Neutral Citation no. [2006] NIQB 98 | *Ref:* **HIGF5454**

Judgment: approved by the Court for handing down | *Delivered:* **18/1/06**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BRIAN CONNOLLY

PLAINTIFF/RESPONDENT;

-and-

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

APPLICANT/DEFENDANT;

_____

HIGGINS J

[1] By a summons dated 5 September 2005 the defendant seeks –

1. an order - pursuant to Order 18 Rule 19 of the Rules of the Supreme Court and/or in the exercise of the inherent jurisdiction of the court – dismissing the plaintiff's action on the ground that the writ of summons and statement of claim herein disclose no reasonable cause of action against the defendant or are frivolous or vexatious or otherwise an abuse of the process of the court;
2. further, or alternatively an order dismissing the plaintiff's action in whole or in part on the ground that it is statute barred;
3. such further or other order as the court may consider just and appropriate; and
4. an order condemning the plaintiff in the costs of this application.

[2] The Senior Queen's Bench Master has referred the summons to the court for consideration pursuant to Order 32 Rule 12(1). The defendant did

not pursue paragraph 2 of the summons at this stage and proceeded only on the ground that the writ and statement of claim disclose no reasonable cause of action.

[3] The plaintiff was born on 11 June 1950. Between 1975 and 2001 he was a police officer in the Royal Ulster Constabulary, the predecessor of the Police Service of Northern Ireland. On 29 October 2003 a writ was issued seeking damages for personal injury loss and damage. By the terms of the writ the personal injury loss and damage was alleged to have been sustained –

> "by reason of the negligence of the defendant, its servants and agents, in and about the performance, management, supervision, care and control of working operations and conditions during the course of the plaintiff's employment and in the on-going delay in investigating serious complaints made by and against the plaintiff."

[4] A statement of claim was served on 12 December 2003. This alleged that "the plaintiff was involved in the investigation of the actions and activities of a very senior officer". Later the plaintiff learnt that no action was to be taken in respect of that investigation. Sometime later the plaintiff was informed that a further investigation of the same senior officer was to take place. The "plaintiff initially refused to co-operate mindful as to how the previous first investigation had not been properly conducted or concluded". The plaintiff then alleged that " the senior officers conducting the second investigation indicated that the plaintiff would be arrested, criminally charged and his house searched if he failed to co-operate. Plaintiff (sic) then fully co-operated in the said investigation."

[5] A defence served on 26 January 2004 denied that the plaintiff was involved in any investigations of the senior officer. A notice for further and better particulars was served on the same date as the defence. Question 6 was framed in the following terms -

> "Furnish precise particulars of each and every respect in which it is alleged that the investigations were conducted improperly."

The plaintiff responded –

> "6.(i) From in and around 1991 the Plaintiff instructed a senior officer, Detective Superintendent 'X' about information received from a registered informant, the identity of whom is a matter within the knowledge of the Defendant, as to the activities of Mr

> 'Y'. On foot of this the Plaintiff was of the view that Mr 'X' was preparing a report or file on the subject of these allegations. The Plaintiff is of the view that a file was prepared and submitted to appropriate authorities within the Police Service. However, it was apparent to the Plaintiff that no action was being taken on foot of same. The Plaintiff was later informed that this file could not be found or was lost.
>
> (ii) in and around May 1998 the Plaintiff was informed that a further investigation of Mr 'Y' was to take place or was taking place. The Plaintiff did not want to be involved with this on the basis that the previous investigation had not been resolved and the Plaintiff was subjected to stress as a result. Despite the Plaintiff providing documentation to this second investigation the Plaintiff was never reverted to for witness statements or at all. The Plaintiff is of the view that this investigation was discontinued and that immunity of some form was granted to Mr 'Y' The Plaintiff is of the view that Mr 'Y' was only interviewed once during this investigation. The Plaintiff is of the view that Mr 'Y' was permitted to leave the Police Service pursuant to the Severance Scheme established pursuant to the Patton Report."

Question 7 was in the following terms -

> "State all respects in which it is alleged the defendant failed to have any or adequate regard for the plaintiff's personal well being."

The plaintiff responded, inter alia, -

> "7. (ix) During the second investigation of Mr 'Y' the Plaintiff was coerced into participating in same. The Plaintiff was threatened with arrest, search of his home, and possible criminal charges."

