Hilary Term
[2018] UKSC 4
On appeal from: [2014] EWCA Civ 15

JUDGMENT

Robinson (Appellant) *v* Chief Constable of West Yorkshire Police (Respondent)

before

Lady Hale
Lord Mance
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

8 February 2018

Heard on 12 July 2017

Appellant
Nicholas Bowen QC
David Lemer
Duncan Fairgrieve
(Instructed by Grieves Solicitors)

Respondent
Jeremy Johnson QC
Ian Skelt

(Instructed by West Yorkshire Police Legal Services)

LORD REED: (with whom Lady Hale and Lord Hodge agree)

1. On a Tuesday afternoon in July 2008 Mrs Elizabeth Robinson, described by the Recorder as a relatively frail lady then aged 76, was walking along Kirkgate, a shopping street in the centre of Huddersfield, when she was knocked over by a group of men who were struggling with one another. Two of the men were sturdily built police officers, and the third was a suspected drug dealer whom they were attempting to arrest. 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.

2. The principal question which has to be decided in this appeal is whether the officers owed a duty of care to Mrs Robinson. The other important question is whether, if they did, they were in breach of that duty. Mr Recorder Pimm held that the officers had been negligent, but that police officers engaged in the apprehension of criminals were immune from suit. The Court of Appeal held that no duty of care was owed, and that, even if the officers had owed Mrs Robinson such a duty, they had not acted in breach of it: [2014] EWCA Civ 15.

3. As will appear, the simple facts of this case have given rise to proceedings raising issues of general importance. Most of those issues can be decided by applying long-established principles of the law of negligence. The fact that the issues have reached this court reflects the extent to which those principles have been eroded in recent times by uncertainty and confusion.

The facts

4. The events leading to Mrs Robinson's accident began when DS Neil Willan spotted Mr Ashley Williams apparently dealing drugs in a park in the centre of Huddersfield. He did not attempt to arrest Williams immediately, as Williams was young and physically fit, and Willan thought that he was unlikely to be able to arrest him without his running away. He called for backup, and DC Ian Green and DS Damian Roebuck then made their way to join him.

5. Williams went to a bookmakers on Kirkgate, and Willan followed him inside. He decided not to attempt an arrest inside the shop, as there were people there whom he recognised, and he was concerned that attempting an arrest would endanger both his own safety and that of the customers and staff. Williams then left the shop and

stood outside it. Green and Roebuck then arrived, and another officer, PC Dhurmea, arrived soon afterwards. Like Willan, they were in plain clothes.

6. Willan and Roebuck formed a plan to arrest Williams while he was standing outside the bookmakers. The plan involved Willan and Dhurmea approaching Williams from one direction, taking hold of him and effecting the arrest, while Roebuck and Green were positioned in the opposite direction, to prevent his escape and assist once Willan and Dhurmea had taken hold of him. Willan and Dhurmea positioned themselves up the street from the bookmakers, while Green and Roebuck took up a position some distance down the street. Kirkgate was moderately busy at the time with pedestrians and traffic. Mrs Robinson was one of a number of pedestrians walking along the pavement. She passed Willan and Dhurmea, and then Williams, very shortly after two other pedestrians.

7. Almost immediately after she passed Williams, and when she was within a yard of him, Willan and Dhurmea approached him. Mrs Robinson was then in their line of sight. The officers took hold of Williams and attempted to arrest him. Williams resisted arrest. As the men tussled, they moved towards Mrs Robinson and collided with her. The initial contact was between her and Williams, who backed into her. She fell over, and the men fell on top of her. Roebuck and Green arrived three seconds later and assisted in arresting Williams.

The proceedings before the Recorder

8. Mrs Robinson issued proceedings for damages for personal injury, on the basis first of the negligence of the officers, and secondly assault and trespass to the person occasioned by DS Willan. The latter aspect of the claim is no longer in issue. Following a hearing on liability, the Recorder dismissed the claim.

9. In relation to the facts, the Recorder relied on CCTV footage of the incident, together with the evidence of DS Willan, DS Roebuck and DC Green concerning the planning of the arrest. He accepted Willan's evidence that the officers had identified the risk that Williams would try to run away, and regarded it as significant. Willan also said that he was aware of the potential for harm to members of the public if Williams tried to escape. His evidence was that in any situation it was necessary to consider the risk to those in the vicinity. He said that if it had appeared to him that someone was in harm's way, he would have walked past Williams without effecting the arrest. The Recorder noted that that was in accordance with the risk assessment guidance provided to police officers in relation to arrests in drugs cases, to which he had been referred in the evidence. Willan said that he had not been aware of Mrs Robinson's presence when he attempted to arrest Williams.

10. Willan also gave evidence that there was some urgency in effecting the arrest. He had seen Williams taking the drugs from a bag secured around his neck. It was important to arrest him while he still had drugs in his possession. Without the drugs, there was unlikely to be sufficient evidence for a successful prosecution.

11. DS Roebuck said that it had taken him and DC Green about three seconds to get from the place where they had taken up position prior to the attempted arrest to the scene where the other three men were on top of Mrs Robinson. He said that suspects like Williams could have recognised them as police officers if they had been any closer. The Recorder did not accept that evidence, which was unsupported by any other evidence. As far as appeared from the evidence, Roebuck and Green would, he found, just have been two men walking along the street.

12. In the light of the evidence, the Recorder found that the decision to arrest Williams at the time and place selected by the officers involved a foreseeable risk that Mrs Robinson would be injured. She was in very close proximity to Williams at that moment, she was an elderly lady, and there was a significant and foreseeable risk that he would try to escape.

13. In the view of the Recorder, the officers had acted negligently. First, Willan accepted that he ought to have been taking care for the safety of members of the public in the vicinity. Although Mrs Robinson had just walked past Williams and was within a yard of him, Willan did not notice her. That was prima facie in breach of his duty of care. Secondly, in view of the known risk that Williams would try to escape, the officers could have waited and selected a safer opportunity to effect the arrest. Thirdly, there was a clear need for all four officers to be present if the arrest was to be carried out safely with pedestrians passing. Roebuck and Green had however been too far away to assist their colleagues until several seconds had passed. The risk could have been minimised if they had been closer at the time when the arrest was attempted.

14. The Recorder held, however, that the decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 had conferred on the police an immunity against claims in negligence. In the light of the decision of the Court of Appeal in *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3; [2011] PTSR 1369, that immunity was not confined to cases of omission. It therefore applied in the present case.

The proceedings in the Court of Appeal

15. In the Court of Appeal, Hallett LJ considered that "the *Caparo* test [*Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618] applies to all claims in the modern law of negligence" (para 40). In consequence, "[t]he court will only impose a duty where it considers it right to do so on the facts" (ibid). The general principle was that "most claims against the police in negligence for their acts and omissions in the course of investigating and suppressing crime and apprehending offenders will fail the third stage of the *Caparo* test" (para 46). That is to say, "[i]t will not be fair, just and reasonable to impose a duty" (ibid). That is because "the courts have concluded that the interests of the public will not be best served by imposing a duty [on] to individuals" (ibid). The answer to counsel's rhetorical question, what would the public think if the police, in the process of arresting criminals, could injure innocent members of the public with impunity, was that "provided the police act within reason, the public would prefer to see them doing their job and taking drug dealers off the street" (para 47). One might observe that if the police are not under a duty of care, then it is irrelevant to the issue whether they act within reason or not. On the other hand, if they act with reasonable care, then they will not be in breach of a duty of care, even if an innocent member of the public is injured.

16. Hallett LJ accepted that the authorities suggested that there might be a number of possible exceptions to the general principle: cases of outrageous negligence, cases which did not relate to core functions, and cases where police officers had assumed responsibility for a claimant. The present case did not fall into any of those categories. It was "a paradigm example of why the courts are loath to impose a duty towards individual members of the public on the police engaged in their core functions" (para 51).

17. Hallett LJ added that, even if counsel for Mrs Robinson had been correct in her argument that there was no immunity from liability where police officers caused direct physical harm to members of the public, it was in any event clear that Williams was responsible for the harm. This was therefore a claim based on the officers' failure to prevent Williams from harming Mrs Robinson: in the language used in other cases, it concerned an omission, rather than a positive act. Such a claim fell at the first hurdle: it was not fair, just or reasonable to impose liability on those facts.

18. Furthermore, Hallett LJ considered that there was no proximity between Mrs Robinson and the police officers, notwithstanding that she had been injured when they fell on top of her. It was not enough to find that there was a reasonably foreseeable risk of her being physically injured in the course of carrying out the arrest.

19. Hallett LJ also added that, had it been necessary, she would have felt obliged to overturn the Recorder's finding of negligence. In that regard, she criticised him for acting as if he were an expert in the arrest and detention of suspects. In her own view, DS Willan could not afford to wait. He was bound to attempt the arrest or risk losing the suspect and the evidence. The delay of three seconds in the other two officers reaching the scene was hardly worthy of criticism. Arnold J delivered a concurring judgment, and Sullivan LJ agreed with Hallett LJ.

