Neutral Citation : [2021] NIMaster 5

Ref:	**2021NIMaster5**

Judgment: approved by the Court for handing down (subject to editorial corrections)

Delivered:	**6/5/21**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Kevin Magill

Plaintiff;

and

The Chief Constable of the Police Service of Northern Ireland

Defendant.

Master Bell

INTRODUCTION

[1] This is an important application. It concerns whether a member of the public in Northern Ireland has a right to sue the police for damages if they are injured by protesters during a lawful public march and, if so, in what circumstances.

[2] I am grateful to Mr Rafferty who appeared on behalf of the applicant/defendant and to Mr McCollum who appeared on behalf of the respondent/plaintiff for their written and oral submissions which dealt with the line of authorities in what has for many years been a difficult and complex area of law.

[3] The basic factual background is this. On 12th July 2012 Mr Magill was taking part in an Orange Order Parade on the Newtownards Road, Belfast in the vicinity of

the Short Strand. Although neither counsel was able to confirm that the parade had been approved by the Parades Commission for Northern Ireland, I have assumed that this is the position because the Statement of Claim states that he was "lawfully" taking part in the parade. While taking part in this parade, Mr Magill was assaulted by protestors from the Short Strand area and sustained a crushing type of injury when he was struck by a heavy object on his left foot. Obviously, if he could have identified the individual protester throwing that heavy object, he could have sued that protestor in the civil courts and indeed criminal proceedings might also have been instituted against the protestor by the relevant authorities. The issue, however, is whether Mr Magill can recover damages for his injuries from the Chief Constable through a claim of negligence in respect of the police.

[4] The Particulars of Negligence set out in Mr Magill's Statement of Claim are as follows:

a. Allowing the Plaintiff to be in and about an area which was dangerous and unsafe in the circumstances.
b. Failing to exercise any or adequate control over the policing of an Orange parade.
c. Failing to exercise any or adequate control over protestors from the Short Strand Area.
d. With the knowledge that there was a risk of violence from protectors at or about the Short Strand, failing to properly assess the risk of violence.
e. Failing to devise a proper plan or strategy for dealing with the potential disruption and violence, which was foreseeable.
f. Failing to ensure that there was a cordon between a march and protestors to the march.
g. Failing to take any or adequate steps to preserve public order.
h. Failing to prevent an orange parade from coming under attack.
i. Failing to ensure that there were adequate numbers of police to maintain control over the policing of an Orange parade.
j. Failing to intervene adequately or at all when an Orange parade came under attack.
k. Failing to have any or adequate regard for the safety of the Plaintiff.
l. Failing to provide the Plaintiff with any or adequate warnings of the dangers that were present.
m. Causing or permitting the Plaintiff to sustain personal injuries, loss and damage.

[5] The plaintiff's claim is concisely summarised in paragraph 8 of Mr McCollum's initial written submission. It is that the parade could not have gone ahead without the police attending to maintain law and order and, upon doing so, the police were under an obligation to take reasonable steps to ensure that they fulfilled this duty. The plaintiff claims that, while the police had knowledge that there was a risk of violence from protestors at or about the Short Strand, they failed

to properly assess the violence, failed to devise a proper plan or strategy for dealing with the foreseeable disruption and violence, failed to ensure that there was a cordon between the parade and protestors and failed to ensure that there were adequate numbers of police to maintain control over the policing of the parade which they had undertaken to police. Furthermore, when the violence occurred, the police failed to intervene adequately or at all when the parade came under attack.

THE APPLICATION

[6] The Chief Constable submits that Mr Magill is not able to recover damages from the Police Service in respect of his injuries in the circumstances of this case. He therefore has made an application under Order 18 Rule 19 to strike out Mr Magill's claim. There are two limbs to his application, whereby he seeks orders:

> (i) Striking out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 19(1)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 and/or the inherent jurisdiction of the Court on the ground that it discloses no reasonable cause of action against the Defendant; and further, or in the alternative,
>
> (ii) Striking out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 19(1)(d) of the Rules of the Court of Judicature (Northern Ireland) 1980 and/or the inherent jurisdiction of the Court on the ground that the proceedings are an abuse of process of the Court.

[7] I recognise that the two parts of the application require to be approached differently. Firstly, I must consider whether the plaintiff's claim ought to be struck out on the ground that it discloses no reasonable cause of action. In considering this part of the application, the effect of Order 18 Rule 19(2) is that the parties are not entitled to offer any evidence, whether oral or on affidavit. Secondly, I must then consider whether the plaintiff's claim ought to be struck out on the ground that it is frivolous and vexatious. In considering this part of the application, the parties are entitled to offer evidence on affidavit and each party has filed an affidavit, one by Ms Leheny and one by Mr Nolan.

[8] I begin by considering the legal position on when a Statement of Claim ought, or ought not, to be struck out and then consider the legal authorities on when the police owe a duty of care to a member of the public.

THE LAW: THE TEST FOR STRIKING OUT

[9] Mr Rafferty referred me to my decision in *McAteer and McAteer v Chief Constable of the Police Service for Northern Ireland and Craig* [2018] NIMaster 10 where I summarised the legal position in respect of applications under Order 18 Rule 19. Mr Rafferty submitted that it was a correct statement of the law and he wished me to apply it. For his part, Mr McCollum, on behalf of the plaintiff, did not oppose Mr Rafferty's submission that it was a correct statement of the law as to the test to be applied in such applications.

