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Judgment: approved by the Court for handing down | *Delivered:* **08/06/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

SEAN FEGAN

Plaintiff

-and-

POLICE SERVICE IN NORTHERN IRELAND

Defendant.

_____

GILLEN J

Cause of action

[1] In this matter the plaintiff claims damages, to include aggravated and exemplary damages, for loss and damage sustained by him by reason of the negligent misstatement of Assistant Chief Constable E W Anderson as servant and agent of the Chief Constable of the Police Service of Northern Ireland.

Background facts

[2] The plaintiff commenced employment as a social worker with the Sisters of Nazareth at Nazareth House, Children's Home, Londonderry (hereinafter called "the employer") on 1 June 1987. The employer provided residential care within two units for up to 20 children aged between 5 and 17.

[3] The plaintiff progressed in his employment and by 1993 he was the acting team leader in a residential home with responsibility for day-to-day running of the residential unit together with social workers employed thereat.

[4] On 31 July 1996 he was informed that a former resident had made an allegation of a sexual nature against him. He was placed on precautionary suspension by the employer albeit he denied the allegations. The matter was investigated under joint protocols by the RUC, Foyle Health and Social

Services Trust ("the Trust") and the plaintiff's employer. On 6 January 1997 the plaintiff was informed by the Director of Public Prosecutions (DPP) that no further action was being taken. On 14 July 1997 the plaintiff was reinstated, the defendant, the Trust and the employer all having recommended his reinstatement.

[5] Some weeks later, two new allegations were raised against him and again he was placed under precautionary suspension by the employer under the terms of the joint protocol on 29 August 1997. The plaintiff had been identified by two children as one of approximately 50 adults in the Northwest area of Northern Ireland who were allegedly involved in their sexual abuse. One of the children was five years old and lived in the Republic of Ireland. The other was a fourteen year old child living in Northern Ireland.

[6] The plaintiff was interviewed on 10 September 1997 by the Garda Siochana ("Garda") in relation to allegations made by the five year old girl in the Republic of Ireland. On 4 April 1998, the plaintiff was informed that the DPP in the Republic of Ireland had determined that no further action be taken. (This was confirmed in a document of 25 September 1998).

[7] It is clear that the plaintiff was never interviewed by the RUC in relation to the allegations made by the fourteen year old in Northern Ireland. Contrary to what he believed, however a file was sent to the Director of Public Prosecutions in Northern Ireland with reference to the fourteen year old girl albeit no further action was taken against him.

[8] Mr Fegan gave evidence that the allegation involving the five year old girl in Buncrana was that he had sexually abused the child at his home although he was not sure what was alleged to have been done. The child was the daughter of a couple who had visited him in Buncrana at a time when he was present with his wife. The allegation involving the fourteen year old girl, who was apparently an aunt of the five year old, was that whilst in the company of some other men he had taken this girl away and abused her. Mr Fegan said that the fourteen year old's father had given the names of up to forty people who apparently had abused her as part of a large circle of abusers.

[9] Mr O'Donoghue QC who appeared on behalf of the plaintiff with Mr McKee placed great stead on certain memoranda and letters which were put before this court. It is necessary for me to outline them in some detail. On 7 April 1998, Sister Teresa King of the employers wrote to the sub-divisional commander of the RUC Strand Road in Londonderry in the aftermath of a telephone conversation she had had with Detective Inspector Robert Paul, CID, Strand Road in relation to the plaintiff. That letter recorded that the plaintiff was presently suspended from employment on full pay since 28

August 1997 due to the allegations of a sexual nature which were currently being investigated by the police. The letter concluded:

> "As you can appreciate the difficulties of Mr Fegan returning to a child care setting, we are therefore anxious to clarify where things are at with your department so that we as employers can decide on appropriate action without compromising your investigation.
>
> I would appreciate an early response and any information which you are in a position to share with us."