[6] Subsequently the Statement of Claim was amended a number of times. The latest version was served on 12 November 2004. No issue arises relating to that for the purposes of this present application. The factual averments are set out in paragraphs 2 - 8 of this amended statement of claim :

> "2. On and after 1991 the Plaintiff was involved in an investigation in respect of allegations as against

another officer Detective Chief Inspector 'Y'. This investigation arose on the basis of information received in respect of the alleged activities of Detective Chief Inspector 'Y' and forwarded by the Plaintiff to a Detective Superintendent 'X'. During the course of said investigation the Plaintiff reported to the said Detective Superintendent 'X' on the basis of the said Detective Superintendent 'X' further reporting to senior officers.

3. In or about 1993 the Plaintiff became aware that no action was to be taken arising from the said investigation. In consequence of same and in consequence of the conduct of the said investigation and all the circumstances attendant upon same the Plaintiff was occasioned personal injury loss and damage. In particular, following the investigation the Plaintiff became concerned for his personal safety and well-being and for the safety and well-being of a registered informant connected with the said investigation. The Plaintiff was thereafter referred to Occupational Health Unit and his posting and duties were changed.

4. In or about 1998 the Plaintiff was informed by a Detective Inspector 'Z' that a further criminal investigation of Detective Chief Inspector 'Y' was being or to be undertaken. The Plaintiff declined to participate in this further investigation on the basis of the conduct and outcome of the previous investigation.

5. The Plaintiff was informed by officers involved in the investigation that steps would be taken against the Plaintiff as a result, being arrested, the raising of criminal charges against the Plaintiff, and the search of the Plaintiff's home.

6. Following such representations to the Plaintiff, the Plaintiff co-operated in this further investigation.

7. The Plaintiff learned that the outcome of this further investigation was that Detective Chief Inspector 'Y' would be permitted or granted immunity from prosecution.

8. As a result of the failures of the Defendant his servants or agents to carry out adequately or at all and properly the aforementioned investigations, or to complete said investigations, or to investigate the matters referred by the Plaintiff to these investigations, the Plaintiff suffered such personal injuries, loss and damage as appears below."

[7] For the purposes of this application the averments in the statement of claim must be assumed to be true. The case is pleaded in negligence and the particulars of negligence alleged are –

"**PARTICULARS OF NEGLIGENCE**

(a) Causing or permitting the Plaintiff to suffer the said personal injuries loss and damage.

(b) Causing or permitting allegations to be made against the Plaintiff.

(c) Failing to investigate adequately or at all the allegations against Detective Chief Inspector 'Y'.

(d) Failing to conclude adequately or at all the investigations into Detective Chief Inspector 'Y'.

(e) Failing to investigate and conclude the allegations against Detective Chief Inspector 'Y' within a reasonable period of time.

(f) Failing to carry out the investigations of Detective Chief Inspector 'Y' in a proper and appropriate manner.

(g) Failing to have adequate or any regard or the Plaintiff's well being during the course of the said investigation.

(h) Failing to have adequate or any regard for the safety of the Plaintiff.

(i) Failing to have adequate or any regard for the Plaintiff's reputation and good name.

(j) Failing to carry out the said investigations within a closed environment.

(k) Failing to act consequent upon the said investigations so as to prevent further criminal activity occurring.

(l) Failing to provide the Plaintiff with explanations as to the nature and conduct of the said investigations.

(m) Causing, permitting or allowing said investigations to conclude with the grant or allowance of immunity to the said Detective Chief Inspector 'Y'.

(n) Failing to provide adequate or at all counselling or appropriate therapeutic care treatment and support to the Plaintiff.

(o) Failing to provide a safe system of work."

[8] The thrust of the application by the defendant, relying on Hill v Chief Constable of West Yorkshire 1988 2 AER 238 and Brooks v Metropolitan Police Commissioner 2005 2 AER 489, is that the police in the course of performing their function of investigating crime are under no legal duty to take care so that a victim, witness, informant or person under investigation does not suffer injury or psychiatric harm as a result of police actions or omissions. It was submitted by the defendant that this principle was undisturbed in the present case by fact that the plaintiff was also a police officer and the informant.