[10] In *McAteer* I summarised the legal position as follows:

> "[7] Order 18 Rule 19 of the Rules of the Court of Judicature (N.I.) 1980 provides:
>
> > "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
> >
> > (a) it discloses no reasonable cause of action or defence, as the case may be; or
> >
> > (b) it is scandalous, frivolous or vexatious; or
> >
> > (c) it may prejudice, embarrass or delay the fair trial of the action; or
> >
> > (d) it is otherwise an abuse of the process of the court,
> >
> > and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
> >
> > (2) No evidence shall be admissible on an application under paragraph (1)(a)."
>
> [8] The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts.
>
> [9] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.
>
> [10] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal for Northern Ireland reviewed the authorities on the test to be applied in such applications. It held that the summary procedure for striking out pleadings was only to be used in "plain

and obvious" cases; it should be confined to cases where the cause of action was "obviously and almost incontestably bad"; and that an order striking out should not be made "unless the case is unarguable".

[11] The Court of Appeal in *O'Dwyer* quoted Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 693-694, a passage approved by the House of Lords:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[12] Where the law in a particular field is not settled but rather is a new and developing field, the court should be appropriately cautious with applications to strike out, particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. (*Lonrho plc v Tebbit* (1991) 4 All ER 973 and *Rush v Police Service of Northern Ireland and the secretary of state for Northern Ireland* [2011] NIQB 28. "

[11] This is therefore the approach that I will adopt in assessing the merits of this application.

THE LAW: POLICE AND A DUTY OF CARE

[12] In my decision in *McAteer and McAteer v Chief Constable of the Police Service for Northern Ireland and Craig* [2018] NIMaster 10 I also summarised the way in which the law on when the police might owe an individual member of society a duty of care has developed. Mr Rafferty referred to extensive sections of that judgment in his skeleton argument. In *McAteer* I summarised the law as follows:

> "[14] As Lord Bingham expressed it in *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593

the common law of negligence seeks to define the circumstances in which *A* is held civilly liable for unintended harm suffered by *B*. Liability turns, in the circumstances of the particular case, on the relationship between *A* and *B*. Usually that relationship is a direct one, as where *A* fails to treat or advise *B* with the degree of care reasonably to be expected in the circumstances, or where *A* drives carelessly and collides with *B*. But the relationship may be more indirect, and in some circumstances *A* may be liable to *B* where harm is caused to *B* by a third party *C*, if *A* should have prevented *C* doing such harm and *A* failed to do so.

[15] The most favoured test of liability is the three-fold test laid down by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, by which it must be shown that :

(i) the harm to *B* was a reasonably foreseeable consequence of what *A* did or failed to do,
(ii) that the relationship of *A* and *B* was one of sufficient proximity, and
(iii) that in all the circumstances it is fair, just and reasonable to impose a duty of care on *A* towards *B*.

[16] The question which is raised by this application concerns whether the Chief Constable, in the course of carrying out his functions of investigating, controlling and preventing the incidence of crime, owes a duty of care to the plaintiffs, as individual members of the public, who claim to have suffered loss through the activities of criminals and the manner in which the criminal investigations were carried out, on the ground of negligence by reason of breach of that duty.

[17] The principles to be applied flow from a series of decisions made by the House of Lords and the Supreme Court : *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495; *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11. In the light of this series of decisions, the circumstances in which an individual may successfully sue the police for negligence will be rare, given that a duty of care will be imposed upon the police only in very limited circumstances.

Hill

[18] The plaintiff in *Hill v Chief Constable of West Yorkshire* was the mother of a young woman who was attacked and killed by Peter Sutcliffe (often referred to as the "Yorkshire Ripper") who was convicted of her murder. Over some years prior to this murder Sutcliffe had attacked and killed other women in similar circumstances. The plaintiff claimed, on behalf of her deceased daughter's estate, damages for negligence against the Chief Constable of West Yorkshire. She alleged that officers for whom the Chief Constable was responsible had been negligent in the conduct of investigations into the crimes which had been committed previously and that, in consequence, the police had failed to apprehend Sutcliffe and prevent the murder of her daughter. The defendant successfully applied to strike out the action and that decision was subsequently upheld by the Court of Appeal and by the House of Lords.

[19] Lord Keith defined the issue before their Lordships as follows:

> "The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty."

[20] Lord Keith made it clear that there were instances where a police officer may be liable in tort:

> "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 W.L.R. 349 and *Rigby v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 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 *Reg. v. Dytham* [1979] Q.B. 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."

[21] Lord Keith then undertook an analysis of the relevant case law including *Anns v Merton London Borough Council* [1978] AC 728 and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and concluded that the circumstances of the case were not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire police.

[22] Importantly, however, Lord Keith then proceeded to give a public policy justification for reaching the same conclusion. He stated:

> "In my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 might fall to be applied was a limited one, one example of that category being *Rondel v. Worsley* [1969] 1 A.C. 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. 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. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely

> to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. 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. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal [1988] Q.B. 60, 76 in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v. Worsley* [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court. My Lords, for these reasons I would dismiss the appeal."

[23] The key point taken from *Hill*, therefore, was that, as a matter of public policy, the police were immune from actions in negligence in respect of the investigation and suppression of crime.

Brooks

[24] The second notable decision in the line of authorities is *Brooks v Metropolitan Police Commissioner*. The plaintiff was a friend of Stephen Lawrence and was present when Stephen Lawrence was murdered in a racist attack. The plaintiff also was abused and attacked and was deeply traumatised by his experience. He was dealt with by the police in a way that was subsequently the subject of severe criticism in an enquiry into the matters arising from Stephen Lawrence's death. The plaintiff then brought an action against the Commissioner of Police and a number of named police officers in which he claimed damages *inter alia* for negligence. His pleaded case was that whilst the attackers remained at large he was frightened for his own safety, not least because he lived in the same locality. At first instance, the judge struck out the action against five of the named officers and the Commissioner

of Police. On appeal, the Court of Appeal allowed the plaintiff's appeal in relation to his claim in negligence against the Commissioner of Police in respect of the three duties of care that he alleged had been owed to him; those were specified to be a duty to take reasonable steps to assess whether he was a victim of crime and, if so, to accord him reasonably appropriate protection, support, assistance and treatment; a duty to take reasonable steps to afford him the protection, assistance and support commonly afforded to a key eye witness to a serious crime of violence and a duty to afford reasonable weight to the account that he had given of events and to act on it accordingly. In the House of Lords their Lordships re-affirmed that as a matter of public policy the police generally owed no duty of care to victims or witnesses in respect of their activities when investigating suspected crimes; they held further that since the duties of care alleged by the plaintiff had been inextricably bound up with the investigation of a crime the claim based on those duties should be struck out.