[10] In a memorandum of 5 May 1998 passing between Chief Inspector Paul and the sub-divisional commander in Strand Road the former recorded the following:

> "I am aware that complaints of sexual abuse were made against Mr Sean Fegan in relation to offences which allegedly happened outside this jurisdiction at Buncrana, Co. Donegal. I believe that the prosecuting authorities in the Republic directed 'No Prosecution'.
>
> In this jurisdiction a complaint was made against this male by a five year old girl but her parents have declined to proceed with the matter through the criminal law process.
>
> To day no further allegations have been made against Mr Fegan.
>
> I would however <u>have concerns</u> if Mr Fegan was re-employed in his former child care role."

[11] On 30 June 1998, Chief Inspector Paul had sent a memo to a detective chief inspector in Strand Road following the request which had been received from Sister King. The note includes the following:

> "In respect of the alleged injured party, she has recently made a statement in which she states she does not wish to continue with statements of complaint or to give evidence in court. She states however that her initial allegations are true. These deal with a large number of suspected abusers in addition to Mr Fegan.

> In respect of these individual matters there have been no criminal proceedings against Mr Fegan.
>
> I am of the opinion however that taking into consideration all the information available that there are justifiable concerns of Mr Fegan merely to continue in his employment as a child care social worker. I would recommend that a letter be forwarded to the officer in charge of Nazareth House Children's Home expressing this concern.
>
> The issue of such a letter will likely lead to court proceedings for unlawful dismissal by Mr Fegan against his employers and the issue of whether or not they will indemnify the RUC in respect of such an action would require to be considered. I am aware that Mr Ted Jones of Church (*sic*) and Jones solicitors are representing the church in this matter.
> Submitted for information and direction."

[12] In a memorandum of 10 August 1998 passing between Detective Chief Inspector Maxwell of Strand Road CID and Detective Superintendent McArthur of Strand Road CID, the former recorded the following:

> "The attached papers refer to allegations which have been made against the above named (*the plaintiff*) over the following time periods.
>
> (a) 1990-1992
> (b) Unknown activity disclosed 1/12/97
> (c) 1987 to 1997 (multiple sexual abuse by various persons including Fegan
> (d) Vague as to time and place (witness is five years of age connected through IP at (c)
>
> All cases have been investigated by CARE personnel with none resulting in prosecution of Fegan. This cumulative report has been compiled in response to correspondence received from Sister King, Nazareth House. Detective Inspector Paul (minute 30.6.98), suggests that a letter be forwarded from the RUC to Sister King expressing concerns of Mr Fegan's continued employment as a child care social worker. Through the process of joint investigation under the Protocol, the social services would be aware of the

> circumstances of '(b)-(d) above'. (a) Was 20 years when the allegations were made and therefore outside of the RUC/social services joint investigative process as outlined in the Protocol.
>
> I have attached a copy of the section (Allegations of Child Abuse Perpetrated by Professional Staff), from the Western Area Child Protection Committee Policy and Procedures document. I believe that Nazareth House, as Fegan's employer, should be in a position to institute procedures as outlined in para 5, point 3, and draw upon the information available by the investigations carried out under para 12. I believe that the RUC should assist, under subpoena to produce evidence and police witness evidence, for any disciplinary procedure instituted by Nazareth House. The issue of a letter, as suggested by Detective Inspector Paul, is at this stage premature without knowledge of the steps taken by Fegan's employers to terminate his employment."

[13] It was the plaintiff's case that during this second period of suspension, his solicitor had told him that the police were not going to interview him about these matters but that his employer thought the police were still investigating him and were awaiting clarification from the RUC before finalising their approach to him. He felt time was moving on and he wanted him to have an opportunity to defend himself. He also gave evidence before me that the police had made statements to the press about a major paedophile ring, that names were being bandied about in the local press as being members of this ring and people were making up their own interpretations in light of the fact that he was suspended. In his view the public had come to the view that there was no smoke without fire.

[14] Accordingly the plaintiff on 25 August 1998 sent a letter to the Complaints and Discipline Branch of the RUC making a formal complaint about what he alleged was the "reluctance of the RUC to either investigate me or eliminate me from any investigation and to clarify their exact position regarding myself". He concluded his complaint by adding:

> "I request that the RUC immediately clarify their position regarding myself and to salvage some credibility by coming clean with the public and informing them of the actual situation."