The issues

20. The issues arising from the judgments below and the parties' submissions can be summarised as follows:

> (1) Does the existence of a duty of care always depend on the application of "the *Caparo* test" to the facts of the particular case?
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> (2) Is there a general rule that the police are not under any duty of care when discharging their function of investigating and preventing crime? Or are the police generally under a duty of care to avoid causing reasonably foreseeable personal injuries, when such a duty would arise in accordance with ordinary principles of the law of negligence? If the latter is the position, does the law distinguish between acts and omissions: in particular, between causing injury, and protecting individuals from injury caused by the conduct of others?
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> (3) If the latter is the position, is this an omissions case, or a case of a positive act?
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> (4) Did the police officers owe a duty of care to Mrs Robinson?
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> (5) If so, was the Court of Appeal entitled to overturn the Recorder's finding that the officers failed in that duty?
>
> (6) If there was a breach of a duty of care owed to Mrs Robinson, were her injuries caused by that breach?

(1) Caparo

21. 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.

22. *Caparo* was decided in the aftermath of Lord Wilberforce's attempt in *Anns v Merton London Borough Council* [1978] AC 728, 751-752 to lay down an approach which could be applied in all situations in order to determine the existence of a duty of care. That approach had two stages: first, it was necessary to decide whether there was a prima facie duty of care, based on the foreseeability of harm, and secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such prima facie duty. That approach had major implications for public authorities, as they have a multitude of functions designed to protect members of the public from harm of one kind or another, with the consequence that the first stage enquiry was readily satisfied, and the only limit to liability became public policy.

23. *Anns* led to a period during which the courts struggled to contain liability, particularly for economic loss unassociated with physical damage or personal injury, and for the acts and omissions of public authorities. Commenting extra-judicially during that period, Lord Oliver of Aylmerton said that "what has been seen as a principle of prima facie liability has been prayed in aid in subsequent cases to justify claims for damages which have become progressively more divorced from common sense and as placing on the defendant a burden, sometimes virtually insurmountable, of showing some good reason in 'policy' why he should not be held liable": "Judicial Legislation: Retreat from *Anns*", Third Sultan Azlan Shah Law Lecture (1988). It was in the context of the retreat from *Anns* that emphasis was placed in a number of cases on the concept of "proximity", and on the idea that it must be fair to impose a duty of care on the defendant.

24. In *Caparo,* Lord Bridge of Harwich noted that, since *Anns,* a series of decisions of the Privy Council and the House of Lords, notably in judgments and speeches delivered by Lord Keith of Kinkel (including his speech in *Hill v Chief*

Constable of West Yorkshire), had emphasised "the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope" (p 617). It is ironic that the immediately following passage in Lord Bridge's speech has been treated as laying down such a test, despite, as Lord Toulson remarked in *Michael,* the pains which he took to make clear that it was not intended to be any such thing:

> "What emerges [from the post-*Anns* decisions] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that *the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests*, *but 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*." (pp 617-618; emphasis added)

25. Lord Bridge immediately went on to adopt an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided:

> "I think the law has now 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 varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44, where he said:
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> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories ...'" (p 618)

It was that approach, and not a supposed tripartite test, which Lord Bridge then proceeded to apply to the facts before him.

26. Applying the approach adopted in *Caparo*, there are many situations in which it has been clearly established that a duty of care is or is not owed: for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 560, "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind". Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in *Perrett v Collins* [1999] PNLR 77, 90-91:

> "It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied."

27. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo,* the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided

in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper".

28. In the present case, Hallett LJ cited the decision of this court in *Smith v Ministry of Defence (JUSTICE intervening)* [2013] UKSC 41; [2014] AC 52 as an example of a decision in which there was a focus on the three ingredients mentioned by Lord Bridge. That was however a case raising a novel legal issue, relating to the provision of protective equipment to soldiers on active duty, and the scope of combat immunity: it did not concern an established category of liability. Hallett LJ also relied on a passage in the speech of Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, 235, in which he remarked that "the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases". That was a case concerned with the loss of a ship and its cargo as a result of negligent advice, in which the reasoning was essentially directed to considerations relevant to economic loss. As Hobhouse LJ observed in *Perrett v Collins* at p 92:

> "*Marc Rich* should not be regarded as an authority which has a relevance to cases of personal injury or as adding any requirements that an injured plaintiff do more than bring his case within established principles. If a plaintiff is attempting to establish some novel principle of liability, then the situation would be different."

It was in any event made clear in *Michael* that the idea that *Caparo* established a tripartite test is mistaken.

29. Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.

30. Addressing, then, the first of the issues identified in para 20 above, the existence of a duty of care does not depend on the application of a "*Caparo* test" to the facts of the particular case. In the present case, it depends on the application of established principles of the law of negligence.

(2) The police

(i) Public authorities in general

31. Before focusing on the position of the police in particular, it may be helpful to consider the position of public authorities in general, as this is an area of the law of negligence which went through a period of confusion following the case of *Anns,* as explained in paras 22-23 above. That confusion has not yet entirely dissipated, as courts continue to cite authorities from that period without always appreciating the extent to which their reasoning has been superseded by the return to orthodoxy achieved first in *Stovin v Wise* [1996] AC 923 and then, more fully and clearly, in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057.

32. At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: see, for example, *Entick v Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93. Dicey famously stated that "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen": Introduction to the Study of the Law of the Constitution 3rd ed (1889), p 181. An important exception at common law was the Crown, but that exception was addressed by the Crown Proceedings Act 1947, section 2.

33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, as explained in *Gorringe,* para 39. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

34. On the other hand, 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" (para 97). This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

35. As that summary makes clear, 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: see, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241, concerning a private body, applied in *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874, concerning a public authority.

36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well-known illustration of that principle is the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "it would be, to say the least, unusual if the mere existence of the statutory duty [or, a fortiori, a statutory power] could generate a common law duty of care": *Gorringe,* para 23.

37. A further point, closely related to the last, is that 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: see, for example, *Smith v Littlewoods Organisation Ltd* and *Mitchell v Glasgow City Council.* In *Michael,* Lord Toulson explained the point in this way:

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." (para 97)

There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. 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. The first type of situation is illustrated by *Dorset Yacht,* and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, discussed below. The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable* [2013] QB 579, as explained in *Michael* at para 69.

38. In *Anns,* however, it was decided that a local authority owed a duty of care at common law, when exercising its power to inspect building works, to protect the ultimate occupier of the building from loss resulting from defects in its construction. The House of Lords thus held a public authority liable at common law for a careless failure to confer a benefit, by preventing harm caused by another person's conduct, in the absence of any special circumstances such as an assumption of responsibility towards the claimant. It added to the confusion by importing public law concepts, and the American distinction between policy and operational decisions, into questions concerning duties arising under the law of obligations. Although the decision was overruled in *Murphy v Brentwood District Council* [1991] 1 AC 398 on a limited basis (relating to the categorisation of the type of harm involved), its reasoning in relation to these matters was not finally disapproved until *Stovin v Wise*.

39. The position was clarified in *Gorringe v Calderdale Metropolitan Borough Council,* which made it clear that the principle which had been applied in *Stovin v Wise* in relation to a statutory duty was also applicable to statutory powers. Lord Hoffmann (with whom Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed) said that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure, however irrational, to provide some benefit which a public authority had power (or a public law duty) to provide (para 32). He was careful to distinguish that situation from cases where a public authority did acts or entered into relationships or undertook responsibilities giving rise to a duty of care on an orthodox common law foundation (para 38).

40. However, until the reasoning in *Anns* was repudiated, it was not possible to justify a rejection of liability, where a prima facie duty of care arose at the first stage of the analysis from the foreseeability of harm, on the basis that public bodies are

not generally liable for failing to exercise their statutory powers or duties so as to confer the benefit of protection from harm. Instead, it was necessary to have recourse to public policy in order to justify the rejection of liability at the second stage. That was accordingly the approach adopted by the House of Lords and the Court of Appeal in a series of judgments, including *Hill*. The need to have recourse to public policy for that purpose has been superseded by the return to orthodoxy in *Gorringe.* Since that case, a public authority's non-liability for the consequences of an omission can generally be justified on the basis that the omissions principle is a general principle of the law of negligence, and the law of negligence generally applies to public authorities in the same way that it applies to private individuals and bodies.

41. Equally, concerns about public policy cannot in themselves override a liability which would arise at common law for a positive act carried out in the course of performing a statutory function: the true question is whether, properly construed, the statute excludes the liability which would otherwise arise: see *Gorringe* at para 38 per Lord Hoffmann.

42. That is not to deny that what might be described as policy considerations sometimes have a role to play in the law of negligence. As explained earlier, where established principles do not provide a clear answer to the question whether a duty of care should be recognised in a novel situation, the court will have to consider whether its recognition would be just and reasonable.

(ii) The police in particular

43. Turning to consider specifically the position of the police (helpfully discussed in Purshouse, "Arrested development: Police negligence and the Caparo 'test' for duty of care" (2016) Torts Law Journal 1), Lord Toulson explained in the case of *Michael* at paras 29-35 that the police owe a duty to the public at large for the prevention of violence and disorder. That public law duty has a number of legal consequences. For example, the police cannot lawfully charge members of the public for performing their duty (*Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270), and a police officer who wilfully fails to perform his duty may be guilty of a criminal offence (*R v Dytham* [1979] QB 722). Some members of the public may have standing to enforce the duty, for example in proceedings for judicial review (*R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118), but in doing so they are not enforcing a duty owed to them as individuals.