[25] Describing *Hill* as "an important decision" Lord Steyn went on to consider "the status of *Hill*". He began by observing:

> "Since the decision in *Hill* there have been developments which affect the reasoning of that decision in part. In *Hill* the House relied on the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993 that immunity no longer exists: *Arthur J S Hall & Co (A Firm) v Simons* [2002] 1 AC 615, [2000] 3 All ER 673. More fundamentally since the decision of the European Court of Human Rights in *Z and others v United Kingdom* 34 EHRR 97, para 100, it would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity.
>
> With hindsight not every observation in *Hill* can now be supported. Lord Keith of Kinkel observed at p63 that "From time to time [the police] 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": Nowadays, a more sceptical approach to the carrying out of all public functions is necessary."

[26] Lord Steyn then returned to the central issue:

> "But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*, arose for decision today I have no doubt that it would be decided in the same way. It is of course desirable that police officers should treat victims and witnesses properly

and with respect … but to convert that ethical value into general legal duties of care on the police towards victim and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence. … A retreat from the principle in *Hill* 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 function in the interests of the community fearlessly and with dispatch, would be impeded. It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime.

(31) It is true, of course, that the application of the *Hill* principle will sometimes leave citizens who are entitled to feel aggrieved by negligent conduct of the police, without private law remedy for psychiatric harm. But domestic legal policy and the Human Rights Act 1998, sometimes compel this result."

[27] Crucially, however, their lordships were agreed that there might be exceptions to the core principle in *Hill*.

[28] Lord Nicholls said:

"Like Lord Bingham and Lord Steyn, in reaching this conclusion I am not to be taken as endorsing the full width of all the observations in *Hill v Chief Constable of West Yorkshire* [1989] AC 53. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy."

[29] Lord Steyn agreed:

"It is unnecessary in this case to try to imagine cases of outrageous negligence by the police, unprotected by specific torts, which could fall beyond the reach of the *Hill* principle. It would

> be unwise to try to predict accurately what unusual cases could conceivably arise. I certainly do not say that they could not arise. But such exceptional cases on the margins of the *Hill* principle will have to be considered and determined if and when they occur. "

Van Colle and Smith

[30] *Van Colle* and *Smith* were two appeals, heard together, which, in the words of Lord Bingham, addressed this problem: if the police are alerted to a threat that *D* may kill or inflict violence on *V*, and the police take no action to prevent that occurrence, and *D* does kill or inflict violence on *V*, may *V* or his relatives obtain civil redress against the police, and if so, how and in what circumstances?

[31] The two appeals arose on different facts and gave rise to different types of claims. In *Van Colle v Chief Constable of the Hertfordshire Police* a threat was made by a man known as Daniel Brougham against Giles Van Colle and culminated in the murder of Van Colle by Brougham. The plaintiff's claim was brought under sections 6 and 7 of the Human Rights Act 1998 ("the 1998 Act"), in reliance on Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and no claim was made under the common law. In *Smith v Chief Constable of Sussex Police*, the threat was made against the Stephen Paul Smith by his former partner, Gareth Jeffrey, and culminated in the infliction of serious injury on Smith by Jeffrey. In *Smith* the claim was made under the common law alone, and no claim was made under the 1998 Act.

[32] The facts in *Smith* are important in respect of the degree of knowledge the police had of the threat. Smith and Gareth Jeffrey lived together as partners. On 21 December 2000 Jeffrey assaulted Smith, after Smith had asked for a few days' break from their relationship. The assault was reported to the police, who arrested Jeffrey and detained him overnight. No prosecution followed. After a time apart, during which Smith moved to Brighton, Jeffrey renewed contact and stayed with Smith on about two occasions in December 2002. Jeffrey wanted to resume their relationship. Smith did not. From January 2003 onwards Jeffrey sent Smith a stream of violent, abusive and threatening telephone, text and internet messages, including death threats. There were sometimes 10 to 15 text messages in a single day. During February 2003 alone there were some 130 text messages. Some of these messages were very explicit: 'U are dead'; 'look out for yourself psycho is coming'; 'I am looking to kill you and no compromises'; 'I was in the Bulldog last night with a carving knife. It's a shame I missed you.' On 24 February 2003 Smith contacted Brighton police by dialling 999. He reported his earlier relationship

with Jeffrey, the previous history of violence and Jeffrey's recent threats to kill him. Two officers were assigned to the case and they visited Smith that afternoon. He again reported his previous relationship with Jeffrey (including the earlier violence) and the threats. The officers declined to look at the messages (which Smith offered to show them), made no entry in their notebooks, took no statement from Smith and completed no crime form. They told Smith that it would be necessary to trace the calls and that he should attend at Brighton Police Station to fill in the appropriate forms. Later that evening Smith received several more messages from Jeffrey threatening to kill him. Smith filled in the forms the next day. The information he provided to the police included Jeffrey's home address and reference to the death threats he had received. Smith then went to London, since Jeffrey had said he was coming to Brighton. He contacted the Brighton Police from London to check on progress, but was told it would take four weeks for the calls to be traced. The messages continued. One read "I'm close to u now and I am gonna track u down and I'm not gonna stop until I've driven this knife into u repeatedly". Smith went to Saville Row Police Station to report his concern. An officer there contacted the Brighton Police and advised Smith that the case was being dealt with from Brighton and he should speak to an inspector there when he returned home. On return to Brighton on 2 March 2003 Smith told an inspector that he thought his life was in danger and asked about the progress of the investigation. He offered to show the inspector the threatening messages he had received, but the inspector declined to look at them and made no note of the meeting. He told Smith the investigation was progressing well, and he should call 999 if he was concerned about his safety in the interim. On 10 March 2003 Smith replied to a communication he had received from the police that day, giving the telephone numbers from which Jeffrey had been sending the text messages. He received a further text message from Jeffrey saying "Revenge will be mine". Later on 10 March 2003 Jeffrey attacked Smith at his home with a claw hammer. Smith suffered three fractures of the skull and associated brain damage. Jeffrey was arrested at his home address. He was charged and in March 2004 was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. He was sentenced to ten years' imprisonment with an extended period on licence.