[15] The letter was initially acknowledged by the Complaints and Discipline Department of the RUC on 7 September 1998. On 16 September

1998 the Complaints and Discipline Department wrote to the plaintiff indicating that the matter had been referred to the Chief Constable and that Chief Inspector McAuley had been instructed to investigate his complaint which was being supervised by the Independent Commission for Police Complaints. He was asked to attend at Strand Road RUC Station at 11.30 am on 1 October 1998.

[16] On 28 August 1998 a memorandum passed from Detective Superintendent McArthur to the Regional Head of CID North on this topic which contained the following extract:

> "A number of complaints have now been made against Mr Fegan of child sexual abuse. For various reasons none of these complaints have resulted in a criminal prosecution.
>
> Mr Fegan currently lives outside this jurisdiction in Buncrana, County Donegal but is apparently pressuring church authorities to be allowed to return from suspension to his work at Nazareth House Children's Home as a residential social worker. The church authorities are obviously at present considering their future employment of Mr Fegan and are seeking our views and assistance. The church authorities may well decide to dispense with Mr Fegan's services and this will likely be the subject of civil proceedings for wrongful dismissal.
>
> The church authorities have requested a formal police response regarding our views as to the continued employment of Mr Fegan in a child care role …
>
> Although the evidence in each of the cases listed in the attached reports may not have been sufficient, nor of the quality to satisfy a criminal court beyond all reasonable doubt of Mr Fegan's guilt in these matters, I am of the opinion that there is sufficient evidence available that would give police reasonable grounds for concern for the safety of any children in Mr Fegan's care or control.
>
> Having regard to all the circumstances in this case I am of the opinion that it is in the public interest that police communicate their justifiable concerns to the Sisters of Nazareth as to Mr Fegan's continued employment in a child care role."

[17] On 2 September 1998, a memorandum passing from Detective Superintendent Stewart of North Region to the Head of Branch C2 recorded as follows:

> "The content of this file strongly suggests that Sean Fegan is not fit to continue in his present employment as a social worker at Nazareth House, albeit the standards of proofs available fall somewhat short of what would be required in a court of law.
>
> Like D/Superintendent McArthur I too believe that in the interest of the public we should share our concerns with Fegan's employers."

[18] On 4 September 1998, Detective Superintendent Harvey of Branch C2 sent a memorandum to the Assistant Chief Constable of Crime on this subject containing the following extract:

> "Please see attached papers from police at Maydown concerning alleged activities of social worker Sean Fegan who figures strongly in allegations made by a number of parties as to sexual offences whilst he was in a position of trust at children's homes.
>
> Whilst Fegan has been interviewed over a number of criminal issues, there has never been a direction to prosecute issued by the DPP and this unfortunately weakens our hand in informing his employers of our suspicions.
>
> It is, however, a high risk game and I feel that the risk of the accused, Fegan, working with children outweighs the likelihood of subjecting him to an injustice by accepting, to some degree the allegations levelled against him.
>
> On balance, I agree with local police that we should share our concern with Fegan's employers and I recommend accordingly."

[19] On the 21 September 1998, Detective Chief Inspector Judith Gillespie, Care Coordinator sent the following memorandum to the Assistant Chief Constable of Crime:

> "Given the number of complaints in which Sean Fagan is specifically mentioned and the corroborative evidence of Dr Sandi Hutton in the case of ……., I conclude that there is a 'balance of probabilities' argument for disclosure to Sister Teresa King office in charge of Nazareth House. The welfare of vulnerable children must be the paramount consideration in this decision.
>
> It is then a matter for Nazareth House as to whether Sean Fegan should be reinstated."

[20] There is appended to that memorandum, dated 23 September 1998, a written handwritten hand note from R White ACC to the head of C2 in the following terms:

> "Approval is given for Detective Inspector McAuley Care N & L Divisions to release the necessary information to Fegan's employers. A written record of the details disclosed should be recorded on this file for future reference."

[21] The next recorded note or memorandum surfaces on an undated note in my papers (but which I was told was dated 20 October 1998) from EW Anderson A/ACC Crime to the solicitor acting on behalf of the Sisters of Nazareth purporting to reply to their letter of 7 April 2008 couched in the following terms, inter alia:

> 'I can confirm to you that an exhaustive investigation has been conducted by the Royal Ulster Constabulary and the Garda Siochana arising out of complaints against Mr Sean Fegan and others.
>
> Although the Director of Public Prosecutions, both here in Northern Ireland and in the Republic of Ireland have (on the basis of evidence available) directed no prosecution, I have to inform you that as a result of the above investigations the view of the RUC is that Mr Fegan is not a fit person to continue in employment as a social worker because of our paramount

> concern for the safety and welfare of children'."