44. In relation to the question whether, and in what circumstances, a private law duty of care might be owed by the police to particular individuals, Lord Toulson discussed in *Michael* the case of *Hill,* and in particular the speech of Lord Keith,

with whom Lord Brandon of Oakbrook, Lord Oliver and Lord Goff of Chieveley agreed. Since it is apparent from the judgments below in the present proceedings, and from the submissions to this court, that Lord Keith's reasoning continues to be misunderstood, it is necessary to consider it once more.

45. For the purposes of the present case, the most important aspect of Lord Keith's speech in *Hill* is that, in the words of Lord Toulson (*Michael,* para 37), "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*." (p 59; emphasis supplied)

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. That is as one would expect, given the general position of public authorities as explained in paras 32-33 above.

46. Lord Keith's dictum is vouched by numerous authorities. Those which he cited were *Knightley v Johns* [1982] 1 WLR 349, where a police officer who attended the scene of a road accident carelessly created an unnecessary danger to the claimant, and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, where police officers attending a siege at a gunsmith's shop, where a psychopathic intruder had armed himself and was firing from the building, carelessly caused damage to the premises in the course of an attempt to end the siege, by firing a CS gas canister into the building in the absence of fire-fighting equipment. That decision, cited with approval in *Hill* and in later authorities, is inconsistent with any supposed rule that the police owe no duty of care in respect of action taken in the course of suppressing crime. Lord Keith also referred to the decision in *Dorset Yacht,* where prison officers who brought young offenders on to an island and then left them unsupervised, when it was reasonably foreseeable that they would attempt to escape, and in doing so cause damage to property, were held to be in breach of a duty of care.

47. Other examples concerning the police include *Attorney General of the British Virgin Islands v Hartwell*, where police authorities were held to have been negligent in entrusting a firearm to an officer who was still on probation and had shown signs of mental instability, and cases such as *Frost v Chief Constable of South Yorkshire*

Police [1999] 2 AC 455, in which police forces, although not technically employers, have been treated as owing the same common law duty as employers to take reasonable care for the safety of their officers. There are also numerous cases concerned with road accidents involving police cars, such as *Marshall v Osmond* [1983] QB 1034, where Sir John Donaldson MR observed that the duty owed by a police driver to a suspected criminal whom he was pursuing was the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in the circumstances. One might also mention *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, where the House of Lords accepted, applying principles developed in cases concerning private individuals and bodies, that a duty of care was owed by the police, when they were responsible for crowd control at a football match, to persons who suffered psychiatric injuries as a result of deaths and injuries sustained by members of the crowd, subject to those persons being sufficiently proximate in time and space to the incident, and to their having a sufficiently close relationship to the dead and injured.

48. These cases are not anomalous exceptions to the general absence of a duty of care, and cannot all be explained as falling within particular categories of the kind listed by Hallett LJ in the present case: cases of outrageous negligence, cases which did not relate to core functions, and cases where police officers had assumed responsibility for a claimant. The cases of *Rigby v Chief Constable of Northamptonshire* and *Marshall v Osmond,* for example, are plainly inconsistent with any supposed rule that the police owe no duty of care when engaged in their core operational activities, or that "outrageous negligence" or an assumption of responsibility must be established. On the contrary, these cases are examples of the application to the police of the ordinary common law duty of care to avoid causing reasonably foreseeable injury to persons and reasonably foreseeable damage to property.

49. There are also examples concerned with other torts, such as *Ashley v Chief Constable of Sussex Police (Sherwood intervening)* [2008] AC 962*,* where relatives of a suspected drug dealer who had been shot dead by a police officer during a raid were held to have a cause of action for damages for battery (liability for negligence having been conceded), *Minio-Paluello v Commissioner of Police of the Metropolis* [2011] EWHC 3411 (QB), where a protestor who suffered serious injuries when being pulled up from the ground by a police officer with excessive force was found entitled to damages for assault, and *McDonnell v Commissioner of Police of the Metropolis* [2015] EWCA Civ 573, where a claim for damages by a suspected drug dealer for assault arising from the use of excessive force during his arrest failed only on its facts.

50. 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. This was recognised by Lord Toulson in *Michael.* As he explained:

> "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 ... The question is therefore not whether the police should have special immunity, but whether an exception should be made to the ordinary application of common law principles." (paras 115-116)

51. As previously explained, however, the reasoning by which Lord Keith arrived at the same conclusion as Lord Toulson reflects the period during which the case was decided, when *Anns* continued to be influential. Following the two-stage approach to liability set out in *Anns,* Lord Keith considered first the argument that a duty of care arose in consequence of the foreseeability of harm to potential victims if the murderer was not apprehended. In that regard, Lord Keith emphasised that the foreseeability of harm was not in itself a sufficient basis for the imposition of a duty of care, and introduced the concept of proximity as a further ingredient. He concluded that there was no ingredient or characteristic giving rise to the necessary proximity between the police and the claimant's daughter (who was one of the murderer's victims), and that the circumstances of the case were not capable of establishing a duty of care owed towards her by the police.

52. As Lord Toulson remarked in *Michael* (para 42), if Lord Keith had stopped at that point, it is unlikely that the decision would have caused controversy. However, having observed that what he had said was sufficient for the disposal of the appeal, Lord Keith went on to discuss the application of the second stage of the approach laid down in *Anns*: namely, whether there were reasons of public policy why an action should not lie "in circumstances such as those of the present case" (p 63). He concluded that there were such reasons, and expressed the view that the Court of Appeal had been "right to take the view that the police were immune from an action of this kind" (pp 63-64).

53. It is important to note that this part of Lord Keith's speech was unrelated to a determination of whether the police were liable for negligence resulting in personal injury, where "anyone else" would be subject to liability under ordinary principles of the law of tort. He had already confirmed the existence of liability in those circumstances, as explained at paras 45-46 above. His comments about public policy were concerned with a different question, namely whether the police generally owe a duty of care to individual members of the public, in the performance of their investigative function, to protect them from harm caused by criminals: a question to which, on the principles established prior to *Anns* and subsequently reinstated in *Stovin v Wise, Gorringe* and *Michael*, as explained in paras 34-37 and 39 above, the answer was plainly no.

54. In relation to that issue, 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).

55. 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.

56. Arguing against that conclusion, counsel for the respondents relied particularly on five authorities as supporting the existence of a general immunity. The first was the decision of the House of Lords in *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, in which police officers who had been suspended pending the completion of disciplinary proceedings sought damages in respect of an alleged failure to conduct the proceedings expeditiously. They claimed to have suffered damage to their reputation, depression, and a loss of earnings. They alleged that they were owed a duty by the investigating officers to exercise proper care and expedition in the conduct of the investigation. It was argued that a police officer investigating a suspected crime owes a duty of care to the suspect and that the same principle applied to the investigation of a disciplinary offence. The House of Lords rejected the argument. Lord Bridge pointed out that the claims in

negligence foundered on the rocks of elementary principle (p 1238). The losses claimed, so far as non-financial, were not reasonably foreseeable, and the financial claims ran up against the formidable obstacles in the way of liability in negligence for purely economic loss. Lord Bridge added that all other considerations apart, it would be contrary to public policy to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.

57. Reliance was placed on the latter dictum, but it is of no assistance to the respondent in the present case. Lord Bridge's remark has to be understood in its context. The case sought to establish a novel type of liability relating to the manner in which an investigation was conducted. Lord Bridge's reference to policy considerations was directed to that claim: he was not addressing the question whether the police may owe a duty of care to avoid causing reasonably foreseeable physical injury in the course of their operations.

58. The second authority relied on was the judgment of Steyn LJ in *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335. The issue in the appeal was whether the Crown Prosecution Service owed a duty of care to a person it was prosecuting to act with reasonable diligence in obtaining and acting on scientific evidence which showed him to be innocent. The Court of Appeal held that no such duty was owed. Steyn LJ observed that the question raised was a novel one, which in the light of *Caparo* had to be considered by analogy with established categories of liability. In that regard, the case of *Hill* was considered instructive. Steyn LJ noted that the issue in that case was whether a claim against the police for a negligent failure to apprehend a violent criminal was sustainable. He summarised the effect of the second part of Lord Keith's speech as being that "the House of Lords further held, as a second and separate ground of decision, that as a matter of public policy the police were immune from actions of negligence in respect of their activities in the investigation and suppression of crime" (p 347). Steyn LJ added that it did not follow that the police might not be liable where there was some form of assumption of responsibility.

59. The decision in *Elguzouli-Daf* has been cited with approval on many occasions, and its correctness was recently confirmed by this court in *SXH v Crown Prosecution Service (United Nations High Commissioner for Refugees intervening)* [2017] UKSC 30; [2017] 1 WLR 1401. But Steyn LJ's summary of the effect of the second part of Lord Keith's speech in *Hill* might convey a misleading impression if taken out of context. Steyn LJ can hardly have meant that the police enjoyed a blanket immunity in respect of anything done in the course of their activities in the investigation and suppression of crime, given his reliance on Lord Keith's speech in *Hill*. As already explained, Lord Keith confirmed the liability of the police for

personal injuries in accordance with the ordinary law of tort, and cited the decision in *Rigby v Chief Constable of Northamptonshire* with approval.