[33] Smith issued proceedings against the Chief Constable in the County Court on 2 March 2006. Following service of a defence the Chief Constable applied to strike out the claim as disclosing no reasonable grounds for bringing it or, alternatively, for summary judgment against Smith on the ground that he had no real prospect of succeeding on the claim. The application was successful and the claim was struck out. Smith appealed. The Court of Appeal allowed his appeal and remitted the case to the county court

for hearing. The Chief Constable then appealed the decision of the Court of Appeal to the House of Lords where he was successful and the claim was struck out.

[34] It is clear from the judgments that the majority of their Lordships upheld the core principle of *Hill* as had been confirmed in *Brooks*. Lord Hope observed:

> "The point that [Lord Steyn] was making in *Brooks*'s case, in support of the core principle in *Hill*'s case, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn's words, to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against because of the risks that this would give rise to. As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 All ER 449 at 467, [1997] QB 464 at 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual."

[35] Lord Carswell observed:

> "I am satisfied nevertheless that the reasons underlying the acceptance of the general rule that a duty of care is not imposed upon police officers in cases such as the present remain valid. Those reasons are summarised in para [76] of Lord Hope's opinion, with which I agree, and I need not set them out again. The factor of paramount importance is to give the police sufficient freedom to exercise their judgment in pursuit of their objects in work in the public interest, without being trammelled by the need to devote excessive time and attention to complaints or being constantly under the shadow of threatened litigation. Over-reaction to complaints, resulting from defensive policing, is to be avoided just as much as failure to react with sufficient speed and effectiveness. That said, one must also express the hope that police officers will make good use of this freedom, with wisdom and discretion in judging the risks, investigating complaints and

taking appropriate action to minimise or remove the risk of threats being carried out."

[36] However there were clear indications that although the core principle in *Hill* was being maintained, so too was the position that this was not a blanket immunity for the police and that exceptions to the core principle were possible. Cases may therefore come before the courts where a duty of care will be recognised. Lord Hope said:

> "In *Brooks*'s case Lord Nicholls of Birkenhead said, in para [6], that there might be exceptional cases where the circumstances compelled the conclusion that the absence of a remedy sounding in damages would be an affront to the principles that underlie the common law. I respect his approach, which is to guard against the dangers of never saying never. But in my opinion the present case does not fall into that category. That is why, if a civil remedy is to be provided, there needs to be a more fundamental departure from the core principle. I would resist this, in the interests of the wider community."

[37] The possibility of exceptions can also be seen in the speech of Lord Phillips:

> "I do not find it possible to approach *Hill*'s case and *Brooks*' case as cases that turned on their own facts. The fact that Lord Steyn applied the decision in *Hill*'s case to the facts of *Brooks*, which were so very different, underlines the fact that Lord Steyn was indeed applying a 'core principle' that had been 'unchallenged … for many years'. That principle is, so it seems to me, that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals."

[38] Similarly Lord Carswell allowed for exceptions:

> "I would not dissent from the view expressed by Lord Nicholls of Birkenhead in *Brooks* at [6] that there might be exceptional cases where liability must be imposed. I would have reservations about agreeing with Lord Steyn's adumbration in para [34] of *Brooks* of a category of cases of 'outrageous negligence', for I entertain some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept. I should accordingly prefer to leave the ambit of such exceptions undefined at present."

[39] Lord Brown was also clear that there were exceptions to the core principle and gave examples:

> "In what circumstances ought the police to be subject to civil liability at common law for injuries deliberately inflicted by third parties ie for crimes of violence? When, in short, should they in this type of case be held to owe a duty of care to the victim? That there are such cases is not in doubt. *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 All ER 449, [1997] QB 464 provides one example, the facts there suggesting that the police had assumed responsibility for the complainant informer's safety (although his claim in the event failed at trial). Another example (again on the basis of assumption of responsibility) is *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752 where a police inspector was found liable to a woman police constable for injuries inflicted on her by a woman prisoner in a police station cell."

[40] He went on to say:

> "True it is that in *Brooks* both Lord Nicholls of Birkenhead and Lord Steyn contemplated the possibility of exceptional cases on the margin of the *Hill* principle which might compel a different result. If, say, the police were clearly to have assumed specific responsibility for a threatened person's safety—if, for example, they had assured him that he should leave the matter entirely to them and so could cease employing bodyguards or taking other protective measures himself—then one might readily find a duty of care to arise. That, however, is plainly not this case. There is nothing exceptional here unless it be said that this case appears exceptionally meritorious on its own particular facts—plainly not in itself a sufficient basis upon which to exclude a whole class of cases from the *Hill* principle. That said, the apparent strength of this case might well have brought it within the *Osman* principle so as to make a Human Rights Act claim here irresistible."