[9] The plaintiff's case is that he received information in respect of D/C/I 'Y' and forwarded it to D/'Superintendent 'X'. The information was to the effect that D/C/I 'Y' was involved in the importation and distribution of illegal drugs and that he was involved with criminals who were associated with such importation and distribution. This gave rise to a criminal investigation of D/C/I 'Y'. The result of this investigation was that no action was to be taken. It is alleged that when the plaintiff became aware of this outcome he suffered personal injury loss and damage. Five years later the plaintiff was informed that a further criminal investigation of D/C/I 'Y' was undertaken. When he declined to assist he was informed that he would be arrested. As a result of this he co-operated with the second investigation. The outcome of the second investigation was that D/C/I 'Y' would be granted immunity from prosecution. The plaintiff alleges that the second investigation

was not completed and was not carried out properly, adequately or fully and as a result he suffered personal injuries loss and damage.

[10] Paragraph 2 of the statement of claim alleges "the plaintiff was involved in an investigation in respect of allegations as against another officer". This might suggest that the plaintiff was one of the investigators of the allegations. It was accepted by counsel on behalf of the plaintiff, that the plaintiff was not an investigator of the allegations in the ordinary sense in which that word would be used in respect of a police investigation, even though he was a police officer. He provided the information which prompted an investigation by other police officers into D/C/I 'Y', albeit he did so as a police officer with access to a registered informant. On the second occasion he was required to co-operate with the investigation. The conduct and outcome of the investigations left the plaintiff exposed to concern for his safety and well-being because of his role in providing information to and in co-operating with, the investigations.

[11] The plaintiff alleges that the defendant was negligent in the conduct of the investigations. In order to establish negligence a plaintiff must prove not only that the injury, loss or damage alleged was foreseeable, but that the defendant to the action owed the plaintiff a duty of care. Whether a duty of care existed is a matter of law. The defendant's application to strike out the plaintiff's claim is based on the submission that the defendant owed no duty of care to the plaintiff throughout the period of these investigations.

[12] In Donoghue v Stevenson 1932 AC 562 Lord Atkins expressed the existence of a duty of care in the context of one's duty towards one's neighbour. At page 579 he said –

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must

> take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[13] The requirement for something more than foreseeability of harm in actions for negligence was reinforced by Lord Keith of Kinkel in Hill v Chief Constable of West Yorkshire 1988 2 AER 238 when he said at 240:

> "It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases. In the *Anns* case there was held to be sufficient proximity of relationship between the borough and future owners and occupiers of a particular building the foundations of which it was decided to inspect, and there was also a close relationship between the borough and the builder who had constructed the foundations."

[14] The plaintiff in the Hill case was the mother of a young female student who had been murdered on 17 November 1980 by a serial killer. Between 1975 and 1980 this serial killer committed seventeen murders and eight attempted murders. He was arrested on 2 January 1981 and confessed to his involvement in the twenty five attacks. He had previously been under suspicion and was arrested and later released without charge. The plaintiff's claim was based in negligence relating to the investigation of the offences by the defendant police force. The statement of claim alleged that the police had failed in a number of respects to exercise all reasonable care and skill in pursuing their investigations into the offences and that if they had, the plaintiff's daughter would not have become a victim. The Chief Constable applied to strike out the claim as disclosing no reasonable cause of action. The question arose whether the police, in the course of carrying out their function of suppressing crime, owed a duty of care to a member of the public who suffered injury through the activities of a criminal. The judge at first instance

held that the police owed no such duty and the Court of Appeal affirmed that decision. On appeal to the House of Lords it was held that in the absence of any special characteristic or ingredient over and above reasonable foreseeability of likely harm, which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal, even though it was reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended. Lord Keith said at page 242:

> "In the instant case the identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. The alleged negligence of the police consists in a failure to discover his identity. But, if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed on any police force a duty of care similarly owed to identify and apprehended an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of a habitual burglar, and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire police.

[15] Thus, although the possibility of harm to a young woman such as the plaintiff's daughter was reasonably foreseeable as long as the serial killer was at large, there was no special characteristic or ingredient which would create the proximity relationship between the police and the subsequent victim which was necessary to establish liability in negligence. Accordingly the appeal was dismissed. Alternatively it was held that even if such a duty did

exist public policy required that the police should not be liable in such circumstances.

