CASE NOTE

Commissioner of Police for the Metropolis v DSD

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I INTRODUCTION

In 2007, Dame Margaret Bazley released her report following a Commission of Inquiry into Police Conduct in New Zealand.[1] While largely positive towards the advances the Police had made through the 1990s and early-2000s in responding to sexual assault complaints, she found evidence of "disgraceful conduct by police officers" that included "a culture of scepticism in dealing with complaints of sexual assault".[2] That culture resulted in numerous instances of officers' "serious dereliction of duty", in which they had failed to investigate allegations of serious criminal offending over decades.[3] Recent reports suggest that the Police, as recently as 2013, failed to investigate a number of complaints of sexual offending due to "investigators' perceptions that a high percentage of sexual violation complaints are fabricated".[4]

This is unsurprising. Police "culture has traditionally been one dominated by men",[5] who are much less likely to experience sexual violence than women,[6] and who therefore have little direct experience of its prevalence. This culture underpins Police "scepticism" of sexual violence complaints. While the culture is increasingly supportive of women[7] and women make up over two-thirds of

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1 Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (March 2007) [Bazley Report].

2 At 1.

3 At 124.

4 New Zealand Police *K3 Report* (2013) at 4.

5 Bazley Report, above n 1, at [7.15].

6 Twenty four per cent of women in New Zealand have experienced sexual violence, compared with six per cent of men: see *2014 New Zealand Crime and Safety Survey* (Ministry of Justice, 2015) at 51.

7 Bazley report, above n 1, at [7.24]. See also New Zealand Police *A Decade of Change 2007-2017: Implementing the recommendations from the Commission of Inquiry into Police Conduct* (April 2017).

Police employees,[8] women make up less than 20 per cent of the Constabulary and its investigators, and less than 10 per cent of Police leadership.[9]

There are minimal legal avenues for redress for victims of sexual offending. While they are entitled to ACC compensation when that offending occurs in New Zealand,[10] accountability for state failures to investigate complaints effectively is difficult to obtain. It is generally accepted that Police owe limited duties at common law.[11] However, the United Kingdom Supreme Court's recent decision in *Commissioner of Police for the Metropolis v DSD* provides a potential pathway in cases of "egregious errors on the part of the police in the investigation of serious crime": recovery by way of damages under the New Zealand Bill of Rights Act 1990.[12] This case note examines the United Kingdom Supreme Court's reasoning, focussing on those aspects most relevant to its application in this country.

II BACKGROUND

The complainants (anonymised to DSD and NBV) were victims of John Worboys, a "clinical and conniving" man who raped or sexually assaulted over 100 women that he carried in his London black taxi cab between 2003 and 2008.[13] Worboys incapacitated his victims by plying them with drugs and alcohol before sexually assaulting them. He created the opportunity to do so by telling them a story that, he said, called for a celebration in the back seat of his taxi with a glass of champagne secretly laced with drugs.[14] His *modus operandi* was so specific and consistent that once "anyone put two or more

8 New Zealand Police *Briefing to Incoming Minister* (December 2017) at 7.

9 Of a rank sergeant or above: see New Zealand Police *Current statistics of women in NZ Police* (April 2016).

10 Accident Compensation Act 1993, s 21. Lump-sum payments can be made up to $100,000: Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002.

11 See *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL) at 63–64 per Lord Keith and 65 per Lord Templeman; *Mortensen v Laing* [1992] 2 NZLR 282 (CA); *King v Attorney-General* [2017] NZHC 1696, [2017] 3 NZLR 556; and Stephen Todd "Abuse of Legal Procedure" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thompson Reuters, Wellington, 2016) at 1039–1040. Contrast this with the approach in Canada: *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41, [2007] 3 SCR 129. See also the United Kingdom Supreme Court's recent limited recognition of a duty in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595.

12 *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11, [2018] 2 WLR 895 at [71] [*DSD* (SC)].

13 *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) at [6] [*DSD* (HC)].

14 At [15].

of the reported incidents side by side, the inference that there was a single serial offender was irresistible".[15] Within eight days of officers analysing the coincidence of that offending, Worboys was arrested.