[22] Thereafter the plaintiff was dismissed on 30 March 1999 by his employer. Two disciplinary procedures were invoked by the employer. It was the plaintiff's case that his solicitor was given a bundle of papers and on 29 January 1999 informed that there was to be a panel meeting within the next day or two. His solicitor successfully submitted that extra time needed to be given and so the panel hearing was convened within two weeks. After the hearing he was informed on 30 March 1999 that he was dismissed.

[23] The plaintiff then proceeded to take proceedings against his employer for unfair dismissal. On 10 December 2001 that claim was settled in a written agreement on the basis that his applications be dismissed. Terms of the written settlement included the following:

> "2. The parties agreed in light of the information and evidence received by the Sister of Nazareth, in particular from Detective Claire and Superintendent E W Anderson, the Royal Ulster Constabulary, that the Sisters had no alternative but to terminate the employment of the applicant.
>
> 3. Within four weeks of the date hereof the Sisters will make an ex gratia payment of £5,000 …. to the applicant who hereby acknowledges that the payment is not and will not be represented or construed by him as an admission of any fault on the part of the Sisters."

[24] The plaintiff has not worked since this date allegedly as a result of the negligent misstatement on the part of Mr Anderson.

Application by the defendant for a direction of no case to answer

[25] At the close of the plaintiff's case Mr Ringland QC, who appeared on behalf of the defendant, submitted there was no case to answer.

[26] Lowry v Buchanan (1982) NI 243 is often regarded as the seminal judgment in such applications where Lowry LCJ stated at p. 244:

> "In any action founded on negligence the stage is reached when the trial judge has to consider whether the case should be left to the jury. Sometimes the answer to this question is a formality. Other times the question arises in one or both of two ways: the

> plaintiff's proof may lack a vital ingredient, or the trial judge may conclude that no jury properly directed as to the law could reasonably find for the plaintiff."

[27] In considering this principle I must view the plaintiff's case in the light most favourable to the plaintiff (see McIlveen v Charlesworth Developments (1973) NI 216 at p. 219.

The submissions

[28] Mr Ringland contended that the plaintiff's claim failed because in the first place the plaintiff was unable to bring himself within a class of person entitled to sue the defendant for economic loss and secondly because the police, in the course of performing their function of investigating crime, are under no legal duty to take care so that a person such as the plaintiff does not suffer injury as a result of police actions or omissions on the basis of public policy considerations.

[29] Mr O'Donoghue whilst accepting the principles set out in Hill v Chief Constable of West Yorkshire (1989) AC 53 ("Hill") argued that in cases outside police investigations different principles applied. In particular where the Police Service had conducted an investigation into alleged criminal conduct of an employee of another person or body, it owed a duty of care to that employee when advising the employer of the fitness of the employee to continue to perform the work for which he was employed. He contended that no public interest issue arose in such an instance particularly in circumstances where, as he contended had occurred in this case, the letter of 20 October 1998 by Mr Anderson was wholly inaccurate and misrepresented the position of the RUC. Counsel submitted there had been no "exhaustive investigation" conducted by the RUC into the complaint made against the plaintiff by the fourteen year old since for example the plaintiff had not been interviewed about the matter. He also stressed that the earlier memoranda from DI Paul, DCI Maxwell, DS McArthur and DCI Judith Gillespie were not expressed in such absolute terms.

[30] It was Mr O'Donoghue's contention that had Mr Anderson communicated properly and accurately with the employer, the employer would then have had a discretion as to whether or not to continue with his employment or to dismiss him whereas the terms in which Anderson had couched his letter were "the kiss of death" to his employment. It effectively deprived the plaintiff of having an opportunity to be heard or to pursue a claim for unfair dismissal on the merits.