Michael

[41] The Supreme Court again considered the issue of the duty of care owed by police in *Michael v Chief Constable of South Wales Police* [2015] 2 All ER 635. This action arose out of the killing of a young woman by her boyfriend, where she had telephoned 999 to report to the police that her boyfriend had threatened to kill her, and there was a delay in responding partly due to the report being passed from one police service to another. In a second call she was heard screaming, but when police arrived they found that she had already been killed. Her parents and children sued in negligence and under Article 2 of the 1998 Act. The police applied for the claims to be struck out, or

for summary judgment to be entered in their favour. In the High Court the judge refused those applications. The Court of Appeal upheld the decision of the judge that the Article 2 claim should proceed to trial, and gave summary judgment in favour of the police on the issue of negligence. The claimants appealed and the police cross-appealed. The Supreme Court held that there was no basis for allowing the claim in negligence to proceed. It took the view that the duty of the police for the preservation of the peace was owed to members of the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private law duty of care. It did not follow from the setting up of a protective system, such as that for 999 emergency calls, from public resources that if it failed to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state was not responsible. Indeed the imposition of such a burden would be contrary to the ordinary principles of the common law. The Court in *Michael* also rejected a narrow principle of liability proposed by the plaintiff, namely that if a member of the public ('A') furnished a police officer ('B') with apparently credible evidence that a third party whose identity and whereabouts were known presented a specific and imminent threat to his life and physical safety, 'B' would owe to 'A' a duty to take reasonable steps to assess such threat and if appropriate take reasonable steps to prevent it being executed.

[42] Reviewing the earlier case law as to whether or not the police had an immunity from civil action in such cases, that term having been used by Lord Keith in *Hill*, Lord Toulson said:

> "[44] An 'immunity' is generally understood to be an exemption based on a defendant's status from a liability imposed by the law on others, as in the case of sovereign immunity. Lord Keith's use of the phrase was, with hindsight, not only unnecessary but unfortunate. It gave rise to misunderstanding, not least at Strasbourg. In *Osman v UK* (1998) 5 BHRC 293 the Strasbourg court held that the exclusion of liability in negligence in a case concerning acts or omissions of the police in the investigation and prevention of crime amounted to a restriction on access to the court in violation of art 6. This perception caused consternation to English lawyers. In *Z v UK* (2001) 10 BHRC 384 the Grand Chamber accepted that its reasoning on this issue in Osman was based on a misunderstanding of the law of negligence; and it acknowledged that it is not incompatible with art 6 for a court to determine on a summary application that a duty of

care under the substantive law of negligence does not arise on an assumed state of facts."

[43] Lord Toulson further observed:

> "[115] The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun-yeu v A-G of Hong Kong*[1987] 2 All ER 705, [1988] AC 175 and *Davis v Radcliffe* [1990] 2 All ER 536, [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood DC* (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* and *Gorringe v Calderdale Metropolitan BC* (no duty of care owed by a highway authority to take action to prevent accidents from known hazards). The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case."

Lord Toulson explained the difficulties in creating a new category of duty of care when he said:

> "[119] If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not?
>
> [120] It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one

> should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners' liability principle. These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care."

Robinson

[44] Recently, in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, the Supreme Court revisited the issue of whether the police are under a duty of care when discharging their function of preventing and investigating crime. One commentator has described the decision as "the most important police law case for a generation."

[45] The facts in *Robinson* are simple. A 76 year old woman was walking along a street when she was knocked over by a group of men who were struggling with each other. One man was a suspected drug dealer. The others were police officers attempting to arrest him. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result. The question before the Supreme Court was whether the police officers owed a duty of care to Mrs Robinson and, if so, were they in breach of that duty.

[46] The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of *Caparo,* which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on

precedent, and on the development of the law incrementally and by analogy with established authorities.

[47] Public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael*, "the common law does not generally impose liability for pure omissions". There are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: see, for example, *Barrett v Enfield London Borough Council* and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, as explained in *Gorringe* at paras 39-40. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body. In particular, public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

[48] There are however circumstances where such a duty may be owed. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied.

[49] In *Robinson* Lord Reed, with whom Lady Hale and Lord Hodge agreed, stated that Lord Keith's reasoning in Hill continues to be misunderstood. Lord Reed explained that the most important aspect of Lord Keith's speech in *Hill* is that he recognised that the general law of tort applies as much to the police as to anyone else. What Lord Keith said was this:

> "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*."

The words "like anyone else" are important. They indicate that the police are subject to liability for causing personal injury in accordance with the general law of tort. Lord Reed continued:

> "On the other hand, as Lord Toulson noted in *Michael* (para 37), Lord Keith held that the general duty

of the police to enforce the law did not carry with it a private law duty towards individual members of the public. In particular, police officers investigating a series of murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. That was again in accordance with the general law of negligence. As explained earlier, the common law does not normally impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, generally under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility."

[50] Lord Reed also explained:

"… the decision in *Hill* has now to be understood in the light of the later authorities. In *Michael*, in particular, Lord Toulson (with whom Lord Neuberger, Lord Mance, Lord Hodge and I agreed) reached the same conclusion as in *Hill,* but did so primarily by applying the reasoning in *Stovin v Wise* and *Gorringe*. Policy arguments were considered when addressing the argument that the court should create a new duty of care as an exception to the ordinary application of common law principles (see, in particular, paras 116-118). Lord Toulson concluded that, in the absence of special circumstances, there is no liability in "cases of pure omission by the police to perform their duty for the prevention of violence" (para 130).

The case of *Hill* is not, therefore, authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed. Lord Keith spoke of an "immunity", meaning the absence of a duty of care, only in relation to the protection of the public from harm through the

performance by the police of their function of investigating crime."