The two complainants were offered as test cases, representing the two temporal ends of Worboys' offending. DSD complained to Police in early-2003, the same morning she was assaulted. While the full magnitude of Police failures could not have been foreseen at the time, the response to DSD's complaint contextualises the extent of Police failures: had officers properly investigated her complaint, the victimisation of dozens of women could have been avoided. NBV was one of Worboys' last victims, and may have been spared from his offending had officers adequately investigated earlier complaints. Police failures were obvious and were largely admitted once they were identified through Police internal reviews.[16]

The circumstances relating to DSD's complaint can be stated briefly. After Worboys had drugged and assaulted her, he attempted to drop her at a house occupied by "Kevin". Kevin was woken by Worboys knocking at his door shouting that there was a girl in his taxi that lived at the address. Kevin did not know DSD, but given her intoxicated state he suggested that she be taken to the local Police station. Kevin accompanied Worboys to show him the way.[17] When they arrived, DSD was so inebriated that officers had to come out and help her from the taxi. The officers made no note of those who had accompanied DSD or the registration number of the vehicle she was in. The officers treated her as a drunk and called an ambulance to take her to hospital. Upon waking at hospital, DSD began to describe symptoms consistent with having been raped and called Police.[18]

Officers eventually interviewed the friends that DSD had been with earlier that night (although statements were never taken from them) and went to the place where she got into Worboys' cab in an unsuccessful attempt to obtain CCTV footage. However, they never spoke to Kevin, nor made any attempt to recover CCTV footage along the route they travelled. After five months, and

15 *DSD* (SC), above n 12, at [102]. The Police's own review concluded that it was unlikely that Worboys' crimes could have been identified earlier: Commissioner's Report *IPCC Independent Investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* at 5.

16 *DSD* (SC), above n 12, at [102].

17 *DSD* (HC), above n 13, at [21].

18 At [22].

several complaints by DSD that she was not being taken seriously by Police, the investigation was effectively closed. DSD would not be formally interviewed until 2008 when she contacted Police after learning of Worboys' arrest.

The offending against NBV took place in July 2007. NBV was out with her friends at a night club when she was picked up by Worboys. After drugging and assaulting NBV, Worboys dropped her at her university residence. While she complained to Police the next day, no search was conducted (despite Worboys' cab being identified) no detailed statement was taken from NBV and there were delays in obtaining the CCTV footage from the nightclub. Ultimately, the correct footage was never viewed. After three months, the investigation was closed.[19]

In 2013, DSD and NBV first sought declarations and damages from the Commissioner of Police in the High Court.[20] The applicants argued that under the Human Rights Act 1998 (UK), the Police owed a duty of care in relation to the investigation of crime, which had been breached in both their cases.

The High Court concluded that there is "a duty imposed upon the police to conduct investigations into particularly severe violent acts perpetrated by private parties in a timely and efficient manner".[21] The Court found numerous failures between the years 2003 (when the first complaint was made) and 2009 (when Worboys was tried),[22] categorised as both systemic and operational, in the investigations relating to both DSD's and NBV's complaints.[23] Systemic failures included: failures in the training and oversight of investigators; not using intelligence to identify linkages; and issues around the prioritisation of resources for the investigation of non-sexual complaints that were seen as being easier to clear (with accompanying pressure on officers to reject complaints of sexual assault).[24] The failures identified as operational included: failing to record the details of those who brought DSD to the Police station; not

19 At [40]–[58].

20 *DSD* (HC), above n 13.

21 At [14].

22 In March 2009, Worboys was convicted of 19 counts of rape, attempted sexual assault, four sexual assaults, and 12 offences of administering a substance with intent and rape.

23 *DSD* (HC), above n 13, at [12].