[16] The ingredients necessary to establish a duty of care were considered again in Caparo Industries Plc v Dickman 1990 1 AER 568. At page 573 Lord Bridge of Harwich said –

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

[17] In Brooks v Metropolitan Police Commissioner 2005 2 AER 489 the plaintiff was the victim of a racist attack in which his friend, Stephen Lawrence, was murdered. An inquiry, chaired by Sir William Macpherson of Cluny, a retired judge, was established to inquire into the manner in which the police investigation was conducted, as well as the way in which the plaintiff was treated by the police. The inquiry report, which was delivered in February 1998, exposed a litany of derelictions of duty and failures in the police investigation as well as failures to deal properly with the plaintiff at the scene of the murder. In April 1999 the plaintiff issued civil proceedings against the Commissioner, fifteen named police officers and the Crown Prosecution Service. He suffered a very severe post-traumatic stress disorder allegedly aggravated by the failure of the police to treat and deal with him properly. The Commissioner applied to strike out the action on the ground that no reasonable cause of action was disclosed. The judge at first instance acceded to this application. The Court of Appeal reversed this decision and the Commissioner appealed to the House of Lords. Before the House the following issues were agreed -

> "(1) Whether, on the pleaded facts, there are no reasonable grounds for the claim that there was sufficient proximity between the Commissioner and/or those for whom he is vicariously responsible, on the one hand, and Mr Brooks, on the other, to give rise to the following duties of care: (a) to take reasonable steps to assess whether Mr Brooks was a victim of crime and then to accord him reasonably appropriate protection, support, assistance and

> treatment if he was so assessed (the first surviving duty); (b) to take reasonable steps to afford Mr Brooks the protection, assistance and support commonly afforded to a key eye witness to a serious crime of violence (the second surviving duty); (c) to afford reasonable weight to the account given by Mr Brooks and to act upon that account accordingly (the third surviving duty). (2) Whether there are no reasonable grounds for the claim that it is fair, just and reasonable to hold that the Commissioner and/or those for whom he is vicariously responsible owed to Mr Brooks the duties of care set out above."

The appeal of the Commissioner was allowed. The headnote reads –

> "Converting the ethical value that police officers should treat victims and witnesses properly, and with respect, into general legal duties of care on the police toward victims and witnesses would be going too far. The prime function of the police was the preservation of the Queen's peace; they had to concentrate on preventing the commission of crime, protecting life and property, and apprehending criminals and preserving evidence. A retreat from the principle that no duty of care lay to individual members of the public in relation to that police function would have detrimental effects for law enforcement; whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to 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. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. Placing general duties of care on the police to victims and witnesses would impede the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch. It would be bound to lead to an unduly defensive approach in combating crime. In the instant case, the alleged duties of care were inextricably bound up with the police function of investigating crime and therefore could not survive. It followed that appeal would be allowed and the claim would struck out (see [4], [5], [30], [33], [35], [36]–[38], below).

> Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238 doubted in part. Calveley v Chief Constable of the Merseyside Police [1989] 1 All ER 1025, Elguzouli-Daf v Comr of Police of the Metropolis, McBrearty v Ministry of Defence [1995] 1 All ER 833 and Kumar v Comr for the Police of the Metropolis [1995] CA Transcript 117 considered."

[18] In Brooks' case counsel on both sides accepted that the agreed issues had to be resolved in accordance with the principles set out by Lord Bridge of Harwich in Caparo Industries Plc v Dickman, supra. It was contended on behalf of the Commissioner that the primary function of the police is to preserve the Queen's peace. It was contended also, in reliance on Hill v Chief Constable of West Yorkshire, supra, that in performing their function of investigating crime, the police owed no duty to take care that either a victim or a witness did not suffer psychiatric harm as a result of police actions or omissions. Counsel on behalf of the plaintiff did not seek to challenge the decision in Hill's case, but sought to distinguish it. It was his submission that the police owe a duty of care not to cause, by positive acts or omissions, harm to victims of serious crime, or witnesses to serious crime with whom they have contact. The distinction drawn between Hill's case and Brooks was that in Hill's case the police negligence was allegedly the indirect cause of the murder of the plaintiff's daughter, whereas in Brook's case the police allegedly were the direct cause of the harm suffered. Lord Steyn noted that the core principle in Hill's case had remained unchallenged for many years. He considered that such a case would be decided in the same way in 2005.