[51] The position established by the Supreme Court in *Robinson* is this:

> "I do not suggest that the discussion of policy considerations in cases such as *Hill, Brooks* and *Smith* should be consigned to history. But it is important to understand that such discussions are not a routine aspect of deciding cases in the law of negligence, and are unnecessary when existing principles provide a clear basis for the decision, as in the present appeal. I would not agree with Lord Hughes's statement that they are the ultimate reason why there is no duty of care towards victims, suspects or witnesses imposed on police officers engaged in the investigation and prevention of crime. The absence of a duty towards victims of crime, for example, does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-established principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility. … Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht* and *Attorney General of the British Virgin Islands v Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility."

DSD

[52] The final authority dealing with this area of law to which I was referred is *Commissioner of the Police of the Metropolis v DSD and Another* [2018]

UKSC 11, a case which concerns John Worboys, the driver of a black cab in London who committed a legion of sexual offences against women. DSD brought proceedings against the police under sections 7 and 8 of the 1998 Act for the alleged failure of the police to conduct effective investigations into Worboys' crimes. The kernel of DSD's claim was that the police failures constituted a violation of her rights under Article 3 of the ECHR. With DSD having succeeded before the High Court and in the Court of Appeal, the Metropolitan Police Service appealed to the Supreme Court. That appeal was unanimously rejected. In his judgment Lord Hughes addressed the relevance of the domestic law on the private law duty of care. Lord Hughes concluded by saying:

> "In the briefest of terms, law enforcement and the investigation of alleged crime involve a complex series of judgments and discretionary decisions. They concern, amongst many other things, the choice of lines of inquiry, the weighing of evidence thus far assembled and the allocation of limited resources as between competing claims. To re-visit such matters step by step by way of litigation with a view to private compensation would inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental to, not a spur to, law enforcement. It is not carrying out the impugned investigation efficiently which is likely to lead to diversion of resources; on the contrary. It is the re-investigation of past investigations in response to litigation which is likely to do so. Moreover, whilst there may exist a mechanism by way of summary judgment for stopping short such a re-investigation if the litigation be "spurious" in the sense of demonstrably bad on the papers, other claims, and particularly those which turn out to be speculative, cannot thus be halted. In short, the public duty would be inhibited by a private duty of such a kind. A contemporary example can be seen in terrorist activity. It is well known that large numbers of possible activists are, to some extent or other, known to the police or security services. The most delicate and difficult decisions have to be made about whom to concentrate upon, whose movements to watch, who to make the subject of potentially intrusive surveillance and so on. It is in no sense in the public interest that, if a terrorist attack should unfortunately occur, litigation should become the forum for a review of the information held about different suspects

and of the decisions made as to how they were to be dealt with." "

CONCLUSION

General Police Duties and a Duty of Care

[13] Mr Rafferty referred me to the basis on which police perform statutory functions in this jurisdiction. Section 32 of the Police (Northern Ireland) Act 2000 provides:

> "*General functions of the police.*
>
> (1) It shall be the general duty of police officers—
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice."

Mr Rafferty argued that the legislation clearly provided that these were general duties and that a general duty and a duty of care were entirely different legal concepts. Mr McCollum disagreed and submitted that this provision should be interpreted as meaning that a duty of care had been imposed upon the police for Mr Magill's safety.

[14] In my opinion the plaintiff's submission on this point is profoundly incorrect. A general duty, breach of which might, for example, lead to disciplinary proceedings for individual officers, is a very different legal concept from a duty of care, breach of which leads to very different consequences, namely an award of damages. I find support for this conclusion in Lord Toulson's analysis of the law in *Michael*. Lord Toulson explained that Lord Parker CJ said in *Rice v Connolly* [1996] 2 QB 414, p 419, that it was the duty of a police constable "to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury". The duty is one which any member of the public affected by a threat of breach of the peace, whether by violence to the person or violence to property, is entitled to call on the police to perform. In short, it is a duty owed to the public at large for the prevention of violence and disorder. This reflects the common law duty of the police. However Lord Toulson then went on in *Michael* to reject the principle that the police owed a private law duty to a member of the public at risk of violent crime in addition to their public law duty.

[15] To interpret the statute as Mr McCollum wishes me to, would mean that the police had assumed a duty of care for the safety of however many hundreds of people who had engaged in the parade. Accordingly, on the plaintiff's legal theory, any marcher hit by stones or missiles thrown by protestors, and indeed any protestor injured by the retaliation of a marcher, would have a viable negligence claim against the police. This would be a bizarre outcome and is clearly not the interpretation of section 32 of the 2000 Act that Parliament intended. Indeed, had Parliament intended to overturn the *Hill* decision by the 2000 Act, it would undoubtedly have done so in unambiguous terms and made it clear that a duty of care was being created by the use of that expression.

The General Principle

[16] The general legal principle applied in situations of this kind, as expressed by Lord Hughes in *DSD*, is that the law does not recognise a duty of care in tort owed by the police to individual citizens and sounding in damages in relation to the detection of crime and the enforcement of the law. As Lord Toulson said in *Michael*:

> "[114] It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.
>
> [115] The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public."

If the general principle is applied, therefore, Mr Magill cannot sue the police for negligence in respect of the policing of the parade he took part in.

[17] Of course, however, as has been repeatedly emphasised by the courts ever since the seminal case of *Hill*, there may be exceptional cases where liability must be imposed. Hence I must now turn to the issue of whether Mr Magill's case can fall within any of the exceptions.