Principles governing this matter

[31] This was a case of economic loss where the plaintiff did not claim any physical damage to or interference with his person or tangible property. In essence it was for pure economic loss in terms of his loss of employment and future loss of income.

[32] The leading authority on this matter was Hedley Byrne v Heller (1964) AC 465. This case scarcely requires factual rehearsal. In essence it allowed recovery of economic loss in negligence within the boundaries of a special relationship of a kind rendering it appropriate to require the defendant to safeguard the economic interests of the claimant.

[33] The outer limits of such a special relationship are now set largely by Caparo Industries Plc v Dickman (1990) 2 AC 605 where Lord Bridge at p. 617/618 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 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."

[34] This three stage test for a notional duty – foreseeability, proximity, justice and reasonableness were described by Lord Oliver in Caparo's case at p. 6 118 as follows:

> "… It is difficult to resist the conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some the degree of foreseeability is such that it is from that alone the requisite proximity can be deduced, whilst in others the absence of the essential relationship can more rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible."

[35] Clearly over the years that have followed Hedley Byrne, there has been an emphasis on incrementalism and pragmatism in developing this aspect of

the law (see Clerk and Lindsell on Torts 19th Edition paras. 8-22 and 8-23). Mr Ringland circumscribed this development too narrowly when he relied upon Spring v Guardian Assurance Plc (1995) 2 AC 296, where an employer was liable to a former employee for a negligently written reference, as being indicative of the confines of the principles arising largely in master servant cases . Thus a solicitor has been held liable to an intended beneficiary on the basis of a deemed assumption of responsibility in spite of the absence of any reliance by the latter or any contractual relationship other than that between the solicitor and his own client in White v Jones (1995) 2 AC 207 .See also Phelps v Hillingdon LBC (2001) 2 AC 619 where educational psychologists employed by a local authority to assess and determine the educational needs of a child provided sufficient proximity to the child to found liability. It is the threefold Caparo test to which attention should be placed rather than fixed categories of responsibility.

[36] Lord Bridge acknowledged in Caparo's case at p. 618 that the concepts of proximity and fairness amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. He said that the law had moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the various duties of care which the law imposes. Lord Bridge was also careful to emphasise that the question to which the threefold test must be directed is not limited to the question whether there is a duty of care at all. It is to be applied to the question of whether the situation gives rise to a duty of care of a given scope (see Mitchell v Glasgow City Council 209 1 WLR 493 at para. 26). As Taylor LJ observed in the Court of Appeal in Caparo's case, the question is one of fairness and public policy.

[37] It is this approach that enables the courts to take account of policy considerations in the law of negligence. The determination that there is or is not a duty of care is a control device used by the courts to limit liability for negligence. Doubtless there has been a pragmatic and incremental approach to the duty of care over the years but as the author of Clerk and Lindsell 19th Edition at para. 8-23 has stated:

> "It is important to recognise that these elements support rather than supplant the development of principles as the basis for determining the existence of the duty of care."

[38] A key authority in this case, involving as it did police services, was Hill v Chief Constable of West Yorkshire (1989) AC 53. In that matter the complainant had alleged that the police had been negligent in failing to

apprehend a mass murderer and were liable for the death of her daughter who was the murderer's last victim. It was held in that case that there was insufficient proximity between the police and a member of the general public to give rise to a duty of care in relation to the apprehension of the criminal. Public policy considerations weighed heavily with the House of Lords in that case leading to the decision that no duty of care should be imposed. They were listed by Lord Keith of Kinkel at ps 63-64. His first reason was that although in some situations recognition of a potential duty of care might tend towards the raising of standards, no such incentive was necessary in the case of the police. The second reason was that in some instances the imposition of liability might lead to the exercise of a function being carried out in a detrimentally defensive frame of mind, and the possibility of this happening in relation to the investigative operations of the police could not be excluded. Lord Keith's third reason was that if potential liability were to be imposed it would not be 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, with the result that the criminal went on to commit further crimes, which might raise issues touching deeply on the conduct of a police investigation. Lord Keith's fourth reason, closely linked with the third, was that if actions were allowed to be brought a great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence and the attendance of witnesses at the trial, which would be a significant diversion of police power and attention from the most important function, that of suppression of crime.