24 *DSD* (SC), above n 12, at [13].

interviewing Kevin (who it was accepted was "a vital witness");[25] not collecting key evidence including CCTV footage and failing to believe DSD or take her complaint seriously. Operational failings of that nature are not unknown to those regularly involved in the criminal justice system, and are among the failings identified by Dame Margaret Bazley in her 2007 report.[26]

The Supreme Court unanimously upheld the lower courts' findings of Police liability for failings in the investigations.[27] The judges agreed that art 3 of the European Convention on Human Rights (the Convention),[28] being the prohibition on inhuman treatment, includes an obligation on the state to carry out an effective investigation when it receives a credible allegation that serious harm has been caused to an individual.[29] The Court split on whether, to be actionable, defects in an investigation must be systemic, or whether (as the majority held) operational errors will suffice.[30]

III DISCUSSION

The judges' disagreement (Lord Kerr, Lord Neuberger and Lady Hale on the one hand, and Lord Hughes on the other) resulted from their respective analyses of both the juridical underpinning of the obligation and its policy. Given the confines of this case note and the reality that any recognition of this obligation in New Zealand (and the extent of that recognition) will be determined by policy, this note will focus on those arguments, after providing a brief outline of how the European courts came to recognise the obligation.

As noted by Lord Mance, while the obligation's underpinning is "shaky" and arguably dilutes the import of rights protected by art 3 of the Convention, the obligation on Police to investigate has now "so often been expressed" in clear terms that it "cannot be ignored".[31]

The obligation to investigate is, to use Lord Hughes' words, a "gloss"[32]

25 *DSD* (HC), above n 13, at [119].

26 Bazley Report, above n 1.

27 The decision was originally appealed to the Court of Appeal, in [2015] EWCA Civ 646, where the appeal was dismissed.

28 European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (signed 4 November 1950, entered into force 3 September 1953).

29 *DSD* (SC), above n 12, at [81], [99], [127] and [150].

30 At [84]–[85] and [99].

31 At [150].

32 At [104].

placed on arts 2 (the right to life) and 3 of the Convention by a line of European Court of Human Rights (ECtHR) cases beginning with *Assenov v Bulgaria,*[33] and *Osman v United Kingdom*.[34]

Assenov involved an allegation of violence inflicted on a suspect held in custody by police officers. The Court held that art 3 required, by implication, that the state investigate where an individual raises "an arguable claim that he has been seriously ill-treated by … agents of the State".[35] If the state is not obliged to identify and punish those responsible, then "the general legal prohibition of torture and inhuman and degrading treatment and punishment … would be ineffective in practice".[36]

By contrast, *Osman*, interpreting art 2, involved an allegation that officers had failed to act on information that a person "represented a serious threat to the physical safety of" an individual who was later killed by that person.[37] The Court held that the obligation on a state to safeguard lives within its jurisdiction implies a "positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another".[38]

Against that background, the ECtHR was faced with a claim in *MC v Bulgaria* that officers had failed to conduct a proper investigation into a complaint of rape by a 14-year-old. There was an associated claim that Bulgarian law failed to provide effective protection against rape and sexual abuse because only cases where the victim had actively resisted or violence was used by the offender were prosecuted.[39] The Court found that:[40]

> … states have a positive obligation inherent in Arts 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

33 *Assenov v Bulgaria* (1998) 28 EHRR 652 (ECHR).

34 *Osman v United Kingdom* (2000) 29 EHRR 245 (ECHR).

35 *Assenov v Bulgaria*, above n 33, at [102].

36 At [102].

37 *Osman v United Kingdom*, above n 34, at 252.

38 At 305.

39 *MC v Bulgaria* (2005) 40 EHRR 20 (Section I, ECHR). Article 8 confers the right to respect for one's private and family life, home and correspondence.

40 At [153].

Returning to the United Kingdom Supreme Court's reasoning in *DSD*, Lord Hughes held that *MC v Bulgaria* required that a state have:[41]

> … a proper structure of legal and policing provision designed to punish [violence] when it occurs and [that it] has administered that structure in good faith and with proper regard for the gravity of the behaviour under consideration.

By contrast, both Lord Kerr and Lord Neuberger (with whom Lady Hale agreed) argued that by necessary implication, *MC v Bulgaria* required a state to conduct investigations effectively and not simply have the proper structures and systems in place. While those competing views also called in aid favourable interpretations of the line of cases and their progeny, discussed above, at the heart of the judges' disagreement were four policy arguments.