Assumption of Responsibility

[18] The issue of exceptions was dealt with by Lord Toulson in *Michael* where he noted that, apart from statutory exceptions (and I note here for the sake of clarity that, other than his argument in respect of the Police (Northern Ireland) Act 2000, Mr McCollum did not seek to argue that Mr Magill's circumstances fell within any statutory exception to the general principle), there are two well recognised types of situation in which the common law may impose liability for an omission to act. Lord Toulson dealt with the relationship between a claimant (C), a defendant (D) and a third party (T):

> "[99] The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. Dorset Yacht is the classic example, and in that case Lord Diplock set close limits to the scope of the liability. As Tipping J explained in *Couch v Attorney-General*, this type of case requires careful analysis of two special relationships, the relationship between D and T and the relationship between D and C. I would not wish to comment on Tipping J's formulation of the criteria for establishing the necessary special relationship between D and C without further argument. It is unnecessary to do so in this case, since Ms Michael's murderer was not under the control of the police, and therefore there is no question of liability under this exception.
>
> [100] The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance Plc*. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive. …. There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

[19] In the submissions made before me on this application, counsel for the plaintiff did not at any point suggest that Mr Magill fell within Lord Toulson's first category of exceptions because the police had control of the third party who caused the injury to Mr Magill. However Mr McCollum did submit that Mr Magill fell within Lord Toulson's second category of exceptions in that the police had assumed responsibility for Mr Magill's safety as a marcher.

[20] Mr McCollum sought to persuade me that the decisions in *Costello v Chief Constable of the Northumbria Police* (referred to in *Van Colle*) and *R v Dytham* (referred to in *Hill*) were of great significance. In both cases the police were present at the scene of an assault. Mr McCollum wishes me to apply a legal principle that, if the police are present at the scene of a crime prior to its commission, then they are adopting responsibility for the safety of the members of the public there against whom the crime is committed. On that basis he wishes me to distinguish Mr Magill's case from the cases of *Hill*, *Van Colle* and others.

[21] When examined at a level beyond the headnote, however, *Costello* is not a decision which assists the plaintiff's argument. The facts of the case concerned a police constable who was attacked and injured in a police station cell. Nearby was a police inspector who did not come to the constable's aid when she was attacked. Astill J had originally held that the Chief Constable owed the plaintiff a duty of care. The Chief Constable appealed and May LJ, delivering the principal judgment of the Court of Appeal, said:

> "For public policy reasons, a senior police officer is not generally to be held liable to a subordinate for operational decisions taken in the heat of the moment and when resources may be inadequate to cover all possibilities (*Hughes*). But a senior police officer may be liable to a subordinate for positive negligent intervention which causes injury to the subordinate and for particular failure or particular instructions given in breach of specific regulations which result in injury (*Knightly v. Johns*). Just as circumstances may occur in which a police officer assumes responsibility in particular circumstances to a particular member of the public not to expose the member of the public to a specific risk of injury (*Swinney*), so in my judgment a police officer may in particular circumstances assume a similar responsibility to another police officer. This last part sentence is, I think, the only increment in this summary which goes beyond matters decided in the authorities to which I have referred. It is not in my view in any sense a difficult incremental step to take, since for obvious reasons the relationship between individual police officers working together is likely to be closer than any relationship between the police and particular members of the public.
>
> If a police officer tries to protect a member of the public from attack but fails to prevent injury to the member of the public, there should in my view generally be no liability in tort on the police officer for public policy reasons. This is analogous to the law relating to the fire services and quite close factually to *Alexandrou v. Oxford*. If a police officer tries to protect a fellow officer from attack but fails to prevent injury to the fellow officer,

> there should in my view generally be no liability in tort. The relationship between the two police officers is arguably closer than the relationship between the police officer and the member of the public, but the public policy considerations are essentially the same and are compelling. One such consideration is that in the circumstances liability should not turn on, and the court should not have to inquire into, shades of personal judgment and courage in the heat of the potentially dangerous moment."

[22] May LJ is therefore very clear in *Costello* that it is not the *presence* of a police officer which leads to a duty of care being found to exist but rather an *assumption of responsibility* having been taken for a particular member of the public not to expose him to a specific risk of injury. May LJ clearly sees a difference between these two concepts whereas Mr McCollum wishes me to amalgamate them. In my view the authorities do not entitle me to do so.

[23] Mr McCollum argued that the police had assumed responsibility for the protection of the marchers by policing the parade and that it could not have proceeded in the absence of police assuming that responsibility. As a result, Mr McCollum argued that the police were obliged to exercise care in accordance with the ordinary principles of the law of negligence. I reject this argument as entirely misconceived. Policing the parade did not amount to an assumption of responsibility. If this were true, the police would arguable be liable in negligence every time someone was injured at the parade. I understand Lord Toulson in paragraphs 115 and 119-120 of the *Michael* decision, quoted above, as emphatically rejecting the view advanced by Mr McCollum.

[24] Mr Rafferty argued that the circumstances in which the police assumed a duty of care for someone involved in a public march would inevitably be extremely rare. He referred me to what Lord Brown said in *Van Colle*:

> "If, say, the police were clearly to have assumed specific responsibility for a threatened person's safety—if, for example, they had assured him that he should leave the matter entirely to them and so could cease employing bodyguards or taking other protective measures himself—then one might readily find a duty of care to arise."

On this basis, Mr Rafferty submitted therefore that, if a local politician or international visitor who was receiving police protection from the PSNI's Close Protection Unit had taken part in a march or an event at which they had subsequently been injured, then it could be argued that the police owed the injured person a duty of care. While I agree with this as a general approach, even this may

go too far as a statement of principle. There might be circumstances where, even though the police had assumed responsibility for a threatened person's safety by means of providing protection from the Close Protection Unit, that person then disengaged from that protection by virtue of their actions. For example, in circumstances where the protected person disregarded advice or instructions from the Close Protection Unit as to what they might safely do, a court might, depending on the particular facts of the case, either conclude that there was no duty of care or that there was a duty of care but a significant element of contributory negligence.