[19] However Lord Steyn, and other members of the House, acknowledged that there were difficulties in sustaining the alternative view in Hill grounded in public policy, which could lead to a blanket ban on litigation. Lord Steyn was of the view that police officers should treat victims and witnesses properly and with respect. However he went on to say in paragraph 30 –

> "But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far.
> …….
>
> A retreat from the principle in *Hill*'s case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to 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. Such legal duties would tend to inhibit a robust

> approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill*'s case, be bound to lead to an unduly defensive approach in combating crime."

[20] He then went on to consider the three alleged duties of care. He found them to be "inextricably bound up with the police function of investigating crime which is covered by the principle in Hill's case…If the core principle in Hill's case stands, as it must, these pleaded duties of care cannot survive" (see paragraph 33). However he did not determine that all cases of police negligence would be bound by the principles stated in Hill's case.

[21] The House of Lords had before them very detailed pleadings as well as the findings of the Macpherson Report. Therefore the assumed facts upon which to decide a preliminary issue that the pleadings disclosed no reasonable cause of action were well defined. Caution should always be exercised in deciding such issues on assumed fact particularly in developing areas of the law – see the remarks of Lord Slynn in Waters v Commissioner of Police of the Metropolis 2000 4 AER 934 at 941.

[22] In Brooks' case Lord Bingham, in agreeing with the opinion of Lord Steyn, concluded that the three duties pleaded were not duties which could even arguably be imposed on police officers charged in the public interest with the investigation of a very serious crime and the apprehension of those responsible. Lord Nicholls agreed with Lord Bingham and Lord Steyn. Lord Nicholl said the three duties would cut across the freedom of action the police ought to have, when investigating serious crime. Lords Rogers and Brown agreed with the views expressed by Lord Steyn.

[23] Thus the governing principle is the core principle as formulated in Hill. This is to be found in the opinion of Lord Keith of Kinkel at 1988 2 AER at 240:

> "There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v Johns* [1982] 1 All ER 851, [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985,

> [1985] 1 WLR 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: see *R v Dytham* [1979] 3 All ER 641, [1979] QB 722, where a constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene. By common law police officers owe to the general public a duty to enforce the criminal law: see *R v Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying on chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public."

[24] Thus no duty of care can be imposed on a police officer relating to the manner in which he discharges his duty to enforce the law. The principle in Hill's case has been applied in a number of other cases. In Alexandrou v Oxford 1993 4 AER 328 two officers attended shop premises following the activation of a burglar alarm. They failed to detect a forced entry at the rear of the premises. Several hours later a substantial quantity of goods was removed from the shop. It was held that no duty of care arose as no special relationship existed between the plaintiff and the police as the communication with the police was by way of an emergency call. In Ancell and Another v McDermott and Oths. 1993 4 AER 355 officers came across a spillage of diesel fuel on the road. It was held that the police owed no duty to protect road users from hazards discovered by police while going about their duties on the highway. In Osman v Ferguson 1993 4 AER 244 a boy and his family were subject to a campaign of harassment by the boy's former teacher. The police were aware of the former teacher's activities and what he might do. Later he killed the

boy's father and seriously injured the boy. In an action against the Commissioner of Police it was alleged that the police had been negligent in failing to apprehend the man, interview him, search his house and charge him with a serious offence. An application to strike out the case as disclosing no reasonable cause of action was dismissed. On appeal by the Commissioner it was held (by a majority) that there was an arguable case that there was a very close degree of proximity amounting to a special relationship between the plaintiffs' family and the investigating police officers, because the family had been exposed to a risk over and above that of the general public. However, it was held that it would be against public policy to hold the police liable to individuals for damage caused to them by criminals whom the police had failed to apprehend. The appeal was allowed.