[39] In Brooks v Comr of Police of the Metropolis (2005) 1 WLR 1495, Brooks was a friend of Stephen Lawrence and was present when the latter was abused and murdered. He was also abused and attacked. His 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. He was deeply traumatised by the experience and the MacPherson report was critical of the way in which he had been treated and of the manner in which the investigation had been conducted. Brooks sued the police

[40] At paragraph 30 of that judgment Lord Steyn said:

> "That the core principle of Hill's case 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's case, arose for decision today I have no doubt that it would be decided in the same way. It is 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'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 function in the interests of the community fearlessly and with dispatch, would be impeded. It would, as was recognised in Hill's case, 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."

[41] I drew to counsel's attention the recent case of Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police (2008) 3 WLR 593 the principles to be invoked in such cases was considered. In the case of Smith there had been a highly regrettable failure by the police to react to a prolonged campaign by a miscreant who was threatening the use of extreme criminal violence against the appellant. In the course of the majority opinion Lord Hope of Craighead said at paragraph 78:

> "How then is the police officer to deal with evidence which, for one reason or another, he or she does not find convincing but about which there is risk that, after the event, a judge might take a different view? Subjecting the officer's judgment to an objective test would tend to lead to what … Lord Carswell describes as defensive policing, focussed on preventing, or at least minimising, the risk of civil claims and negligence. It would deny the police the

> freedom they need to act as the occasion requires in the public interest. In my opinion the balance of advantage in this difficult area lies in preserving the Hill principle."

[42] Lord Carswell at paragraph [106] said:

> "The principles laid down in Hill … were reviewed and affirmed by the House as recently as 2005 in Brooks … and I do not think that it is necessary to depart from them. One must acknowledge at once that the price of the certainty of the rule and the freedom from liability afforded the police officers is that some citizens who have very good reason to complain of the police handling of matters affecting them will not have a remedy in negligence.… One has to face this and decide whether in the wider public interest the law should allow that. I am of opinion, in agreement with Lord Hope that in the interests in the wider community it is necessary that it should do so for the better performance of police work."

[43] Lord Carswell went on to add at paragraph [108]:

> "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 and 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 would 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 from being carried out."

[44] I consider that child protection is a genre that invokes strong public policy considerations in determining the nature and scope of any duty of care arising in this context . A revealing case is D v East Berkshire Community Health NHS Trust (2005) 2 WLR 993. In those cases a parent was suspected of having deliberately harmed his or her own child or having

fabricated the child's medical conditions. The ensuing investigation by the doctors was conducted negligently. In consequence, the suspected parents' family life was disrupted, to a greater or lesser extent, and the suspected parent suffered psychiatric injury. Lord Nicholls at paragraph 71 declared that two counterveiling interests, each of high social importance, applied. First, the need to safeguard children from abuse by their own parents, and the need to protect parents from unnecessary interference with their family life. At paragraphs 77 and 78 Lord Nicholls said:

> "In this area of the law, concerned with the reporting and investigation of suspected crime, the balancing point between the public interest and the interest of a suspected individual has long been the presence or absence of good faith. Good faith is required but not more. A report, made to the appropriate authorities, that a person has or may have committed a crime attracts qualified privilege. A false statement attracts a remedy if made maliciously. Misfeasance in public office calls for an element of bad faith or recklessness. Malice is an essential ingredient of causes of action for the misuse of criminal or civil proceedings. In Calveley v Chief Constable of the Merseyside Police (1989) AC 1128, 1238, Lord Bridge of Harwich observed that:
>
> > 'Where no action for malicious prosecution would lie, it would be strange indeed if an acquitted defendant could recover damages for negligent investigation.'
>
> This must be equally true of a person who has been suspected but not prosecuted.
>
> 78. This background accords ill with the submission that those responsible for the protection of a child against criminal conduct owes suspected perpetrators the duty suggested. The existence of such a duty would fundamentally alter the balance in this area of the law. It would mean that if a parent suspected that a babysitter or a teacher at a nursery or school might have been responsible for abusing her child, and the patient took the child to a general practitioner or consultant the doctor would owe a duty of care to the suspect. The law of negligence has of course developed much in recent years, reflecting

> the higher standards increasingly expected in many areas of life. But there seems no warrant for such a fundamental shift in the long established balance in this area of the law."