[25] In support of his argument that the plaintiff fell within the "assumption of responsibility" exception, Mr McCollum also sought to use a passage from Gillen J's decision in *Rush v Police Service of Northern Ireland and Another* (2011) NIQB where the judge stated:

> "[33] Confining my focus to the pleadings, the case made in this instance is that the defendant "had actual knowledge" of the route of the bombers, their target, namely Omagh and the date and timing of the bombing. I consider that this arguably is distinguishable from the facts in *Smith* where the police had to process and interpret information reported to the police by one party to a so-called domestic case. Contrast the instant case, where the case is made that the police actually knew that the event was to take place i.e. there was no question of treating, processing or judging a report from a member of the public and making a value judgment.
>
> [34] Accordingly is it not at least arguable that the instant case on the pleadings has more in common with the circumstances in Costello where a police officer knew that the plaintiff was being attacked and stood by and did nothing? The analogy in the instant case is that the police, knowing an attack was imminent, similarly stood by and did nothing. Did those circumstances involve the police assuming a responsibility to protect the public? If this is the proven state of affairs does not the need to protect persons imminently about to be killed outweigh the public interest in protecting from liability police in the performance of their duties?
>
> [35] It seems to me arguable that the precision of the foreknowledge and the exactitude of the information alleged arguably put this plaintiff within the bracket of

> the outrageous negligence adumbrated by Lord Steyn, the special circumstances described by Lord Phillips, the exceptional circumstances contemplated by Lord Carswell and that category of cases addressed by Lord Keith "where the absence of a remedy would be an affront to the principles underlying the common law."

[26] I do not consider, however, that I can attach any significant weight to this passage of Gillen J's decision in *Rush* given the development of the jurisprudence in the intervening years and exemplified by what Lord Hughes wrote at paragraph 132 of *DSD*:

> "In the briefest of terms, law enforcement and the investigation of alleged crime involve a complex series of judgments and discretionary decisions. They concern, amongst many other things, the choice of lines of inquiry, the weighing of evidence thus far assembled and the allocation of limited resources as between competing claims. To re-visit such matters step by step by way of litigation with a view to private compensation would inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental to, not a spur to, law enforcement. It is not carrying out the impugned investigation efficiently which is likely to lead to diversion of resources; on the contrary. It is the re-investigation of past investigations in response to litigation which is likely to do so. Moreover, whilst there may exist a mechanism by way of summary judgment for stopping short such a re-investigation if the litigation be "spurious" in the sense of demonstrably bad on the papers, other claims, and particularly those which turn out to be speculative, cannot thus be halted. In short, the public duty would be inhibited by a private duty of such a kind. A contemporary example can be seen in terrorist activity. It is well known that large numbers of possible activists are, to some extent or other, known to the police or security services. The most delicate and difficult decisions have to be made about whom to concentrate upon, whose movements to watch, who to make the subject of potentially intrusive surveillance and so on. It is in no sense in the public interest that, if a terrorist attack should unfortunately occur, litigation should become the forum for a review of the information held about different suspects and of the decisions made as to how they were to be dealt with. Nor is it difficult to see that it is by no means necessarily in the public interest that there should be pressure on the authorities, via the prospect of litigation, to ratchet up the surveillance of additional persons."

[27] On the basis of the facts alleged by Mr Magill in his Statement of Claim I therefore cannot conclude that the police assumed responsibility for his safety. He does not therefore fall within the second exception referred to by Lord Toulson in *Michael*.

The Police Ombudsman's Report

[28] Counsel for the plaintiff invited me to place weight on the fact that the Police Ombudsman found that police had failed to protect members of the Orange Order who were attacked as they marched through the Short Strand Area during the parade. Although the report itself was not exhibited, the media release from the Police Ombudsman's Office was exhibited to Mr Nolan's affidavit and indicated that the Ombudsman stated:

> "Overall there is no dispute that the parade did come under attack from the Short Strand. While I have found no evidence to suggest any individual officer was guilty of misconduct, it is clear that, for a number of reasons, police had not prepared for such an eventuality.
>
> My investigators have spoken to senior police officers who acknowledged some of the concerns raised and accept there are a number of lessons to be learned for the policing of future parades in the area.
>
> Members of the Lodge have said they wanted a formal apology from the police. I have forwarded a report of my findings and this request to the PSNI."

Nothing in respect of the Police Ombudsman's findings are referred to in the plaintiff's Statement of Claim and therefore I have not taken the Ombudsman's findings into account in respect of this application under Order 18 Rule 19(1)(a). I refer to it, however, simply to note that, even if the Police Ombudsman's findings had been a matter included in the pleadings, and therefore a fact which I could have taken into account, it would have made no difference to the outcome of this application. The fact that there was a lack of preparation by police in respect of a possible attack on the parade or that there were lessons to be learned for the future in regard to policing future parades does not change the legal principles established by the case law and create a duty of care by the police towards the marchers in general and to Mr Magill in particular. Nor does it bring the plaintiff within one of the exceptions to the general principle.

[29] In *Van Colle* and *Smith* Lord Hope commented about the general principle derived from *Hill* which had been discussed by Lord Steyn in *Brooks*:

> "The point that he was making in *Brooks*, in support of the core principle in *Hill*, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn's words, to a retreat from the core principle. *We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against because of the risks that this would give rise to. As Ward LJ said in Swinney v Chief Constable of Northumbria Police Force [1996] 3 All ER 449 at 467, [1997] QB 464 at 487, the greater public good outweighs any individual hardship…"*

[30] In conclusion, the answer to the question I opened this judgment with is that it is only in exceptionally rare circumstances that a person involved in a lawful march who has been injured by a third party will be able to sue the police for damages. This is, in my view, clearly not one of those cases. I am therefore obliged to strike out the defendant's Statement of Claim in its entirety on the basis that it discloses no reasonable cause of action against the Chief Constable. Having concluded that the Statement of Claim discloses no reasonable cause of action, there is no need for me to consider the second limb of the defendant's application as to whether or not it is an abuse of process.

[31] Counsel should make arrangements through the Masters' Office to have this application listed within the next 7 days for a further short Webex hearing so that they may make any submissions they wish to make on the issue of costs.