[25] The cases to which I have referred are all cases in which it was alleged that the police were negligent in carrying out their duty to suppress crime or to investigate criminal offences. Calveley and Others v Chief Constable of the Merseyside Police 1989 1 AER 1025 was a case in which disciplinary proceedings had been brought against the plaintiffs, who were serving police officers. They had been suspended on full pay pending the outcome of the investigation of complaints against them. The complaints were dismissed, quashed on appeal or not proceeded with. The plaintiffs brought actions against their chief constable alleging negligence in the conduct of the disciplinary proceedings and breach of statutory duty under the Police Acts and Regulations. Applications to strike out the actions were successful. On appeal it was contended that the officer investigating the complaints owed a duty of care at common law to conduct the investigation properly and expeditiously. The Court of Appeal rejected that contention and dismissed the appeals. Further appeals to the House of Lords were similarly dismissed. In giving the leading opinion Lord Bridge of Harwich said at 1029:

> "Leading counsel for the plaintiffs submitted that a police officer investigating any crime suspected to have been committed, whether by a civilian or by a member of a police force, owes to the suspect a duty of care at common law. It follows, he submits, that the like duty is owed by an officer investigating a suspected offence against discipline by a fellow officer. It seems to me that this startling proposition founders on the rocks of elementary principle. The first question that arises is: what injury to the suspect ought reasonably to be foreseen by the investigator as likely to be suffered by the suspect if the investigation is not conducted with due care which is sufficient to establish the relationship of legal neighbourhood or proximity in the sense explained by Lord Atkin in Donoghue (or M'Alister) v Stevenson [1932] AC 562

at 580–582, [1932] All ER Rep 1 at 11–12 as the essential foundation of the tort of negligence? The submission that anxiety, vexation and injury to reputation may constitute such an injury needs only to be stated to be seen to be unsustainable. Likewise, it is not reasonably foreseeable that the negligent conduct of a criminal investigation would cause injury to the health of the suspect, whether in the form of depressive illness or otherwise. If the allegedly negligent investigation is followed by the suspect's conviction, it is obvious that an indirect challenge to that conviction by an action for damages for negligent conduct of the investigation cannot be permitted. One must therefore ask the question whether foreseeable injury to the suspect may be caused on the hypothesis either that he has never been charged or, if charged, that he has been acquitted at trial or on appeal, or that his conviction has been quashed on an application for judicial review. It is, I accept, foreseeable that in these situations the suspect may be put to expense, or may conceivably suffer some other economic loss, which might have been avoided had a more careful investigation established his innocence at some earlier stage. However, any suggestion that there should be liability in negligence in such circumstances runs up against the formidable obstacles in the way of liability in negligence for purely economic loss. Where no action for malicious prosecution would lie, it would be strange indeed if an acquitted defendant could recover damages for negligent investigation. Finally, all other considerations apart, it would plainly be contrary to public policy, in my opinion, to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.

If no duty of care is owed by a police officer investigating a suspected crime to a civilian suspect, it is difficult to see any conceivable reason why a police officer who is subject to investigation under the 1977 regulations should be in any better position."

[26] Therefore the principles applicable in cases involving the suppression or investigation of crime are of equal application to internal investigations by the police. Such internal investigations may relate to investigations of criminal offences or disciplinary offences or both. Whichever it is, the core principles derived from Hill's case and referred to above, apply.

[27] In the instant case the police were investigating a complaint by a police officer against a fellow, but more senior, police officer. The complaints appear to be largely related to alleged criminal activity, but probably involved alleged police disciplinary matters as well. It is possible to categorise the alleged negligent failures of the defendant as alleged in the particulars of negligence. Four relate directly to the conduct of the investigation – failure to investigate adequately or all; failure to conclude the investigation; failure to investigate or conclude the investigation within a reasonable time and failure to carry out the investigation in a proper and appropriate manner and in an enclosed environment. Three relate to the plaintiff's well being and character. Individual allegations relate to causing or permitting injury to the plaintiff or allegations to be made against the plaintiff, the prevention of further criminal activity and the grant of immunity to 'Y'. One relates to a failure to provide a safe system of work. I do not understand from the pleadings or from the oral submissions of counsel that this is a case based on the nature or character of the plaintiff's employment. The case is rooted firmly (as was this application and the response to it) in the investigations into the activities of 'Y' in respect of which the plaintiff was an informant and potential witness.

[28] It was submitted by the defendant that the fact that the plaintiff was an employee of the defendant does not put him in a different position from a victim as in Hill's case or a witness as in Brooks' case. Nor should the fact that he was an informant or "whistleblower" place him in any different situation. It was submitted the same principles should apply.

