IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRIGHTON COUNTY COURT
HIS HONOUR JUDGE SIMPKISS
CLAIM NO.6BN00939

Royal Courts of Justice
Strand, London, WC2A 2LL
05/02/2008

Before:
LORD JUSTICE PILL
LORD JUSTICE SEDLEY
and
LORD JUSTICE RIMER

Between:

SMITH	Appellant
- and -	
CHIEF CONSTABLE OF SUSSEX POLICE	Respondent

Ms H Williams QC (instructed by Messrs Griffith Smith Farrington Webb) for the Appellant
Mr E Faulks QC and Mr E Bishop (instructed by Messrs Weightmans) for the Respondent

Lord Justice Sedley:

Background

1. Stephen Smith was attacked with a claw-hammer and seriously injured by his former partner, Gareth Jeffrey. He asserts that the local police in Brighton had been repeatedly told by him that Jeffrey was threatening to kill him but had done nothing to stop it happening. Jeffrey, arrested for attempted murder, was convicted of making threats to kill and causing grievous bodily harm with intent: in other words, he would have been guilty of murder had Mr Smith died.

2. Mr Smith, out of time for suing for breach of his Convention rights pursuant to s.7 of the Human Rights Act 1998, brought a claim in negligence in the Brighton County Court against the Sussex police. On the defendant's application the claim

was struck out by Judge Simpkiss. He was not persuaded that the claim was bound to fail on causation – that is to say, that Mr Smith would not be able to establish that action on the part of the police would have prevented the attack – but he accepted that there was, on the facts pleaded, no sufficient relationship of proximity between Mr Smith and the police, and that his claim should not be entertained on grounds of public policy. Mackay J, granting the claimant permission to appeal, directed pursuant to CPR 52.14(i)(a) that the appeal be transferred to this court because it raised an important point of principle: whether a negligence claim of this kind is today reinforced by the Human Rights Act, specifically through the operation of articles 2 and 8 of the Convention. There is no cross-appeal on causation.

3. The facts which are to be taken as proved for present purposes include the following. On 24 February 2003 the claimant made a 999 call to report that his former partner, who had been violent towards him in the past, was now threatening to kill him. Two constables went to the claimant's home in Brighton, where the claimant told them that Jeffrey had attacked him in December 2000 when he sought to end their relationship (they were living together in Abingdon), and that since January he had been receiving from Jeffrey a stream of abusive and threatening text messages and e-mails. He wanted to show the constables the texts and printouts, which contained messages such as "U are dead fucking meat" and "I am looking to kill you and no compromises", but they declined to look at them. One message, received that morning, read: "I was in the Bulldog [a local bar] last night with a carving knife. It's a shame I missed you." No notes were made by the officers, no statement was taken and no crime report was filed. The claimant was advised to attend the police station in order to complete forms to enable the calls to be traced. He did so next day. The details he supplied included Jeffrey's home address. The death threats continued to come. On 27 February Mr Smith phoned the Brighton police and was told it would take four weeks to complete the trace. Next day, having received yet another series of explicit death threats from Jeffrey, he went to Saville Row police station (he was staying in London for safety), where officers contacted the Brighton police. The messages, violent and highly explicit in content, continued. Mr Smith returned to Brighton and on 6 March again visited the police station. He saw an inspector, told him he felt in danger and asked for an update on the investigation. As before, the inspector refused to look at the messages Mr Smith had brought with him, took no notes and simply told him that the investigation was progressing well and that he would hear from the police in about three weeks. Four days later, on 10 March (almost a fortnight after the inquiry had been initiated), a constable asked the claimant for Jeffrey's telephone numbers, which he supplied. But later the same morning Jeffrey arrived at Mr Smith's home and attacked him with a claw-hammer, causing him serious and lasting injuries. The following day police arrested Jeffrey at the London address which Mr Smith had set out on the form he filled in at the police station on 25 February.

4. The essence of the claim in negligence is readily apparent: that from the time of Mr Smith's initial complaint the Sussex police had ample evidence and information to arrest Jeffrey for making threats to kill; that they had no excuse for not doing so; that it was apparent that if they left Jeffrey at large he might well attempt to carry out his threats; and that that, predictably, was what he did.

5. Additionally, but with contested relevance to the cause of action in negligence, these facts would also plainly sustain an allegation that the state, by the inertia of its police officers in the face of a manifest threat to Mr Smith's life, had failed in its positive obligation to protect his life under ECHR art. 2. They might also sustain claims under art. 3 and art. 8. As a bridge between the Convention rights and the negligence claim, Heather Williams QC for Mr Smith relies upon the Sussex Police's domestic violence policy, which explicitly invokes arts. 2 and 3 in giving proper priority to a form of crime which police culture has tended to disregard or marginalise. Separately Ms Williams submits that the Convention values now give shape and colour to the common law doctrine of negligence.

