adopted by the EU.[86] This, however, all depends on what Brexit will look like and if the UK will even be interested in keeping some of the European structures.

6. Conclusion

[84] Fisher and Harrison (n 38).

[85] Vincent Devictor, Robert J Whittaker and Coralie Beltrame, 'Beyond Scarcity: Citizen Science Programmes as Useful Tools for Conservation Biogeography' (2010) 16 Diversity and Distributions 354, 355; Internationales Institut für Angewandte Systemanalyse (IIASA), 'FotoQuest' <http://fotoquest-go.org/> accessed 3 August 2018.

[86] Devictor, Whittaker and Beltrame (n 83) 355, 358-360; Ludwig Krämer, 'Monitoring the Application of the Birds and the Habitats Directives' (2013) 10 Journal for European Environmental & Planning Law 209, 231.

A comparison of the probable development of Europe's Natura 2000 network with the development of India's judicial system once the British had left might not seem obvious at first. However, parallels can be identified. Both reflect well-established concepts and work, albeit not completely flawlessly within the political system in which they were first developed. When India separated from the British, it acknowledged some advantages of its British legacy and kept, inter alia, the basic structures of the British judicial system. Building upon these structures, the country has established its National Green Tribunal, a promising environmental tribunal that efficiently deals with environmental injustice throughout India. Its procedural rules address some key weaknesses from which the Indian judicial system, inherited from the British, arguably suffers. Above all, the tribunal's benches are composed of scientific as well as legal experts – an innovative strategy that leads to efficient and highly successful environmental legislation. The post-Brexit Natura 2000 network could be the same for the UK. Established within the EU, it forms a large coherent network of sites where special rules of conservation apply and developments can only take place under specific, legally determined, circumstances. Retaining this network after the UK exits the EU appears desirable, especially against the background of the UK's continuing nature conservation obligations under various international conventions. The UK may even be able to tackle one of the network's current systemic weaknesses, the remaining scientific knowledge gaps, by testing, for example, innovative methods of data gathering and connecting ideas which have not yet found their way into the more cumbersome European system. Even the establishment of a national British green tribunal similar to the Indian tribunal is thinkable in this scenario. By following this approach, the UK could build upon existing structures and might, by avoiding any post-Brexit deterioration of its national nature conservation network, actually exploit the opportunity of Brexit to develop a better mechanism to conserve the UK's biodiversity.

Are refugees afforded sufficient protection under human rights law?

BORYS BIEDRON*

EDITORIAL NOTE: *This is an adapted and edited text version of the opening speech at the Lawyers Without Borders Student Division at Aberdeen University's annual Human Rights Conference, which took place on February 14th 2019. It was chosen to open the conference as a result of winning AULWOB's student speaker competition.*

Today, according to the United Nations Commissioner for Human Rights, there are over 25 million refugees.[1] Every single one of those 25 million people is someone who has been forced to flee the place they call home, where they were born, that they cherish. Their numbers are increasing – resettlement needs increased by over 17% from 2018 to 2019.[2] It is of the utmost importance that these people are given shelter and that their rights are protected at all times. And yet, there remain glaring gaps in the international legal infrastructure set up towards that end. In this speech, I will outline a number of areas in which I believe current human rights law fails refugees today.

In practice, the rights of a refugee depend on luck – to be precise, on where they happen to be born. They might be covered by a regional convention that acknowledges those forced to flee their country by war, internal conflict, or any other serious disturbances of

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[1] United Nations High Commissioner for Refugees, 'Global Trends: Forced Displacement In 2017' (United Nations High Commissioner for Refugees 2018).

[2] 'Projected Global Resettlement Needs 2019' (*UNHCR*, 2019) <https://www.unhcr.org/protection/resettlement/5b28a7df4/projected-global-resettlement-needs-2019.html> accessed 17 January 2019.

public order, like the Latin American Cartagena Declaration,[3] or the Organisation of African States Refugee Convention.[4] Others may only be covered by the 1951 UN Convention Relating to the Status of Refugees that is limited to a definition that is dependent on 'persecution,'[5] that is, in the words of Andreas Zimmermann, 'the severe violation of human rights accompanied by a failure of the state to protect the individual.'[6] When one considers the myriad of reasons why people actually choose to flee their countries, this seems simply too narrow. The Latin American and African approaches offer broader protection to those in need, but they are still not ideal, as they fail to account for certain emerging issues, namely so-called climate change refugees.