[29] Counsel on behalf of the plaintiff submitted that this was a very different case from Brooks. He distinguished Brooks' case for a number of reasons - the absence of an employment relationship; full knowledge of the facts; the legal proximity of the plaintiff and the existence of a duty of care; the availability of alternative remedies and the absence of intentional or reckless acts by the defendant. He submitted that there was an arguable case that a duty of care was owed to the plaintiff by the defendant and relied on the judgment of Carswell LCJ in O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary 1997 NI 403. The headnote in that case states -

> "On 4 February 1992 M, a serving police constable, entered the Sinn Fein Centre in Falls Road, Belfast, carrying a shotgun. He fired a number of close-range shots, which inflicted fatal injuries on O'D and L (of whom the first and second plaintiffs were the

personal representatives) and wounded the third and fourth plaintiffs. Later the same day he killed himself by a shot from the same shotgun. The plaintiffs each commenced proceedings against the chief constable of the Royal Ulster Constabulary, claiming damages on the ground that police officers were negligent in failing to take steps to restrain M and prevent him from carrying out the shooting. The particulars of negligence pleaded by the plaintiffs included the claim that the defendant had acted or omitted to act when it was known that M was intoxicated, in a deranged state of mind, would if released from police detention have access to a shotgun and ammunition, and was likely to make use of such firearm and was thereby a danger to both himself and to others who had a Republican connection or whom he might have perceived to have such a connection by reason of for instance their presence in the offices of Sinn Fein. The defendant applied in each action under RSC (NI) 1980, Ord 18, r 19(1)(a) for an order striking out the writ of summons and statement of claim, on the ground that it disclosed no reasonable cause of action. The master made orders striking out the writ and statement of claim in each action. His decision was affirmed on appeal to Pringle J who held that it could not be said as a matter of law that the RUC owed a duty of care to the victims of the shooting on 4 February 1992 because, although the possibility of harm to them was reasonably foreseeable, there was no special characteristic or ingredient to establish the proximity of relationship between the police and the victims necessary to found liability in negligence. The plaintiffs appealed to the Court of Appeal. The defendant sought to uphold the judgment of the judge and also submitted that on the grounds of public policy a duty of care towards the plaintiffs should not be imposed upon the police because to do so to would hamper the police in the performance of their general duties of the prevention of crime and its investigation

Held – It was a well-settled principle that the summary procedure for striking out pleadings was to be used only in plain and obvious cases. In order to hold that a duty of care existed a court had to be satisfied that the injury or damage had been

foreseeable, that there was a sufficiently proximate relationship between the parties and that it was fair, just and reasonable to impose the liability. Where a defendant had responsibility for the care of another person, he might in some circumstances be liable for that person's wrongful acts where he failed to exercise reasonable care to prevent him from doing those acts. Courts had to be conscious, however, of the need for great caution before holding liable in negligence those who had been charged with the duty of protecting society from the wrongdoings of others. Nevertheless, it was arguable in the instant case that if the facts alleged in the statements of claim were correct, as had to be assumed on an application to strike out, the RUC had come under a duty to take reasonable steps to prevent M from inflicting harm on anyone. Moreover, it was not necessary in a case such as the present case to impose the limitation that the plaintiffs should establish the existence of a special relationship between the police and the victims. It was possible to see the necessity for it in a case of failure to exercise reasonable care in carrying out a duty where such failure could affect a very wide class of people. However, once it was established that the circumstances gave rise to a duty on the part of the police to take some steps to prevent M from endangering other people, the class of people at risk consisted of those whom he might meet or seek out in the course of a relatively limited period. It was not necessary to limit it any further. M was on the assumed facts in such a disturbed state of mind that he was liable to endanger the public in general, and there did not appear to be any incontestable reason why the class of people to whom the duty of care might have arisen should be restricted by the interposition of a filter such as the existence of a special relationship. Furthermore, while the force of public policy considerations against imposing a duty of care on the police could be recognised, the circumstances of the instant case were unusual and, hopefully, unique. Such public policy considerations were not of sufficient strength in a case such as the instant case to constitute a ground for barring claims which otherwise might be properly brought.