6. The judge gave careful consideration to these contentions, but he acceded to the application to strike out the claim as having no real prospect of success on two grounds. The first was that the claimant's position vis-à-vis the police was that of a member of the public and not one calling for special protective measures. The second was that in this situation public policy was against imposing a duty of care on the police. As can be seen, the two findings are interdependent. The question before us is whether the relationship established by the assumed facts is one which is capable at common law of creating a duty of care which it is fair, just and reasonable that the police should discharge. If the law recognises such a duty of care, breach and damage are not in issue, and there is no cross-appeal against the judge's refusal to strike out the claim for want of a causative link between the two.

7. Edward Faulks QC for the respondent chief constable submits that the judge was entirely right. While there are cases where a negligence claim has stood up because the police have entered into a special relationship with the eventual victim, no decided case enables a member of the public who seeks the help of the police to sue them without more if they fail, however negligently, to protect him or her. This, Mr Faulks submits, is not so by chance: it is because to impose on the police a duty towards individuals who seek their help – if towards one, then towards all –is to set priorities for policing which it is not the law's role to set and which will be arbitrarily determined according to who makes demands or sues.

Decided cases

8. The commission of the peace creates public law duties which can be enforced by mandatory orders[1], but not, by itself, private law duties. Correspondingly, no duty of care is owed by the police to the public at large so as to render them liable to an individual who suffers harm by their neglect. The bedrock of this doctrine

is *Hill v Chief Constable of West Yorkshire*[2], in which the House of Lords held that the estate of a victim of the Yorkshire Ripper, who – it was averred and assumed – would have been caught by competent detective work in time to prevent her murder, had no claim against the police for negligence. There was no relationship between the victim, as a member of the public, and the police capable of giving rise to a duty of care.

9. To the want of sufficient proximity, however, Lord Keith in the leading speech added public policy as a further ground for barring the claim. He said (at 63):

> "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

This reasoning, as Mr Faulks suggests, can be regarded as a version of the "fair, just and reasonable" test later adopted in *Caparo Industries v Dickman*[3].

10. As Lord Keith recognised, there was already in existence a body of decided cases in which a public authority had been held in particular circumstances to have entered in the course of its public functions into a sufficiently proximate relationship with individuals to give rise to a duty of care. *Anns v Merton Borough Council*[4] was such a case. So was *Dorset Yacht Co v Home Office*[5], in which prison officers who allowed boys in their custody to escape and damage a yacht were held, given the specificity of the known risks, to have entered into a sufficiently proximate relationship with the yacht owners to found a duty of care. I will return to other instances closer to the present case; but first it is useful to consider those cases in which, either on grounds of want of proximity or on grounds of public policy, claims against the police have failed at the threshold.

11. One such case, relied on by Mr Faulks, was *Brooks v Metropolitan Police Commissioner*[6]. A friend of Stephen Lawrence who witnessed his murder was dismissively and woundingly treated by the police who attended the scene and investigated the killing. Lord Steyn, in the principal speech, held that, albeit the police were here dealing directly with an individual, what they were doing was part of their general function of investigating crime, and so within the *Hill* principle. The common ratio seems to have been that the particular duties asserted on the basis of the known facts – duties, in substance, to take the claimant seriously as a witness and treat him with proper consideration - were on any view too weak to found a negligence claim in the context of policing.

12. I would not therefore accept Mr Faulks' submission that *Brooks* constitutes as formidable a barrier as *Hill* to Mr Smith's claim, which is far starker than *Brooks* in its assumed facts. Nor do I accept that *Hill* by itself constitutes a barrier, since Mr Smith's claim does not depend on his status as a member of the public facing a risk common to many others. What *Hill* lays down is a perimeter of public policy. Our present concern is what lies within it.

13. In *Alexandrou v Oxford*[7] this court held that a cursory inspection by police officers of premises to which they had been summoned by a burglar alarm, with the result that a burglary was not prevented, was insufficient to create a proximate relationship between the owner and the police. Glidewell LJ, with whom the other members of the court agreed, held:

> "The communication with the police in this case was by a 999 telephone call, followed by a recorded message. If as a result of that communication the police came under a duty of care to the plaintiff, it must follow that they would be under a similar duty to any person who informs them, whether by 999 call or in some other way, that a burglary, or indeed any crime, against himself or his property is being committed or is about to be committed. So in my view if there is a duty of care it is owed to a wider

> group than those to whom the judge referred. It is owed to all members of the public who give information of a suspected crime against themselves or their property. It follows, therefore, that on the facts of this case it is my opinion that there was no such special relationship between the plaintiff and the police as was present in the *Dorset Yacht* case."