60. Thirdly, reliance was placed on the speech of Lord Steyn in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495. In that case, the claimant sought damages in respect of a psychiatric illness which he claimed to have suffered in consequence of his insensitive treatment by officers investigating an incident in which he had been assaulted and a friend of his had been murdered. The issue before the House of Lords was whether it was arguable that the police owed him a duty of care (a) to take reasonable steps to assess whether he was a victim of crime and, if so, to accord him reasonably appropriate protection and support, (b) 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 (c) to afford reasonable weight to the account given by him and to act on the account accordingly. The House held that it was not. The correctness of that conclusion is not in question. On ordinary principles, behaviour which is merely insensitive is not normally actionable, even if it results in a psychiatric illness.

61. Lord Steyn recognised that this was a novel type of claim, to which Lord Bridge's observations in *Caparo* applied. As in *Elguzouli-Daf,* he based his approach to the question whether it would be right to recognise a duty of care of the kind alleged on Lord Keith's speech in *Hill*. He cited first Lord Keith's confirmation of the liability of the police for the negligent infliction of personal injuries in accordance with the general law of tort. He went on to cite the part of Lord Keith's speech concerning whether the police owed a duty of care to future victims in the performance of their investigative function. In the passage on which reliance was placed, he stated (para 30):

> "A retreat from the principle in *Hill's* case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's* case*,* be bound to lead to an unduly defensive approach in combating crime."

62. As Lord Toulson noted in *Michael,* by endorsing the principle in the *Hill* case in the terms that he did, Lord Steyn confirmed that the functions of the police which he identified were public law duties and did not give rise to private law duties of care in the absence of special circumstances, such as an assumption of responsibility. Nothing in his reasoning is inconsistent with the existence of a duty of care to avoid causing physical harm in accordance with ordinary principles of the law of negligence. Lord Steyn plainly had no intention of undermining the confirmation in *Hill* that the police were under such a duty of care. The passage cited was directed towards a different issue.

63. Fourthly, reliance was placed on *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2009] AC 225, one of two appeals which the House of Lords heard together, the other being *Van Colle v Chief Constable of the Herefordshire Police (Secretary of State for the Home Department intervening).* The case of *Smith* concerned the question whether, where a person had informed the police that he had received threats of violence, the police then owed him a duty of care to prevent the threats from being carried out. Applying the established principles discussed earlier, the answer was no, in the absence of special circumstances such as an assumption of responsibility, and the House of Lords so held. The House was not however referred to the line of authority including *East Suffolk Rivers Catchment Board v Kent, Stovin v Wise* and *Gorringe,* which would have provided a basis for deciding the case; nor did it rely on the equivalent body of authority concerned with omissions by private individuals and bodies, such as *Smith v Littlewoods Organisation Ltd.* Those were the bases on which a very similar issue was subsequently decided in *Michael.*

64. In *Smith v Chief Constable of Sussex Police,* the majority of the House were in agreement that, absent special circumstances such as an assumption of responsibility, the police owed no duty of care to individuals affected by the discharge of their public duty to investigate offences and prevent their commission. Lord Hope, with whose reasoning the other members of the majority agreed, followed the approach adopted in *Brooks* in the passage cited in para 61 above, and emphasised the risk that the imposition of a duty of care of the kind contended for would inhibit a robust approach in assessing a person as a possible suspect or victim. He acknowledged that "[t]here are, of course, cases in which actions of the police give rise to civil claims in negligence in accordance with ordinary delictual principles", and cited *Rigby* as an example (para 79). Lord Phillips of Worth Matravers CJ summarised the core principle to be derived from *Hill* and *Brooks* as being that in the absence of special circumstances, the police owe no common law duty of care to protect individuals against harm caused by criminals. Lord Brown approached the matter in a similar way, concluding that, in the absence of an assumption of responsibility towards the eventual victim, the police generally owe no duty of care to prevent injuries deliberately inflicted by third parties, when they are engaged in discharging their general duty of combating and investigating crime.

None of the speeches is inconsistent with the existence of a duty of care to avoid causing physical harm in accordance with ordinary principles of the law of negligence.

65. Fifthly, reliance was placed on the judgment of the Court of Appeal, delivered by Sir Anthony May P, in *Desmond v Chief Constable of Nottinghamshire Police*. The issue in the case was whether the chief constable owed a duty of care when providing information to the criminal records bureau about the claimant, so as to enable the bureau to respond to a request for an enhanced criminal record certificate, made in connection with a job application. The chief constable was under a statutory duty to provide such information as was in his opinion relevant and ought to be included in the certificate. It was argued that the chief constable had made an error of judgement in deciding that certain information was relevant and ought to be included, with the result that the job application had been unsuccessful. The claim was for damages in respect of financial loss, stress and anxiety.

66. The court correctly identified the relevant legal principles as being those laid down in *East Suffolk River Catchment Board v Kent, Stovin v Wise* and *Gorringe*, and concluded that no duty of care was owed. Reliance was however placed by counsel on an earlier part of the judgment, in which the court considered the cases on which the judge below had based his approach - *Hill, Elguzouli-Daf, Brooks,* and *Smith v Chief Constable of Sussex Police* - and explained why, in its view, they did not provide an answer to the case at hand. The court summarised the principle to be derived from those decisions as being that "in the absence of special circumstances, the police and the Crown Prosecution Service do not generally in the interests of the whole community owe individual members of the public, be they victims, witnesses or those who are prosecuted, a common law duty of care in undertaking and performing their operational duties of investigating, detecting, suppressing and prosecuting crime" (para 31). The court went on to state that that principle might not apply "in exceptional circumstances at the margins; to an ordinary case where, for instance, in a road accident the police cause personal injury or physical damage by negligent driving; nor to cases where on particular facts a police officer is taken to have assumed responsibility to an individual claimant" (para 32).

67. That summary of the law appears to treat the police as being generally under no duty of care when undertaking and performing their operational duties, other than in special circumstances. It does not reflect the acceptance of the House of Lords in *Hill,* reflected also in later cases such as *Frost, Alcock* and *Smith v Chief Constable of Sussex Police,* that the police are generally under a duty of care to avoid causing personal injury where such a duty would arise according to ordinary principles of the law of negligence. Nor can a case such as *Rigby* be distinguished as an exceptional case at the margins: it was treated both in *Hill* and in *Smith v Chief Constable of Sussex Police* not as an anomaly, but as an instance of a wider principle.

In short, while it is not suggested in the present case that the decision in *Desmond* was wrong, the particular passage relied on is not an accurate summary of the law.

68. On examination, therefore, there is nothing in the ratio of any of the authorities relied on by the respondent which is inconsistent with the police being under a liability for negligence resulting in personal injuries where such liability would arise under ordinary principles of the law of tort. That is so notwithstanding the existence of some dicta which might be read as suggesting the contrary.

69. In relation to this discussion, it is necessary to respond briefly to some of the points made by Lord Hughes in his judgment:

> 1. 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.
>
> 2. The courts are not policy-making bodies in the sense in which that can be said of the Law Commission or government departments. But the exercise of judgement about the potential consequences of a decision has a part to play when the court is asked to decide whether a novel duty of care exists, together with a consideration of existing principles and of the need for the law to develop coherently and incrementally: see para 24 above.
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> 3. *Hill, Brooks* and *Smith* were all cases in which novel types of claim were made. *Hill* was also decided at a time when, following *Anns,* policy arguments were particularly prominent in judicial reasoning, and when the principle in *East Suffolk Rivers Catchment Board,* which could otherwise have provided a solution, had been rejected. *Brooks* and *Smith* were cases in which existing principles pointed strongly towards the rejection of a duty of care, but since those principles were challenged or argued to be subject to exceptions which would accommodate the instant case, it is entirely

understandable that the House of Lords referred to policy considerations as supporting their conclusion.

4. The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.

5. The argument that most cases can be equally analysed in terms of either an act or an omission, sometimes illustrated by asking whether a road accident is caused by the negligent driver's act of driving or by his omission to apply the brakes or to keep a good lookout, does not reflect the true nature and purpose of the distinction, as explained above. The argument was answered by Lord Hoffmann in *Stovin v Wise* (p 945):

> "One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes,

> the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50 miles an hour."

> 6. In relation to the cases discussed in Lord Hughes's para 114, it follows from the foregoing explanation of the distinction between acts and omissions that *Hill* and *Smith* were concerned with omissions, as in each case the claimant sought to have the police held liable for death or personal injuries which had been caused not by the police but by a third party. *Calveley, Elguzouli-Daf* and *Brooks,* on the other hand, were concerned with positive acts, but were cases in which a duty of care was held not to exist for other reasons, as explained earlier. In *Calveley,* the plaintiffs sought to have the police held liable for economic loss and other harm which they had caused by subjecting the plaintiffs to disciplinary proceedings which were unduly prolonged. In *Elguzouli-Daf,* the plaintiffs sought to have the Crown Prosecution Service held liable for a loss of liberty which they had caused by subjecting the plaintiffs to criminal proceedings which were unduly prolonged. In *Brooks,* the claimant sought to have the police held liable for a mental illness which they had caused by treating him inconsiderately.

> 7. So far as the cases discussed in Lord Hughes's paras 115-117 are concerned, *Goldman v Hargrave* [1967] 1 AC 645 and *Thomas Graham Ltd v Church of Scotland* 1982 SLT (Sh Ct) 26 concerned the responsibilities of an occupier of land in respect of dangers to his neighbours' property which arise on his land: responsibilities which can be understood as arising from his exclusive right of possession. *Michael* was clearly concerned with an omission, as Lord Toulson's judgment made clear: the police were sought to be made liable for the death of a woman at the hands of a third party. *Barrett v Enfield London Borough Council,* as explained in *Gorringe* at para 39, was a case where there was an assumption of parental responsibilities. *Phelps v Hillingdon London Borough Council*, as explained in *Gorringe* at para 40, concerned a relationship which involved an implied undertaking to exercise reasonable care, akin to the relationship between doctor and patient.

