# CASE NOTE

## *VAN COLLE AND ANOTHER v CHIEF CONSTABLE OF HERTFORDSHIRE POLICE*

## [2002] 2 AC 545

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The coming into force and implementation of the Human Rights Act 1998 (hereinafter referred to as 'the Act') has created a window of opportunity for cases which would have little or no chance of succeeding under English law. Established principles of law have been called into question under the Act; the imposition of a burden of proof on the defendant in *R v Lambert*[1] and the secrecy of the identity of certain witnesses in *R v Davis*[2] are just two circumstances in which the courts have been asked to test the compatibility of the law against the European Convention On Human Rights (hereinafter referred to as 'the Convention'). Whilst this seems to be a commendable progress at first blush, it is difficult not to notice that the courts are exceptionally skilled at side-stepping the issue of compatibility to preserve these established principles.

Nowhere is this demonstrated more clearly than in the case of *Van Colle and Another v Chief Constable of Hertfordshire Police*[3] (hereinafter referred to as the '*Van Colle*' case). The *Van Colle* case concerned a young optometrist named Giles Van Coles, who was a prosecution witness in a case against a former employee of the optical firm where he was employed. A series of attacks were

1 [2002] 2 AC 545 (HL).
2 [2008] UKHL 36.
3 [2008] UKHL 50.

perpetrated against Van Colle and another witness, involving arson and threatening phone calls. The accused wanted Van Colle not to testify and to convince the firm to withdraw the case against him. Van Colle reported each attack to the detective in charge of the case, who sometimes could not be reached and at other times concluded that the evidence was such that he could not take any action. Then, on the 22 November 2000, Van Colle was shot dead outside his house by the accused, who was later charged and convicted of murder. Van Colle's parents then brought a case against the police, relying only on the Human Rights Act 1998 and the Convention.

Also on appeal with *Van Colle* was the case of *Smith v Chief Constable of Sussex Police.*[4] In this case, Mr. Smith was repeatedly threatened by his ex-lover. The threats were violent in nature and Mr. Smith reported each one to the police. The police refused to look at the threatening phone messages nor make entries in their notebooks or even take his statement. They decided to trace the assailant's address using his phone number, a process that takes up to four weeks, despite the fact that Smith offered it to them. One night, Smith was attacked by his ex-lover with a claw hammer and suffered severe injuries. The assailant was imprisoned, but Smith brought an action against the police, who in turn applied to have the motion struck off.

It is a well-established principle in tort law that the police have blanket immunity against negligence suits. This was established in the case of *Hill v Chief Constable of West Yorkshire*[5] (hereinafter referred to as the '*Hill*' case). In this case, the police apprehended a man suspected of killing several young women in the area, only to release him sometime later. He went on to kill another girl, and her mother brought a negligence suit against the police. Lord Keith of Kinkel said in his judgment:

[4] [2008] EWCA Civ 39.
[5] [1989] AC 53.



> *The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded... A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime.*

This decision set the tone of negligence suits against the police for a good 20 years; years in which even the most negligent and malicious acts went unpunished. The courts, it appeared, realised that the balance between fairness to the public and the efficacy of the force was an elusive creature and, instead of making an attempt to find it, chose to maintain the *status quo*.

The first sign that change was in the air came from the case of *Osman v The UK*.[6] Similar to *Van Colle*, the police disregarded incidents of an escalating violent nature against a student, which culminated in the death of the student's father and the injury of the student. They contended that in breach of Article 2, of the Convention the authorities had failed to protect the right to life of Osman's father against the threat posed by P; in breach of Article 6 of the Convention, the Osmans had been denied their right to access to a court to sue the authorities for damage caused by police negligence; and, in breach of Article 8 of the Convention, the

[6] (2002) ERHH 245.

police had failed to secure Osman's personal safety by failing to protect him from harassment.

The application was dismissed by the Court of Appeal, relying as always on the *Hill* principle. The case then went to the European Court of Human Rights. In considering the alleged violations of Articles 2 and 8 of the Convention, the court held that any such allegation must be supported by evidence showing that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and that they failed to take measures to avoid that risk. When the test was applied to the case, it was decided by a bare majority that the police were not negligent in the discharge of their duties.