First, they considered the impact the recognition of the obligation would have on policing. As the ECtHR said in *Osman*, any obligations imposed on Police must be interpreted so as not to "impose an impossible or disproportionate burden on the authorities".[42] Lord Hughes considered that this factor weighed heavily in favour of limiting the obligation. Law enforcement and the investigation of alleged crime, Lord Hughes said, "involve a complex series of judgments and discretionary decisions".[43] Revisiting those judgments, and exposing the Police to litigation, would "inhibit the robust operation of police work, and divert resources from current inquiries".[44] He went on to say that the Court must bear in mind the "practical business of policing",[45] "the unpredictability of human conduct and the operational choices which must be made in terms of priorities and recourses".[46]

Additional obligations will always burden those on whom they are placed. The question is whether the benefits outweigh the costs. The standard the Police are expected to meet under this obligation is not high; breaches must be "egregious and significant", "conspicuous or substantial" or "obvious and

41 *DSD* (SC), above n 12, at [127].

42 *Osman v United Kingdom*, above n 34, at 305. See also *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [121]–[122].

43 *DSD* (SC), above n 12, at [132].

44 At [132].

45 *DSD* (SC), above n 12, at [127].

46 At [112] citing *Osman v United Kingdom*, above n 34, at [116].

significant" to be actionable.[47] It ought not be unjustifiably onerous for Police to avoid making such significant errors.

Secondly, Lord Hughes was concerned about costs associated with responding to complaints; a broad obligation, he said, will lead to increased complaints and litigation.[48] However, accepting Lord Hughes' narrower obligation over the majority's is unlikely to make any material difference. While it is true that a narrower obligation will enable some claims to be filtered out at an early stage, all will require investigation, whatever their individual merit. Further, a narrow obligation will only enable claims to be filtered out if its parameters are clear and the point at which failures cease being systemic is far from clear — Lord Hughes characterised all of the failures in DSD's and NBV's cases as systemic.[49]

Relatedly, as Lord Neuberger was concerned to point out, the competing definitions raise broad forensic issues. Lord Neuberger said that the narrow definition may present a court with "difficult practical, categorisation, and apportionment issues".[50] However, this criticism ignores the issues inherent in the majority's definition. The application of both tests to the breaches at issue in DSD's complaint illustrates the point. A failure to record the registration number or name of someone who drops a drunk person at a Police station, in the context of what officers knew at the time in DSD's case could hardly be said to be an "egregious" or a systemic failure.[51] Further, difficulty in a court's forensic task is not generally a reason for broadening the scope of a duty. Definitions are not always easy to apply in practice, which is why courts are looked to as arbiters of those tests.

Third, the ultimate consequences of any breach (not apprehending an offender) must not weigh into the scope of the obligation. The obligation is "one of means, not result".[52] Focussing on operational failures risks creating an inquiry that looks to the ultimate consequences rather than individual egregious failures, which each reduced the opportunity for the apprehension of an offender. That risk can be adequately mitigated through care in its application.

47 *DSD* (SC), above n 12, at [29] and [72].

48 At [132].

49 At [140].

50 At [96].

51 At [51].

52 At [33].

Finally, as Lord Neuberger reasoned, there is nothing in ECtHR jurisprudence that leads one to believe that it may limit the extent of the obligation in the way Lord Hughes suggests.[53] The ECtHR's jurisprudence, "shaky" though its rationale may be, has been consistent; broadening obligations on states and not limiting them.[54] Through each of *Secic v Croatia*,[55] *Beganović v Croatia,*[56] *BV v Belgium*,[57] and *Vasilyev v Russia*[58] the ECtHR has repeatedly recognised the constituent parts of the majority's reasoning: that the obligation to investigate is not limited to ill treatment by state agents and that the operational failures are actionable. There is no reason to suppose that a court would not join the two when the opportunity arises.

IV APPLICATION TO NEW ZEALAND

When it comes time for New Zealand courts to consider whether to recognise the duty on Police and its extent, they will be reminded that systemic issues — similar to those in *DSD* — surrounding Police investigations of complaints of alleged sexual offending, have been identified before. These systemic issues are underpinned by a male-orientated and dominated Police culture.