70. 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.

71. In the light of that conclusion, the remaining issues in the case are relatively straightforward and can be dealt with comparatively briefly.

(3) Is this case concerned with an omission or with a positive act?

72. The role of the police in the accident in which Mrs Robinson was injured is not comparable to that of the defendant in the examples commonly given of pure omissions: for example, someone who watches and does nothing as a blind man approaches the edge of a cliff, or a child drowns in a shallow pool. Nor, to cite more realistic examples, is it comparable to that of the police authority in *Hill,* which failed to arrest a murderer before a potential future victim was killed, or the police authority in *Michael,* which failed to respond to an emergency call in time to save the caller from an attack. In such cases the defendant played no active part in the critical events. Nor is this a case in which the chief constable is sought to be made liable for the conduct of a third party. Lord Reid's observation in *Dorset Yacht* (at p 1027) is apposite: "the ground of liability is not responsibility for the acts of the escaping trainees; it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind".

73. In the present case, the ground of action is liability for damage caused by carelessness on the part of the police officers in circumstances in which it was reasonably foreseeable that their carelessness would result in Mrs Robinson's being injured. Her complaint is not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured. In short, this case is concerned with a positive act, not an omission.

(4) Did the police officers owe a duty of care to Mrs Robinson?

74. It was not only reasonably foreseeable, but actually foreseen by the officers, that Williams was likely to resist arrest by attempting to escape. That is why Willan summoned assistance in the first place, before attempting to arrest Williams, and why it was decided that DS Roebuck and DC Green should be positioned on the opposite side of Williams from Willan and Dhurmea, so as to block his escape route. The place where the officers decided to arrest Williams was a moderately busy shopping street in a town centre. Pedestrians were passing in close vicinity to Williams. In those circumstances, it was reasonably foreseeable that if the arrest was

attempted at a time when pedestrians - especially physically vulnerable pedestrians, such as a frail and elderly woman - were close to Williams, they might be knocked into and injured in the course of his attempting to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards the pedestrians in the immediate vicinity when the arrest was attempted, including Mrs Robinson.

(5) Was the Court of Appeal entitled to overturn the Recorder's finding that the officers had failed in their duty of care?

75. The Court of Appeal was correct to emphasise the importance of not imposing unrealistically demanding standards of care on police officers acting in the course of their operational duties. That is most obviously the case where critical decisions have to be made in stressful circumstances with little or no time for considered thought. This point has long been recognised. For example, in *Marshall v Osmond,* concerned with a police driver engaged in the pursuit of a suspect, Sir John Donaldson MR stated, as noted at para 47 above, that the officer's duty was to exercise "such care and skill as is reasonable in all the circumstances". He went on to state that those "were no doubt stressful circumstances", and that although there was no doubt that the officer made an error of judgment, he was far from satisfied that the officer had been negligent (p 1038). The same point was made, in a context closer to that of the present case, by May LJ in *Costello v Chief Constable of Northumbria* [1999] ICR 752, 767, where he remarked that "liability should not turn on ... shades of personal judgment and courage in the heat of the potentially dangerous moment".

76. It is also necessary to remember that a duty to take reasonable care can in some circumstances be consistent with exposing individuals to a significant degree of risk. That is most obviously the case in relation to the police themselves. There are many circumstances in which police officers are exposed to a risk of injury, but in which such exposure is consistent with the taking of reasonable care for their safety. Equally, there may be circumstances which justify the taking of risks to the safety of members of the public which would not otherwise be justified. A duty of care is always a duty to take such care as is reasonable in the circumstances.

77. In the present case, the Recorder's finding of negligence was based on a number of matters. It is unnecessary to consider them all, as at least one of them clearly did not involve imposing on the officers an unrealistically high standard of care. The Recorder accepted DS Willan's evidence that the officers were aware that there was a significant risk that Williams would try to run away, and that he was aware of the potential for harm to members of the public in that event. Willan also gave evidence that it was necessary to consider the risk to those in the vicinity, and that if it had appeared to him that someone was in harm's way, he would have

walked past Williams without effecting the arrest. The Recorder noted that that was in accordance with the relevant guidance provided to police officers. Although Mrs Robinson had just walked past Williams and was within a yard of him, in full view of the officers, Willan simply failed to notice her.

78. The Recorder was entitled to find negligence on that basis alone, regardless of the soundness of his other criticisms of how the arrest was carried out. Willan accepted that he ought to have been taking care for the safety of members of the public in the immediate vicinity. If he had been taking such care, he would have noticed Mrs Robinson: she was immediately in front of him, next to Williams. This was not a situation in which Williams had to be arrested at that precise moment, regardless of the risk that a passer-by might be injured: on Willan's evidence, if he had noticed that someone was in harm's way, he would not have made the arrest at that moment.

(6) Were Mrs Robinson's injuries caused by the officers' breach of their duty of care?

79. The chain of events which resulted in Mrs Robinson's being injured was initiated by DS Willan's and PC Dhurmea's attempt to arrest Williams. It was their taking hold of him which caused him to attempt to struggle free, and it was in the course of the resultant tussle between the three men that Mrs Robinson was knocked over and injured.

80. In these circumstances, it is impossible to argue that the chain of causation linking the attempt to arrest Williams to Mrs Robinson's being injured was interrupted by Williams' voluntary decision to resist arrest, which resulted in his knocking into her. The voluntary act of a third party, particularly when it is of a criminal character, will often constitute a novus actus interveniens, but not when that act is the very one which the defendant was under a duty to guard against: see, for example, *Dorset Yacht* and *Attorney General of the British Virgin Islands v Hartwell*. It would be absurd to say that the officers owed Mrs Robinson a duty of care not to arrest Williams when she was in the immediate vicinity, because of the danger that she might be injured if he attempted to escape, and then to hold that his attempted escape broke the chain of causation between their negligently arresting him when she was next to him, and her being injured when he attempted to escape. In short, Mrs Robinson was injured as a result of being exposed to the very danger from which the officers had a duty of care to protect her.

Conclusion

81. For these reasons, I would allow the appeal, hold that the Chief Constable is liable in damages to Mrs Robinson, and remit the case for the assessment of damages.

LORD MANCE:

82. I have read with benefit the judgments prepared by Lord Reed and Lord Hughes in this case. I agree that the case is one of positive conduct by the police in instigating an arrest on public pavement, which caused injury to Mrs Robinson, an otherwise uninvolved passer-by. Having watched the excellent CCTV recording and compared it with the judge's findings, I confess to the same doubt as Lord Hughes about the judge's finding of negligence. The pavement was quite busy, the relevant suspects were for the first time stationary, and Mrs Robinson might appear to have passed by and to be at a little distance, by the time the police seized what they obviously thought was the opportune moment. However, like Lord Hughes and bearing in mind the evidence accepted by the judge as set out by Lord Reed in his para 77, I do not on balance consider that this is a case where an appellate court should interfere with the judge's conclusions, after hearing all the evidence.

83. As Lord Reed demonstrates, it is unnecessary in every claim of negligence to resort to the three-stage analysis (foreseeability, proximity and fairness, justice and reasonableness) identified in *Caparo Industries Ltd v Dickman* [1990] 2 AC 605. There are well-established categories, including (generally) liability for causing physical injury by positive act, where the latter two criteria are at least assumed. The concomitant is that there is, absent an assumption of responsibility, no liability for negligently omitting to prevent damage occurring to a potential victim. This also provides a rationale for the general rule that the police and CPS have no liability for failure, by efficient investigation or pursuit of an actual or potential offence, to prevent a subsequent victim from suffering physical injury at the hands of a third party for whose acts the State is not responsible: *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] AC 1732, paras 114-130 and 137. Economic loss also falls outside the established category of liability for physical injury, but an assumption of responsibility for economic loss will, as discussed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, likewise satisfy the latter two *Caparo* criteria. Outside any established category, the law will proceed incrementally, and all three stages of the *Caparo* analysis will be material.

84. It would be unrealistic to suggest that, when recognising and developing an established category, the courts are not influenced by policy considerations. No-one now suggests that the common law has not changed since the Saxon era, merely to

be revealed from time to time by an increasingly perceptive judiciary. As Lord Reid said famously in *The Judge as Law maker*: "There was a time when it was thought almost indecent to suggest that judges make law - they only declare it ... But we do not believe in fairy tales any more": 12 Journal of the Society of Public Teachers of Law 22 (1972); see also Lord Goff's comments on the declaratory theory of the common law in *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349, 377-379. The courts are not a Law Commission, but, in recognising the existence of any generalised duty in particular circumstances they are making policy choices, in which considerations such as proximity and fairness, justice and reasonableness must inhere. Landmark examples are *Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562, in relation to physical injury, and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, in circumstances where there has been an assumption of responsibility to give accurate information upon which it is foreseeable that the recipient will rely to its economic benefit or detriment.