However, the European Court of Human Rights held unanimously that the English practice of granting immunity to the police was in breach of Article 6 of the Convention. It said of the matter:

> *The Court did not accept either the Government's plea that the applicants had available to them alternative routes for securing compensation which mitigated their inability to take a negligence action against the police, for example a civil action against Paget-Lewis or the psychiatrist who had examined the latter and found him not to be mentally ill.*
>
> *In its opinion neither course of action would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent Paget-Lewis from exacting a deadly retribution against Ali and Ahmet Osman?*
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> *While they might or might not have failed to convince the domestic court that the police were negligent in the circumstances, they were nevertheless entitled to have the police account for their actions and omissions in adversarial proceedings.*



The judgment of the European Court of Human Rights caused a great stir in the legal community; now that Strasbourg had spoken, it seemed only logical that the United Kingdom would follow. Perhaps now the police force could finally be brought to task for its indiscretions. Soon after came the case of *Donachie v The Chief Constable of the Greater Manchester Police*.[7] The appellant in this case was a member of the police force himself and suffered psychiatric injury as the result of a botched up covert operation. He sued the force for negligence, and the Court of Appeal not only found in his favour, but barred the respondent from appealing. Whilst the greater part of the Court of Appeal's discussion was devoted to *Page v Smith*[8] (hereinafter referred to as the 'Smith' case) and psychiatric injury, the fact that the police were held liable for negligence cannot be overlooked.

The reaction to these changes, surprisingly, were mixed. Morgan of the University of Plymouth seemed to think that the ill-effects contemplated by Lord Keith in *Hill* were likely to come to pass. Others were of the opinion that this change finally acknowledged and attempted to set right the blatant infringement of human rights that had been sanctioned by the courts thus far.

Here, we come back to where we began this discussion; the case of *Van Colle*. Both the trial judge and the Court of Appeal found in favour of *Van Colle* based on the decision of the European Court of Human Rights.

In *Osman*, things took a different turn when the case went to the House of Lords.

Lord Bingham, in delivering the leading judgment of the House of Lords, highlighted the test laid down by the court in *Osman*, as provided below:

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7 [2004] EWCA Civ 405.
8 [1995] 2 WLR 644.

> *...it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.*

Based on that test, the judge went on to ask whether Detective Ridley should have appreciated that there was a real risk to the life of Van Colle based on the facts available to him at that time. The offender had a history of petty offences, and the only indication of violence was a conviction for assault. Several incidents involving the offender and the witnesses went unreported. Citing these facts, Lord Bingham decided that DC Ridley could not have come to the conclusion that Van Colle was at immediate risk of harm.

He further discussed the rationale behind the decision of the trial judge, who felt that a lower standard than the one applied in *Osman* was appropriate where a threat to the life of an individual derives from the state's decision to call that individual as a witness; this lower standard for state witnesses had been discussed and applied previously in the case of *R (A and others) v Lord Saville of Newdigate and Others*[9]. The decision was held to be *per incuriam*, though couched in much nicer words. Lord Hope recommended the confinement of the case of *Lord Saville* to its facts. All the Lords took pains to state that the *Osman* test is to be applicable across the board in cases involving allegations of police negligence.

The case of *Smith* was not as easily disposed of. The actions of the police were undeniably negligent and Lord Phillips of Matravers even went so far as to say that it is possible that the declaration made by every police officer to 'cause the

[9] [2001] EWCA Civ 2048.



peace to be kept and preserved and [to] prevent all offences against people and property' would give rise to a common law duty of care. However, the consensus at the end of the day was that the case did not warrant a departure from the well-established principle. This was expressed succinctly by Lord Brown of Eaton-under-Heywood, who stated:

> *Clearly the violation of a fundamental right is a very serious thing and, happily, since the 1998 Act, it gives rise to a cause of action in domestic law. I see no sound reason, however, for matching this with a common law claim also. That to my mind would neither add to the vindication of the right nor be likely to deter the police from the action or inaction which risks violating it in the first place. Such deterrence must lie rather in the police's own disciplinary sanctions (as, indeed, were applied in Van Colle) and, in a wholly exceptional case like R v Dytham, in criminal liability. Rather I am satisfied that the wider public interest is best served by maintaining the full width of the Hill principle.*

However, Lord Bingham dissented, by stating:

> *On the other hand, one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the convention.*

Several important points have to be noted concerning this judgment; the first of these is that this decision effectively overrules *Osman*, even though it is not stated expressly. It seems as though the Lords merely found a new way to re-instate the blanket immunity of the police, handed to them by the European Court of Human Rights; the requirement for the police to be aware of an "immediate threat"

to the victim has arguably been interpreted so strictly as to create a standard too high for the average, deserving case of negligence to succeed. In the case of *Smith*, for example, the police flatly refused to take notes of the incident or even fill out a report despite requests from the claimant for them to do so. Unlike *Van Colle*, *Smith* reported every single incident to the police, so the police had a very clear picture of the continued abuse of the claimant. One hates to speculate, but could this reluctance to admit the existence of a case worth investigating be put down to discrimination? Did Smith's sexual preference make him less deserving of police protection? If so, this case is one of malice or *mala fide* rather than simple, forgivable negligence. If this possibly malicious and definitely negligent act did not justify the imposition of liability, then what will?