Applying the principles to this case

[45] I am satisfied that although there are undoubtedly exceptional cases where the core Hill principle that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals will not apply, that principle remains unchallenged. Exceptional circumstances may include instances where, as in Swinney v Chief Constable of Northumbria Police (1997) QB 464 police owed a duty of care to an informant for whom they had assumed responsibility by giving him an undertaking of confidentiality. But even in those cases the public interest issue will be at the heart of the consideration of whether a duty of care exists. In Swinney's case the public interest was in encouraging the free flow of information to the police which should outweigh the interest in the police carrying out the function of investigating and suppressing crime uninhibited by the spectre of negligence litigation.

[46] In the present case however, the interest of the police in preventing commission of crime and protecting vulnerable children is part of the core principle of Hill. It is crucial to ensure that the interests of children are paramount in the vexed area of child protection. In my view this is a fundamental function of the duty of police officers. A retreat from that principle will in my opinion have detrimental effects on the overarching need to protect children. To dilute this principle would bring about a situation in which police officers, whilst focusing on protecting children from criminal abuse, would in practice be required to ensure that every warning given would lack that robust and fearless approach which is crucial in the interests of the community. It would irreparably inhibit their freedom to exercise their judgment and lead to an unduly defensive policing approach in combating abuse to children. The cancer of child abuse in our community is such that the creation of a duty of care which would lead to a defensive frame of mind in protecting children would be utterly against the public interest.

[47] There will be instances where, if the police act in a manner which constituted the "outrageous negligence" that Lord Steyn contemplated in Brooks case, they will be outside the reach of the principle in Hill's case. Lord Carswell had some reservations about agreeing with Lord Steyn's adumbration in Van Colle's case (see paragraph 109) entertaining as he did "some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept." Whether therefore the ambit of such exceptions remains undefined or comes within the concept of "outrageous negligence", matters not in this instance. I am satisfied that the present case

does not come within such a bracket and falls within the analogy to the Hill core principles.

[48] There was no allegation pleaded in this case, and indeed I found no evidence indicating, that Mr Anderson had made a false statement maliciously, recklessly or in bad faith. Mr O'Donoghue had alleged that there was a substantial difference between on the one hand the views expressed by senior police officers in the memoranda and notes to the effect that there may have been justifiable questioning of his fitness and on the other hand the terms used by Mr Anderson that he was in fact unfit return to child care. Counsel's assertion was that the terms in which Mr Anderson couched his letter left the employer with no discretion. I do not agree. Phraseology such as "there is sufficient evidence to give reasonable grounds for concern" (see McArthur 28/8/98) and "the content of the file strongly suggests he is not fit to continue ….as a social worker" (see Stewart 2/9/98) etc are all resonant of the terminology adopted by Anderson. Whilst he may have used terms somewhat more forthright than those canvassed in the earlier correspondence between the police officers, I do not believe that the overall effect was to do anything other than capture the mood of the police concerns whilst leaving the ultimate decision in the hands of the employer in the last analysis. The plaintiff in this case did take proceedings against his employer but, apparently after advice, concluded that it should be settled on the basis of the case being dismissed and he being paid £5,000 towards his costs. In terms therefore he chose not to challenge the employer's decision. Since I have come to the conclusion that there was not a duty of care owed by the defendant to the plaintiff, absent bad faith or recklessness, I find no cause of action arises out of the terms used by Anderson.

[49] Mr O'Donoghue also asserted that there had not been an exhaustive investigation into the matter of the fourteen year old's allegations since the plaintiff had not been spoken to by police. I am not persuaded that the absence of the plaintiff being spoken to rendered this a wholly inappropriate description of what had taken place. Cases are often stopped because parties withdraw allegations or the evidence is not sufficiently strong before the alleged miscreant has been interviewed but this does not preclude an exhaustive investigation having taken place. I find nothing in this phraseology that persuades me the case should be taken outside the Hill core principles.

[50] I have come to the conclusion therefore that there is no basis in law for the plaintiff's claim in this instance, that I must accede to the defendant's application and I therefore dismiss the plaintiff's action.