85. The key to the application of the above principles is to ascertain whether or not a particular situation falls within an established category. Lord Reed treats physical loss resulting foreseeably from positive conduct as constituting axiomatically such a category, whatever the precise circumstances. I accept that principle as generally correct: see eg *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, 396F-G, per Lord Keith. But I am not persuaded that it is always a safe guide at the margins. I note that Lord Oliver went no further in *Caparo* than to say that, "in the context of loss caused by physical damage", "the existence of the nexus between the careless defendant and the injured plaintiff can rarely give rise to any difficulty": p 632F. He went on to identify *Hill*, "so far as concerns the alternative ground of that decision", as a case "where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of 'closeness') exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy": p 633D-E.

86. Lord Reed says that *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 was a case where it was appropriate to apply the three-stage *Caparo* approach because it raised "a novel legal issue, relating to the provision of protective equipment to soldiers on active duty, and the scope of combat immunity: it did not concern an established category of liability". But, why not? Combat immunity, where it applies, is, I suggested at para 114, itself "not so much an entirely separate principle as the result of a general conclusion that it is not fair, just or reasonable to regard the Crown or its officers, soldiers or agents as under a duty of care to avoid injury or death in their acts or omissions in the conduct of an active military operation or act of war". And, however that may be, a reading of the judgments shows that no distinctions were there drawn between acts and omissions, either generally or in the specific context of the discussion which is to be found on prior authority, including *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *Elguzouli-Daf v Commissioner of Police for the Metropolis* [1995] QB 335, *Stovin*

v Wise [1996] AC 923, *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495 and *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225: see *Smith's* case at eg paras 82-83, 95-96 and 97, per Lord Hope and paras 108-109, 114, 117 and 136, per Lord Mance (dissenting).

87. Lord Carnwath's (dissenting) judgment at paras 157-170 is also of interest, for noting that the issue was a novel one, and that the closest analogy consisted in the above line of cases about police responsibility, again without drawing any distinction between acts and omissions. The case was a novel one, not because it fell outside the general category of negligent acts or omissions allegedly causing physical loss, but because it was not (yet) established that the established category embraced the particular types of acts or omissions alleged and the circumstances in which soldiers might suffer from them. Indeed, it was accepted on all sides that combat immunity meant that the established category was not on any view completely unqualified, and the question arose in that respect what scope the courts should, as a matter of policy, attach to the principle of combat immunity.

88. A similar difficulty arises in fitting other authorities which Lord Reed accepts as correctly decided into any absolutely fixed legal mould. The cases of *Hill* and *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2009] AC 225 can, I agree, be rationalised as cases of omission, but that was not how they were reasoned. The case of *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 involved a claim by police officers for pursuing disciplinary proceedings with insufficient expedition, thereby, it was alleged, causing them physical loss, which was held to be unforeseeable, and economic loss of a kind, which is, in the absence of any assumption of responsibility, generally irrecoverable. But again Lord Bridge buttressed his conclusion with general statements about the need to shield the police from the pursuit of claims in relation to their investigative activity, without distinction between acts and omissions.

89. In *Elguzouli-Daf* there were two similarly based claims, but the consequences of the CPS's failure to pursue their investigation with sufficient expedition were alleged to be that the claimants remained in custody for some 22 and 85 days respectively. In the absence of any specific assumption of responsibility, the Court of Appeal held that policy factors argued against the recognition of a duty of care owed by the CPS to those it prosecutes: p 349B-C, per Steyn LJ, who went on:

> "While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the CPS."

As Morritt LJ put it at p 352G-H, policy considerations similar to those which weighed with Lord Keith in *Hill's* case excluded any general duty to use reasonable care in the institution and conduct of criminal proceedings. The reasoning contains no hint of a categorical distinction between acts and omissions.

90. A year later, the House had before it in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211 a claim by cargo owners against a classification society by whose alleged negligence the carrying vessel was allowed to continue on her voyage after temporary repairs to a crack in her hull, which then caused the loss of both vessel and cargo. Cargo owners' primary submission was that, this being a case of physical damage to property in which the plaintiff had a proprietary or possessory interest, the only requirement was proof of reasonable foreseeability. The House rejected this categorically, in the following passage from Lord Steyn's speech, p 235D-H):

> "Counsel for the cargo owners submitted that in cases of physical damage to property in which the plaintiff has a proprietary or possessory interest the only requirement is proof of reasonable foreseeability. For this proposition he relied on observations of Lord Oliver of Aylmerton in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 632C-633D. *Those observations, seen in context, do not support his argument. They merely underline the qualitative difference between cases of direct physical damage and indirect economic loss. The materiality of that distinction is plain.* But since the decision in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 it has been settled law that the elements of foreseeability and proximity as well as *considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff.* Saville LJ explained at 1077[D-E]:
>
>> '... *whatever the nature of the harm sustained by the plaintiff*, it is necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course, … these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed. … *Again in most cases of the direct infliction of physical loss or injury through*

> *carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem.* Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. In the end whether the law does impose a duty in any particular circumstances depends upon those circumstances, ...'

> That seems to me a correct summary of the law as it now stands. It follows that I would reject the first argument of counsel for the cargo owners." *(italics added for emphasis)*

While both the House and Saville LJ (as he was) were happy to accept that "in most cases" of the direct infliction of physical loss or injury through carelessness, liability was self-evident, they were cautious to warn against absolute rules in that respect.

91. *Elguzouli-Daf* was, as Lord Reed notes, para 59, followed and applied in *SXH v Crown Prosecution Service* [2017] UKSC 30; [2017] 1 WLR 1401, where the complaint was that the CPS had acted unreasonably in prosecuting an asylum seeker, leading to her detention for some months. Lord Toulson giving the majority judgment said:

> "38. The duty of the CPS is to the public, not to the victim or to the suspect, who have separate interests. To recognise a duty of care towards victims or suspects or both, would put the CPS in positions of potential conflict, and would also open the door to collateral interlocutory civil proceedings and trials, which would not be conducive to the best operation of the criminal justice system. Similar considerations are relevant when considering the applicability of article 8 in the context of a decision to prosecute. A decision to prosecute does not of itself involve a lack of respect for the autonomy of the defendant but places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions of bail or remand in custody and the like."

The claim here was clearly for a positive act, causing excessive detention.

92. Finally, Lord Reed dismisses *Brooks's* case on the basis that it concerned police behaviour which was "merely insensitive" and so "not normally actionable, even if it results in a psychiatric illness": para 60. But the starting point for the House's consideration of the case was that Mr Brooks had, as a key witness to the fatal attack on Stephen Lawrence on 22 April 1993, suffered "from a very serious post-traumatic stress disorder" until the spring of 1998, and that this had been severely exacerbated or aggravated as a result of the police's failure to treat him lawfully: para 10. Lord Steyn said in this connection that:

> "In particular the matter must be considered on the basis that Mr Brooks has suffered personal injury (in the form of an exacerbation of or aggravation of the post-traumatic stress that was induced by the racist attack itself) in consequence of the negligence of the officers and that injury of this type was reasonably foreseeable." (para 16)

That being the basis on which the matter fell to be considered, the appellant advanced the argument that *Hill's* case could be distinguished. The House disposed of that argument tersely as follows, para 32:

> "The only suggested distinction ultimately pursued was that in *Hill's* case the police negligence was the indirect cause of the murder of the daughter whereas in the present case the police directly caused the harm to Mr Brooks. That hardly does justice to the essential reasoning in *Hill's* case. In any event, *Calveley* ..., *Elguzouli-Daf* ..., and *Kumar* ... were cases of alleged positive and direct negligence by the police. The distinction is unmeritorious."

93. According to the House's decision in *Alcock's* case, what is necessary in order to recover damages for negligently caused psychiatric injury is not only foreseeability, but also proximity. Both requirements appear clearly to have been present in Brooks' case. In the event, Lord Steyn also treated the third stage of the Caparo test (fairness, justice and reasonableness) as applicable. But it is clear that the House decided the case by reference to a general principle derived from the cases of *Hill*, *Calveley* and *Elguzouli-Daf*, and not on the basis of any general distinction between either physical and psychiatric injury or acts or omission. Rather, it decided the case on the basis that, outrageous negligence aside, the police owe no "duty of care not to cause by positive act or omissions harm to victims of serious crime, or witnesses to serious crime, with whom they have contact"; and it rejected categorically any distinction between indirect causation of the murder of an innocent victim, due to failure properly to investigate past offences against other victims

(*Hill's* case) and harm "directly caused … to Mr Brooks" (*Brooks's* case itself): paras 18 and 32.

94. What I think emerges from this examination of past authority is that it is not possible to state absolutely that policy considerations may not shape police or CPS liability in a context where the conduct of the police may perfectly well be analysed as positive, rather than simply as involving some form of omission. It is at least clear that extended detention and psychiatric injury, due to the police's or CPS's positive acts or omissions, will be treated as outside any otherwise generally established category of liability for negligence.

95. As to the present appeal, I also think that there was open to the law a genuine policy choice whether or not to hold the police responsible on a generalised basis for direct physical intervention on the ground, causing an innocent passer-by physical injury, in the performance of their duties to investigate, prevent and arrest for suspected offending by some third person(s). In my opinion, that policy choice should now be made unequivocally in the sense indicated by Lord Reed. In *Hill's* case Lord Keith stated (p 59B-C), that:

> "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."