Accordingly, it was arguable that a duty of care existed, sufficiently so to make it unjustifiable to

> strike out the pleadings. It would be for the trial judge to hear the evidence put before him and to rule in the light of that evidence whether or not the police officers owed in law a duty of care to the plaintiffs and, if so, whether or not on the facts proved that duty had been broken. The appeals would therefore be allowed and the summonses to strike out the writs and statements of claim would be dismissed. Lonrho v Tebbit [1991] 4 All ER 973 applied. Carmarthenshire CC v Lewis [1955] AC 549 and X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 2 AC 633 considered. Hill v Chief Constable of West Yorkshire [1989] AC 53 and Osman v Ferguson [1993] 4 All ER 344 distinguished."

[30] The circumstances of O'Dwyer's case were, as Carswell LCJ observed, unique. The plaintiffs' allegations focussed on the alleged failure of the police to prevent the deceased police officer from arming himself when the other officers were in possession of information that he might do so and then harm someone else as well as himself and when, for a critical period of time, he had been in their care, if not their custody. By reason of the knowledge of those circumstances it was held that it was arguable that the police then came under a duty to take reasonable steps to prevent the deceased officer from inflicting harm on anyone. Those unique circumstances took that case outside the scope of the public policy considerations which were held to apply in Hill's case and subsequently in Brooks' case.

[31] While there are distinctions in the factual circumstances alleged in the instant case when compared with Brooks' case, in each the central issue relates to the investigation of alleged criminal offences. In Brooks the failures related mainly to the manner in which Mr Brooks was treated by the police; in the instant case the alleged failures relate to the conduct of the investigation per se. Police officers cannot be regarded as immune from suit in every instance in which they carry out their investigative and crime prevention functions. Lord Steyn stated that it would be best for the principle in Hill's case to be reformulated in terms of the absence of a duty of care. The claim in Hill was rejected on two grounds, the second of which related to public policy. The first ground was that the common law imposes no specific requirements as to the manner in which the obligation of the police to enforce the law, is to be discharged – see 1988 2 AER at 241. It was alleged that the police had been negligent in failing properly to investigate the crimes committed by the Yorkshire Ripper before the murder of Miss Hill occurred. It was held that while there was a risk of harm to some females if the Yorkshire Ripper was not apprehended, the allegation of failing properly to investigate the earlier offences was not capable of establishing a duty of care

owed to Miss Hill by the police in the absence of some special ingredient or characteristic. In Home Officer v Dorset Yacht Co Ltd 1970 2 AER 238 that special ingredient or characteristic was held to lie in the fact that the borstal officers had a right to control the conduct of the trainees whose misconduct led to the damage caused to the yacht. It might be said that in O'Dwyer's case the special ingredient or characteristic lay in the responsibility the defendant Chief Constable had, through his officers, for the care of the deceased officer while he was in their custody.

[32] It is clear from the authorities that have been reviewed that in any action for negligence a court has to be satisfied that the alleged injury or damage was foreseeable, that a sufficiently proximate relationship between the parties was present and that it was fair, just and reasonable to impose liability, before the existence of a duty of care could be established.

[33] With all these considerations in mind I approach the facts alleged in the amended statement of claim in this case, as supported and/or expanded by the replies to the notices for further particulars. The central issue is whether those facts, which must be assumed to be correct in an application to strike out, give rise to a duty of care on the part of the police towards the plaintiff. Those facts allege failures relating to the investigation of 'Y' and fall squarely within the core principles established in Hill and restated in Brooks. Is there any special ingredient or characteristic which distinguishes this case and creates a duty of care? Counsel on behalf of the plaintiff referred to features that did not exist in Brooks, in particular the fact that the plaintiff was himself a police officer and that in Brooks the facts were known fully as a result of the MacPherson Inquiry. As regards the latter it must be assumed that the plaintiff has pleaded his best case and the relevant circumstances. It would not be correct, in an otherwise clear case, to refuse an application to strike out on the grounds that the full facts may not have been pleaded and that something else might emerge at a later stage or during the trial. In this regard a plaintiff is protected, if orders under Order 18 Rule 19, are made only in plain and obvious cases. The other fact relied on relates to the plaintiff's employment as a police officer. While that is true it does not place him in any different position, in relation to the investigation, from an ordinary witness or informant, nor was any suggested other than the fact that he was a policeman. It does not seem to me that it is arguable that if the facts alleged in the statement of claim are correct that the defendant was under a duty to the plaintiff to take reasonable care in the conduct of the investigation into 'Y' . Accordingly the writ of summons and the statement of claim disclose no reasonable cause of action against the defendant and are struck out.