Since 2008 an average of 26 million people a year have been forced to flee their homes due to natural disasters, and due to the adverse effects of climate change millions more will likely end up in the same position in the future. The best hope for a comprehensive legal framework to address this issue was the Paris Agreement, but it fell far short. While the Agreement did result in the Conference of the Parties to the United Nations Framework Convention on Climate Change tasking the Executive Committee of the Warsaw International Mechanism for Loss and Damage with creating policies to minimise and address climate-change related displacement,[7] the term 'refugee' is never used and neither the rights of climate refugees nor the responsibilities of states towards them are specified.[8] The

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[3] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

[4] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 UNTS 45.

[5] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, 137.

[6] Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocol* (Oxford University Press 2011).

[7] *Conference of the Parties, Twenty-First Session Adoption Of The Paris Agreement (*United Nations Framework Convention on Climate Change 2015) <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> accessed 17 January 2019.

[8] Stellina Jolly and Nafees Ahmad, 'Climate Refugees in South Asia' [2019] International Law and the Global South 41.

continued lack of consensus on the definition and legal status of climate refugees could have potentially deadly consequences in the future.

We had a taste of the worst-case scenario in the infamous 2015 New Zealand case of *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*. This case, which reached the New Zealand Supreme Court, centered on Ioane Teitiota, a man from Kiribati, a small island nation battered by rising ocean levels and the contamination of food and drinking water. He understandably wished to flee, but the Supreme Court finally ruled that his circumstances were covered by neither the 1951 Convention nor New Zealand's own laws on refugee protection.[9]

Justice John Wild summed up the issue at hand in the Court of Appeal's earlier judgment, when he said 'No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.'[10]

It is not the fault of the New Zealand courts that no legal basis currently exists for them to rule in favour of climate refugees. However, the fact remains that these reasons for seeking refuge away from one's homeland are no less meaningful than those of 'traditional' refugees. This question will not simply go away. In fact, there will be millions more like Ioane Teitiota in the future. According to the International Organisation for Migration estimates of the number of future climate refugees range from 25 million to 1 billion people by 2050.[11] To effectively deal with this challenge, international human rights law should be reformed to formally and

[9] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.
[10] *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173, para 41.
[11] 'A Complex Nexus' (*International Organization for Migration*, 2019) <https://www.iom.int/complex-nexus#estimates> accessed 17 January 2019.

fully acknowledge climate refugees, of which there will be many more. Some have suggested that such reform could take the form of an additional protocol to the 1951 Convention.[12] Indeed, this would likely be necessary as such a legal regime would require a shift away from the present conception that refugee status may accrue to those subject to persecution due to political opinion or membership of a particular social group towards one in which said status may be granted simply on the basis of where one used to live.[13] From a human rights point of view, there is no reason not to formally acknowledge this in international law, and in time it will likely prove absolutely necessary.

Another way in which the international law in this area fails refugees and leaves them subject to the vagaries of chance is related to the settlement of refugees. As of 2017, around 5 million people lived in refugee camps[14], most of which are in developing countries which are often unable to deal properly with a large influx of displaced people.[15] As a result, these camps often face difficulty in ensuring basic sustenance or security for their inhabitants. For instance, a 2015 survey of several refugee camps in Rwanda found that teenage girls living in said camps frequently faced sexual exploitation as a result of a combination of severe financial constraints and a lack of willingness by the relevant authorities to fully tackle the issue.[16]

In other words, refugees living in camps may have fled one violation of their human rights only to find themselves facing another. One may say they should simply leave – but how? Many of them cannot return home as whatever reason they had for leaving