Lord Keith then cited as "instances where liability for negligence has been established" two authorities: *Knightley v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242.

96. Neither comes particularly close to the present case, and indeed, in reasoning to some extent echoed in the present Court of Appeal decision, the Court of Appeal (Leveson and Toulson LJJ) in *Desmond v Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3; [2011] PTSR 1369, identified the "modified core principle in *Hill*" as meaning that: Absent special circumstances, "the police … do not … owe individual members of the public … a common law duty of care in undertaking their operational duties of investigating, detecting, suppressing and prosecuting crime": para 31. But it recognised that the modified core principle in *Hill* "may not apply in exceptional circumstances at the margins". It gave as examples of where it would not apply cases of negligent driving by the police and of assumption of responsibility. It also identified as further examples the two cases mentioned by Lord Keith.

97. As to those two cases, the former concerned police (mis)management of the aftermath of a relatively mundane traffic accident, by giving instructions to an officer to ride against the traffic flow in a tunnel, as a result of which he suffered personal injury. The latter concerned police failure to re-equip themselves with fire-fighting equipment, before taking the drastic step, with a view to forcing the intruder's arrest, of firing an incendiary canister into a building in which an intruder had broken with a gun. The present case concerns in contrast a quite delicate operational decision involving coordination between four officers, with a view to the arrest of suspected drug dealers, in a public place. It can be suggested that this raises special considerations, negativing any duty of care. But in my view we should not accept that suggestion. Rather we should now recognise the direct physical interface between the police and the public, in the course of an arrest placing an innocent passer-by or bystander at risk, as falling within a now established area of general police liability for positive negligent conduct which foreseeably and directly inflicts physical injury on the public. On that basis, I would also allow this appeal and restore the judge's judgment.

LORD HUGHES:

The question of law

98. The general question of importance in this appeal is when the police do or do not owe a legal duty of care to individuals in the course of performing their public functions of investigating and preventing crime.

99. It is important that the question is posed in those terms. It may have become a convenient shorthand to express the decisions of the House of Lords and this court in *Hill v Chief Constable of West Yorkshire, Brooks v Commissioner of Police of the Metropolis*, *Smith v Chief Constable of Sussex Police* and *Michael v Chief Constable of South Wales* in terms of a rule of police immunity. That may not be surprising since Lord Keith did at one point in *Hill* refer to the police as immune from an action of the kind there brought. Whether convenient or not, that shorthand is misleading, as Lord Toulson explained in *Michael* at para 44. Whatever the answer to the question posed, the police do not enjoy some immunity from liability which otherwise would arise. Like others, however, they do not owe a duty of care to avoid harm or damage in every situation where such harm or damage can be foreseen. The general rule of law of tort is that the foreseeability of harm is a necessary but not a sufficient condition for liability. So in all the many situations and relationships which may result in damage, the question becomes: when is the defendant under a legal duty of care to the claimant to take reasonable steps to avoid it.

100. For the reasons very clearly set out by Lord Reed at paras 21-30 it is neither necessary nor appropriate to treat *Caparo Industries v Dickman* [1990] 2 AC 605 as requiring the application of its familiar three-stage examination afresh to every action brought. Where the law is clear that a particular relationship, or recurrent factual situation, gives rise to a duty of care, there is no occasion to resort to *Caparo*, at least unless the court is being invited to depart from previous authority.

101. The four cases of *Hill, Brooks, Smith* and *Michael* make it clear that they do not touch on the liability of police officers if by positive negligent act they cause physical harm to individuals or damage to property. That is apparent from:

> i) the approval in those cases of the decisions in *Rigby v Chief Constable of Northamptonshire* (negligent use of a CS gas canister in an attempt to force an armed psychopath from a shop in which he had gone to ground) and *Knightley v Johns* (negligent organisation of traffic in an emergency situation); and
>
> ii) the explicit statement by Lord Keith in *Hill* at 59B, approved in subsequent cases, that:
>
>> "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."

(although see below for consideration of omissions).

102. There are other examples of recognition of the duty of care which police officers owe not by positive negligent act to cause physical harm. They include *Marshall v Osmond* (a car chase) and *Ashley v Chief Constable of Sussex Police* (where negligent shooting of a suspected criminal was conceded).

103. The principal cases, however, also contain explicit statements of the vital policy considerations which impose limits on the duties of care which the police owe to individuals when engaged in their public function of investigating and preventing crime. The analysis begins with Lord Keith in *Hill*. With the express agreement of three other members of the court, and a concurring speech by the fifth, he said at 63A:

> "That is sufficient for the disposal of the appeal. But 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 …

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."

Lord Templeman added this at 65:

> "Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.
>
> This action is in my opinion misconceived and will do more harm than good."

104. In *Brooks* at para 28 Lord Steyn qualified that part of what Lord Keith had said about the best endeavours of police officers, saying that a more sceptical approach to the carrying out of all public functions was necessary. His qualification was shared by Lord Bingham at paras 3 and 4 and by Lord Nicholls at para 6. But notwithstanding that reservation, Lord Steyn, with whom Lord Rodger and Lord Brown fully agreed, otherwise fully endorsed the reasoning of Lord Keith. At para 30 he held that the "core principle" of *Hill* had remained unchallenged for many years. He went on:

> "It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police (Conduct) Regulations 2004 (SI 2004/645). But to convert that ethical value into general legal duties of care on the police towards victims 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 functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's* case, be bound to lead to an unduly defensive approach in combating crime."

As Lord Steyn pointed out (para 19), there can be no doubt that Lord Keith's analysis represented the alternative ground of decision for, and part of the ratio decidendi of, *Hill*.

105. In the same case, Lord Bingham, at para 4, said of the suggested duties of care to witnesses which were advanced by the claimant,

> "But these are not duties which could be imposed on police officers without potentially undermining the officers' performance of their functions, effective performance of which serves an important public interest. That is, in my opinion, a conclusive argument in the Commissioner's favour."

And at para 5 Lord Nicholls held that

> "These duties would cut across the freedom of action the police ought to have when investigating serious crime."

106. In *Smith* Lord Bingham dissented on the extent of the duty of care owed to those who complained to the police about risks from another identified person and advanced what he termed a "liability principle" recognising a duty of care in narrow circumstances. But notwithstanding that opinion, he reviewed the policy considerations voiced by Lord Keith in *Hill* and by the House in *Brooks* and, except for the reservation entered in *Brooks* which is explained above, he did not question them: see paras 48-52. The majority of the House expressly endorsed the policy considerations subject to the same reservation.

107. At para 74 Lord Hope addressed Lord Bingham's opinion that the limited liability which he would have imposed was not inconsistent with the policy factors, and that the observations in *Hill* and *Brooks* were to be read in the context of the duties there contended for. He held that they were not so limited:

> "In my opinion however it is clear from Lord Steyn's opinion, read as a whole, that he was laying down a principle of public policy that was to be applied generally. In para 22 he referred to his own judgment in *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] 1 QB 335. That was, as he said, a different case altogether, as it raised the question whether the Crown Prosecution Service ('CPS') owed a duty of care to those whom it was prosecuting. But he relied on the case by analogy. In holding in *Elguzouli-Daf* that policy factors argued against the recognition of a duty of care owed by the CPS to those whom it prosecutes, he said this at p 349:
>
>> 'While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the CPS. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence.'
>
> 75. The phrase 'the interests of the whole community' was echoed in the last sentence of the passage which I have quoted from Lord Steyn's opinion in *Brooks*. There is an echo too in *Brooks* of the warning against yielding to arguments based on civil liberties: see the first sentence of that quotation where he warns against a retreat from the core principle. 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* [1997] QB 464, 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.
>
> 76. The risk that the application of ordinary delictual principles would tend to inhibit a robust approach in assessing a person as a possible suspect or victim, which Lord Steyn mentioned in the last sentence of the passage that I have quoted from his opinion in *Brooks*, is directly relevant to cases of the kind of which *Smith's* case is an example …
>
> Police work elsewhere may be impeded if the police were required to treat every report from a member of the public that he or she is being threatened with violence as giving rise to a duty of care to take reasonable steps to prevent the alleged threat from being executed. Some cases will require more immediate action than others. The judgment as to whether any given case is of that character must be left to the police."

108. At para 89 Lord Phillips observed that public policy has been at the heart of consideration whether a duty of care is owed by police officers to individuals. After reviewing the policy factors he concluded at para 97:

> "I do not find it possible to approach *Hill* and *Brooks* as cases that turned on their own facts. The fact that Lord Steyn applied the decision in *Hill* 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. The two relevant justifications advanced for the principle are (i) that a private law duty of care in relation to individuals would be calculated to distort, by encouraging defensive action, the manner in which the police would otherwise deploy their limited resources; (ii) resources would be diverted from the performance of the public duties of the

> police in order to deal with claims advanced for alleged breaches of private law duties owed to individuals."

109. At para 108 Lord Carswell said this:

> "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."

110. Lastly, Lord Brown added, at paras 131-133

> "131. Fourthly, some at least of the public policy considerations which weighed with the House in *Hill* and *Brooks* to my mind weigh also in the present factual context. I would emphasise two in particular.