While the New Zealand Police is a long way down the track to rectifying them,[59] more will need to be done than simply hiring more women. As recent experiences in the legal profession show, increasing the number of women within an organisation will not, of itself, resolve enduring cultural issues. Increased investigator training, resourcing, as well as individual attitudes, all need to change for systemic issues to abate. Until they do, the Police will remain at risk of breaching any broader duties owed.

In considering whether any particular Police conduct breaches the duty, care will need to be taken to keep in mind its origin as a "gloss" on the right of individuals to be free from "degrading, or disproportionately severe treatment".[60]

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53 *DSD* (SC), above n 12, at [93].

54 At [150].

55 *Šečić v Croatia* (2009) 49 EHRR 18 (Section I, ECHR).

56 *Beganović v Croatia* (46423/06) Section I, ECHR 25 June 2009.

57 *BV v Belgium* (61030/08) Section II, ECHR 2 May 2017: see the Supreme Court's partial translation of the case in *DSD Supreme Court decision,* above n 12, at [43], [87] and [151].

58 *Vasilyev v Russia* (32704/04) Section I, ECHR 17 December 2009.

59 See New Zealand Police *A Decade of Change 2007-2017: Implementing the recommendations from the Commission of Inquiry into Police Conduct* (April 2017) at 4.

60 New Zealand Bill of Rights Act 1990, s 9.

In New Zealand, this right is protected by s 9 of the New Zealand Bill of Rights Act 1990. Our Supreme Court has required a high "level of harshness" to found a breach of s 9.[61] To engage s 9, allegations of sexual offending would need to qualify as "cruel" or "degrading" treatment. Treatment will be cruel "if the suffering that results is severe or is deliberately inflicted" or degrading, and "if it gravely humiliates and debases the person subjected to it".[62] No court in this country has considered whether the state has a duty to prevent infliction of such conduct on citizens by non-state actors.[63]

There is, as Lord Hughes stated, "a clear distinction between protection from an immediately anticipated danger and inquiry into a past event".[64] However, the duty to investigate would "be of little value unless it was a duty to investigate effectively".[65] To fully consider whether an investigation was effective a court must be able to consider whether substantial errors were made that limited the means to apprehend an offender. Limiting the obligation to a review of Police systems, properly defined, is unlikely to enable a court to properly assess the effectiveness of an investigation. A court could dismiss a claim on the basis that while the investigation contained significant and substantial errors, it was not defective because officers were trained appropriately and the relevant procedures were satisfactory.[66]

Higher court consideration of the obligation may not be far away. The family of Steven Wallace have proceedings afoot in the New Plymouth High Court, which Brown J refused to strike out in 2016, alleging that Police had an obligation to properly investigate the killing of Mr Wallace by a Police officer.[67] While it remains to be seen whether the facts of that case will be ripe for development of the obligation (the incident was investigated by the Police and the Independent Police Complaints Authority, and was the subject of an

61 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] NZLR 429 at [362] per McGrath J.

62 At [171] per Blanchard J.

63 See a discussion of the state's obligation to do so in Steph Lambert "Modern day slavery and human trafficking: Are the recent charges in Nelson just the tip of the iceberg?" *Law Talk* (26 September 2014); and Kris Gledhill and Peter Hosking "The Right to Life, Liberty and Security of the Person" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) at [8.3.06].

64 *DSD* (SC), above n 12, at [138].

65 At [92] per Lord Neuberger.

66 At [95] per Lord Neuberger.

67 *Wallace v Commissioner of Police* [2016] NZHC 1338. The proceedings stalled pending the family's applications for legal aid: *Wallace v Legal Services Commissioner* [2017] NZCA 114.

unsuccessful private prosecution) there can be little doubt that the obligation to investigate will be adopted in some form in this country.[68] The obligation to investigate has been clearly and consistently adopted under the Convention and a "generous" interpretation of the New Zealand Bill of Rights Act must require nothing less.[69] Its recognition will be a welcome development where complaints of sexual offending have been met with inaction on the part of Police, and may provide victims with a legal path to overcome the inertia and resistance they have encountered thus far.

68 Gledhill and Hosking, above n 63, at [8.3.06].

69 *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J. Their Honours held that courts must adopt a generous approach to the interpretation of the New Zealand Bill of Rights Act 1990.