Still, one must consider the merit of the House of Lords' point of view; can the occasional act of negligence be overlooked in order to prevent the rise of defensive policing? It is no secret that the English are highly litigatious, and despite having the largest allocation for legal aid in the world, a common gripe in the United Kingdom is that it is nowhere near enough. So bad is this culture of litigation that teachers are no longer allowed to touch children to comfort them; they cannot pick up a fallen child nor carry one to the nurse's office. Also worth considering is the current political climate of the United Kingdom, which is on the verge of anarchy. Extremist immigrant and extreme right parties come into violent contact every other week and the police have enough on their plate trying to decide whom to protect.

The recent occurrence in Luton is a good example of this. The town had gathered to welcome home a regiment of troops from their posting in Iraq. Along with the family, friends and well-wishers were a few members of a Muslim religious group known to harbour extremist views, carrying placards with statements such as "baby killers". They had spoken to the police and were told that they could peacefully picket as long as they stood away from the general crowd that had gathered. The turn-out was larger than expected and a number of the picketers



found themselves right in the middle of the crowd. As a result, the marching soldiers and their well-wishers got an eyeful of the anti-military slogans.

The whole thing might have blown over with little more than a few well-placed insults from family members but the British National Party had recently won a number of seats on the local council and was still riding high after their European victory. Members and supporters took this opportunity to confront "the enemy", mobbing around the picketers and pelting them with bacon rashers. The police, finally privy to the impending slaughter, gathered around the area and their presence was enough to convince each side to stand down. The Chief of Police later commented to the media that he underestimated the racial tension in that part of town, but pointed out that no violence had taken place.

Now, imagine what would have happened if the police were vulnerable to negligence suits. The first problem the Chief of Police would have would be deciding whether to allow the religious young men to picket in the first place; to allow them would be like taking a match to dry twigs, but to deny them would be infringing their right to expression. Then, of course, there would have been arrests to prevent the outbreak of a riot for which they might be sued if someone had been hurt. Had the right-wingers been arrested, the media would have spun the story to make it seem as though the police had allowed religious extremists to have a go at the brave ol' troops and picked on the native English people who were only trying to defend them. Had the extremists been arrested, the media would have spun the story to make it seem as though the jingoistic police had denied these young men the right to have their grievances aired against an unjustifiable war. The police would have spent more time trying to prevent a lawsuit and taking care of their image than doing any actual policing.

Also adding to the fray is the fact that people are rarely completely honest with the police, whether they are victims or victimizers. And then consider the fact that people are unpredictable and that the police often have to make decisions based

on how they think people will act. Any accomplished lawyer would be able to pick apart the actions of the police on the nitty-gritty at every stage of their investigations, which is precisely the reason why judges are unwilling to allow the police to be susceptible to negligence suits.

One contends that the vast majority of the police force are upstanding citizens and try their best to carry out their duties properly. However, as in all professions and institutions, there are bad eggs who inevitably wreak havoc and it is these officers who take advantage of the blanket immunity, knowing that any transgression, no matter how severe, will be overlooked. How then is the law equipped to deal with these characters? There is a disciplinary tribunal, known as the Internal Affairs Department, (IAD) which investigates and takes action against erring officers, but the feeling is that these IAD officers and the police are all part of an "old boys club" and the enforcement is thus lax. Certainly, no action was taken against Detective Ridley or the officers involved in (Smith's) case, which is why the parties involved turned to the judicial system for justice.

But justice was denied to them in the name of preventing defensive policing. It does not take much scrutiny to see the problem faced by the judicial system; to strike a balance between holding the police responsible for acts of negligence and preserving the legally-dubious efficacy of the force. The answer to this can be found in the judgment that set in motion this series of events; Lord Keith in *Hill* commented that tortious actions would be allowed for acts of gross negligence. This is the standard, strictly interpreted, that ought to be adopted by the courts, instead of a truly blanket immunity.

How shall "gross negligence" be defined? One recommends the adoption of the *Wednesbury* test; if the conduct of the officer was so unreasonable that no reasonable person would have taken the same course of action, it should qualify for judicial consideration.



There is still hope for reform in this area of the law, unlike psychiatric injury or occupier's liability; the decision in *Van Colle* is very recent, and it remains within the realm of possibility that the Court of Appeal may yet find a way to reconcile both the European Court of Human Rights decisions and the House of Lords decisions on police negligence. However, one must bear in mind that British politics is reactionary at the moment, and that it is unlikely that any reform would take place without being preceded by a horribly tragic occurrence.[10]

[10] Just witness what it took to get the government to review the social services dealing with children. The death of Baby P led to inquiries in England, as did the death of Brandon Muir for Scotland. Ireland, lacking any tragic infant deaths highlighted by the media, has been left to its own devices. The author wishes she could say that these deaths had some effect on the system, but they sadly it has not.