> 132. First, concern that the imposition of the liability principle upon the police would induce in them a detrimentally defensive frame of mind. So far from doubting whether this would in fact be so, it seems to me inevitable. If liability could arise in this context (but not, of course, with regard to the police's many other tasks in investigating and combating crime) the police would be likely to treat these particular reported threats with especial caution at the expense of the many other threats to life, limb and property of which they come to learn through their own and others' endeavours. They would be likely to devote more time and resources to their investigation and to take more active steps to combat them. They would be likely to arrest and charge more of those reportedly making the threats and would be more likely in these cases to refuse or oppose bail, leaving it to the courts to take the responsibility of deciding whether those accused of making such threats should remain at liberty. The police are inevitably

> faced in these cases with a conflict of interest between the person threatened and the maker of the threat. If the police would be liable in damages to the former for not taking sufficiently strong action but not to the latter for acting too strongly, the police, subconsciously or not, would be inclined to err on the side of over-reaction. I would regard this precisely as inducing in them a detrimentally defensive frame of mind. Similarly with regard to their likely increased focus on these reported threats at the expense of other police work.
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> 133. The second public policy consideration which I would emphasise in the present context is the desirability of safeguarding the police from legal proceedings which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating crime. This was a point made by Lord Keith of Kinkel in *Hill* and is of a rather different character from that made by Lord Steyn in para 30 of his opinion in *Brooks* - see para 51 of Lord Bingham's opinion. In respectful disagreement with my Lord, I would indeed regard actions pursuant to the liability principle as diverting police resources away from their primary function. Not perhaps in every case but sometimes certainly, the contesting of these actions would require lengthy consideration to be given to the deployment of resources and to the nature and extent of competing tasks and priorities."

111. In *Michael* Lord Toulson (at para 121) was inclined to accord force to criticism of the fear of defensive policing. But he held that it was possible to imagine that liability might lead to police forces changing their priorities, and that it was hard to see it as in the public interest that the determination of priorities should be affected by the risk of being sued. He added that the one thing of which any court could be sure is that the payment of compensation would have to come from police budgets, at the expense of spending on policing unless an increase in budgets from the public purse were to ensue.

112. It should be acknowledged that it is sometimes asserted that that part of the policy considerations which related to the danger of defensive policing lacks hard evidence. That may technically be so, since there has not existed the kind of duty of care which would test it in practice. But like Lord Brown in *Smith* I for my part would regard that risk as inevitable. It can scarcely be doubted that we see the consequences of defensive behaviour daily in the actions of a great many public authorities. I do not see that it can seriously be doubted that the threat of litigation

frequently influences the behaviour of both public and private bodies and individuals.

113. However that may be, the several statements of the policy considerations, especially in three different decisions of the House of Lords, are simply too considered, too powerful and too authoritative in law to be consigned to history, as I do not understand Lord Reed to suggest that they should be. Nor do I see it as possible to treat them as no more than supporting arguments. As all of them, and especially the speech of Lord Hope set out at para 10 above, make clear, the statements are intended as ones of general principle. No doubt *Hill* was decided at a time when *Anns v Merton London Borough Council* was understood to provide the test for the existence of a duty of care. But the error of *Anns* was exposed at the latest in 1991 in *Murphy v Brentwood Council*, whilst *Brooks* and *Smith* were decided in 2005 and 2008 respectively. In any event, the error of *Anns* lay chiefly in its effective imposition of an often impossible burden on a defendant to demonstrate that public policy ought to negate the existence of a duty of care. The *relevance* of considerations of public policy, such as those so fully adumbrated in *Hill, Brooks* and *Smith*, and the fact that they may indeed demonstrate that a duty of care is not owed, remains unchanged by the different formulation in *Caparo*.

114. In *Michael* (at para 97) Lord Toulson helpfully brought into the analysis the general reluctance of English law to impose liability in tort for pure omissions. *Smith v Littlewoods Organisation Ltd* [1987] AC 241, to which he referred, is a good example. There, the claimant suggested that the occupiers of a disused cinema, awaiting demolition and reconstruction as a shop, owed a duty to exclude vandals from getting in, so that they were liable to neighbours when the vandals started a fire which spread to adjoining properties. That was, no doubt, a case of pure omission, and was so analysed by Lord Goff, although not by the majority of the House of Lords, through Lord Mackay. It is clear that the reluctance of the common law to impose liability in tort for pure omissions is another reason why the police do not owe a duty of care to individuals who turn out to be the victims of crime (as in *Hill* or *Smith*) or to witnesses (as in *Brooks*) or to suspects (as in *Calveley v Chief Constable of Merseyside* and *Elguzouli-Daf*). But analysis in terms of omissions cannot be the only, or sufficient, reason why such duties of care are not imposed, nor why there is very clearly no duty owed to individuals in the manner in which investigations are conducted.

115. There are at least two reasons why this is so. First, the rule against liability for omissions is by no means general. In *Smith v Littlewoods Organisation Ltd* Lord Goff identified at any rate several situations where such liability is imposed. One is where there has been an assumption of responsibility towards the claimant. The law readily finds such an assumption in many common situations, such as employment, teaching, healthcare and the care of children, and imposes liability for omitting to protect others. It could equally readily do so in the case of police officers with a

general public duty to protect the peace, but it does not. Another was epitomised by *Goldman v Hargrave* and by *Thomas Graham Ltd v Church of Scotland* 1982 SLT (Sh Ct) 26, a case very similar to *Littlewoods* where the occupier knew of previous incursions by third parties and where Lord Goff accepted that liability was rightly imposed for omission to keep them out. If the occupation of land is treated as imposing liability for an omission, the law could, and might, have said that the same applies to police officers where they are aware of the risk posed by (or to) those they are investigating, but it does not.

116. For the same reasons, the question whether a statutory public duty gives rise to a private duty or not is a fluid one. *Stovin v Wise* and *Gorringe* are examples where no private duty of care was held to exist. *Barrett v Enfield London Borough Council*, decided after *Stovin v Wise*, accepted at least in principle the possibility of such a duty in relation to the different statutory scheme there in question.

117. Secondly, there is no firm line capable of determination between a case of omission and of commission. Some cases may fall clearly on one side of the line, and *Hill* may have been one of them. But the great majority of cases can be analysed in terms of either. *Michael* could be said to be a case of omission to respond adequately to the 999 call. But it was argued for the claimant as a case of a series of positive acts, such as, for example, misreporting the complaint when passing it from one police force to another. *Barrett v Enfield London Borough Council* was a case of mixed acts (allegedly negligent placements) and omissions (to arrange adoption). *Phelps v Hillingdon London Borough Council* similarly involved allegedly negligent examination, also a positive act.

118. The ultimate reason why there is no duty of care towards victims, or suspects or witnesses imposed on police officers engaged in the investigation and prevention of crime lies in the policy considerations examined above and, in the end, in the clear conclusion, as expressed by Lord Hope in *Smith* (see para 10 above) that the greater public good requires the absence of any duty of care.

119. Likewise the policy considerations will be directly relevant to any suggestion that a duty of care exists towards individuals such as victims, witnesses or suspects via the route of foreseeable risk of psychiatric harm. The law remains uncertain about when a claimant can properly be regarded as a primary or a secondary victim for the purposes of recovering damages for psychiatric harm: see *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, *McLoughlin v Grovers* [2001] EWCA Civ 1743 per Hale LJ as she then was, and *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. But it is clear that no duty of care towards victims of crime, witnesses or suspects can be erected on the back of foreseeability of psychiatric harm, and the reason clearly lies in the policy considerations.

120. Thus whilst there remains a duty of care imposed on police officers not by positive action to occasion physical harm or damage to property which ought reasonably to be avoided, there is no duty of care towards victims, witnesses or suspects in the manner of the investigation of offences or the prevention of crime. That also means that there is no duty of care to protect individuals from harm caused by the criminal acts of third parties.

121. Of course, where action is brought on the basis of physical harm done by positive act of the police, it will succeed if but only if negligence is proved. As Lord Reed explains at para 75, policing may sometimes involve unavoidable risk to individuals. It may very often involve extremely delicate balancing of choices. Crowd control, hostage situations, violent outbreaks of crime and the allocation of scarce resources where there are large numbers of persons with the potential to offend, even at the terrorist level, are simply examples. Sometimes decisions may have to be made under extreme pressure; at other times they may remain very difficult notwithstanding time for analysis, and there may be a high level of risk that they turn out to be wrong. The question is always not whether, with hindsight, the decision was wrong, but whether in all the circumstances it was reasonable.

The present case

122. I agree that the present case is one of positive act, namely arresting the suspect, which directly caused physical harm. It matters not that the suspect was the first to be in physical contact with the claimant given that the collision with her was by him plus two of the policemen.

123. I confess that I have pondered hard about the finding of negligence. That the suspect might run away was known, but the limited risk that he not only would do so, but also would cannon into a pedestrian if he did, had to be balanced against the duty to effect an arrest promptly. Many might regard the decision when to effect the arrest as a marginal one. But it is important that appellate courts do not second guess trial judges who have had the opportunity to hear the witnesses in person, as well as to examine the CCTV in the light of the way the case is argued. It does not seem to me that even if one were to entertain doubts about how one might oneself have decided the issue, it can be right to displace the finding of the trial judge unless there is error of principle. It is impossible to say that the judge was not entitled to attach the significance he did to the fact that Mr Willan had lost sight of the claimant at the moment he moved in.

124. In those circumstances I would allow the appeal and restore the finding of the trial judge. The case must be remitted to the court of trial for the still outstanding assessment of damages.