[12] Jolly and Ahmad (n 8).
[13] Frank Biermann and Ingrid Boas, 'Preparing For A Warmer World: Towards A Global Governance System To Protect Climate Refugees' (2010) 10 Global Environmental Politics 75.
[14] United Nations High Commissioner for Refugees 2018.
[15] Glazebrook Susan, 'The Refugee Convention in The 21st Century' (2018) 49 Victoria University of Wellington Law Review.
[16] Timothy P. Williams, Vidur Chopra and Sharon R. Chikanya, '"It Isn't That We're Prostitutes": Child Protection and Sexual Exploitation of Adolescent Girls Within and Beyond Refugee Camps in Rwanda' (2018) 86 Child Abuse & Neglect.

has not simply gone away. Yet their host countries are all too often unable to accommodate them. They cannot seek asylum in other countries, as the journey is physically and financially draining and, in any case, those countries do whatever they can to put up roadblocks to prevent them from ever entering in the first place. They are left vulnerable to people smugglers or human trafficking.

To avoid taking responsibility for 'too many' refugees, Western countries tend to employ 'non-entrée policies' to avoid ever giving potential refugees a chance to set foot in the country and press their case. Various kinds of non-entrée policies have been employed over the years. While the best known are the 'first country of asylum' and 'safe third country' policies, which are arguably incompatible with Article 33,[17] the arsenal of policies deployed by developed countries to prevent refugees from reaching their borders is more wide-ranging than that. One commonly employed non-entrée policy includes imposing visa requirements on countries known to produce genuine refugees and imposing sanctions, such as fines or impounding aircraft, on airlines that do not vigorously enforce said requirements, even as seeking refugee protection is often deemed to not be sufficient ground for the granting of a visa.[18] Absurdly, some countries, such as France or Australia, have attempted to declare parts of their own territory, usually parts of airports or islands, 'international zones' where their obligations under international law do not apply,[19] where they can be detained and deported after a summary hearing – appeal is often made unnecessarily and implausibly difficult.[20]

However, as the effectiveness of these conventional non-entrée policies has been reduced by the growth of people smuggling, developed countries have increasingly moved onto 'cooperative

[17] Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' [2003] SSRN Electronic Journal.
[18] James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement In A World Of Cooperative Deterrence' [2014] SSRN Electronic Journal.
[19] ibid.
[20] Pauline GJ Maillet, 'Exclusion from Rights through Extra-Territoriality at Home: The Case Of Paris Roissy-Charles De Gaulle Airport's Waiting Zone' [2017] Theses and Dissertations (Comprehensive) <https://scholars.wlu.ca/etd/1908/> accessed 17 January 2019.

deterrence' policies involving cooperation with neighbouring, usually developing, countries to prevent refugees from ever reaching their borders[21]. The best recent example of cooperative deterrence is the Italian government's policy under which Italy provides assistance in the form of money, training, and even deploying warships to the Libyan government with the goal of ensuring no migrants make it across the Mediterranean. This policy has been described in some analyses as an attempt to circumvent Article 33 on the grounds that it requires migrants to be sent to Libyan detention centres and held there indefinitely, while often being subjected to torture and other kinds of extreme inhumane treatment.[22]

This is not protection. This is leaving people in need to their fate, whatever it may be, in the false hope that they will forever remain somebody else's problem. We should not allow suffering people to potentially slip through the cracks simply because the numbers seem vaguely daunting at first glance.

The 1951 Convention was written in the shadow of World War II –the most devastating conflict in human history. Its priorities reflect that specific historical context and it has not kept up with modern challenges, and its admirable spirit has been distorted through increasingly tortuous legal workarounds in the name of political expediency. It simply must be reformed – the definition of refugee must be broadened to include those fleeing their homes due to the effects of climate change. More must be done to ensure refugees are genuinely protected and not just abandoned in barely functional camps or left in the hands of the unscrupulous. In other words, the burden must be shared to a much greater degree than it is now. Otherwise, we simply cannot honestly claim that our international instruments, which are supposedly designed to protect

[21] Hathaway and Gammeltoft-Hansen (n18).
[22] Thulin Malcolm, *Italian Deterrence Policies: An Examination Of The State's Non-Entrée Policies In Response To The Migration Crisis* (Lund University 2018) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8966047&fileOId=8968712> accessed 17 January 2019.

refugees, is fit for purpose, and we will not be ready for the challenges of the future.

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