14. It seems to me that Mr Faulks' case is better served by this decision than by *Brooks*. The reasoning places a caller who has summoned the police to the scene of a crime on a par with the victim in*Hill* by treating both as members of the public who happen to have been the victim of a preventable crime. If Mr Alexandrou was outside the ring of proximity, so – Mr Faulks can legitimately argue – must Mr Smith be.

15. His difficulty, however, lies in other cases on which Ms Williams founds and in which the facts have been held both to create sufficient proximity to overcome the *Hill* barrier and not to infringe the policy which protects the police from lawsuits which will interfere with their public function.

16. One of these is this court's decision in *Osman v Ferguson*[8] (the precursor of *Osman v United Kingdom*[9] in the European Court of Human Rights). There it was held (by a majority, Beldam LJ reserving the question) that the reporting to the police by Ahmet Osman's family of the menacing behaviour of his obsessed teacher arguably created a relationship of sufficient proximity to attract a duty of care. Unanimously, however, the court held that it was contrary to public policy to make the police liable for the consequent harm.

> "In my judgment," McCowan LJ said, "the House of Lords decision on public policy in *Hill*'s case dooms this action to failure …"

17. So far as concerns proximity, Mr Faulks and Ms Williams are alike unable to identify any distinction of principle between *Alexandrou* and *Osman*. The former was cited by the court which decided the latter, but without explaining what it was that distinguished the one from the other. So far as concerns the public policy bar, however, the reasoning in *Osman* (until it reached the European Court of Human Rights: see below) appeared conclusive notwithstanding any special relationship, however proximate. But it has become clear in the years since it was decided that in some cases involving the police the very proximity of the parties can not only create a duty of care but can overcome the public policy considerations which would otherwise bar the claim.

18. An example of this is *Swinney v Chief Constable of Northumbria*[10]. The police had negligently disclosed the identity of an informer whom they had undertaken to protect. This court held that the public interest in the protection of informants had to be weighed against the public interest in protecting the police from lawsuits over the way they discharged their duties, and that on the alleged facts the proper place for this was at trial.

19. *Swinney* was decided before *Osman* reached Strasbourg. There the European Court of Human Rights took the view that *Hill* afforded the police a comprehensive immunity from suit which was not compatible with the Convention. Subsequently, in *Z v United Kingdom*[11] , the Court moderated its critique of English law, accepting that there was no simple exclusionary rule but an incremental development of the 'fair, just and reasonable' filter on all negligence claims against public authorities which was compatible with art. 6.

20. It remains the case that any rule of law which had the effect of immunising the police against any and every negligence claim would fall foul of art. 6. This is in part why, in *Brooks*, Lord Steyn said:

> "28. With hindsight not every observation in *Hill* can now be supported. Lord Keith of Kinkel observed that "From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it": 63D. Nowadays, a more sceptical approach to the carrying out of all public functions is necessary.
> 29. Counsel for the Commissioner concedes that cases of assumption of responsibility under the extended *Hedley Byrne* doctrine fall outside the *Hill* principle. In such cases there is no need to embark on an enquiry whether it is "fair, just and reasonable" to impose liability for economic loss: *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830.
> 30. But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill,* arose for decision today I have no doubt that it would be decided in the same way. It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police Conduct Regulations 2004 (No. 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: see section 29 of the Police Act 1996, read with Schedule 4 as substituted by section 83 of the Police Reform Act 2002; section 17 of the Police (Scotland) Act 1967; *Halsbury's Laws of England,* Vol 36 (1), para 524; *The Laws of Scotland, Stair Memorial Encyclopaedia,* 1995, para 1784; *Moylan, Scotland Yard and the Metropolitan Police,* 1929, 34. A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect,

witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill,* be bound to lead to an unduly defensive approach in combating crime.
31. It is true, of course, that the application of the *Hill* principle will sometimes leave citizens, who are entitled to feel aggrieved by negligent conduct of the police, without a private law remedy for psychiatric harm. But domestic legal policy, and the Human Rights Act 1998, sometimes compel this result."

21. By the time the Human Rights Act 1998 came into force, then, the law of negligence did not bar actions against the police but recognised that it would be contrary to public policy to allow any to proceed which were not founded upon a high degree of proximity. In this way the two tests – the one relating to proximity, the other to whether it is fair, just and reasonable that there should be liability – have in large part merged. Hence, in *Brooks*, the acceptance by counsel for the Commissioner that cases of assumption of responsibility fell outside the *Hill* principle[12].

The common law and the Convention

22. In *Van Colle v Chief Constable of Hertfordshire*[13], a case under the Human Rights Act concerning the failure of the police to protect a witness from reprisal, this court remarked that a negligence claim would have been "fraught with difficulty". Mr Faulks stresses this remark; but while it recognises that such a claim lacks the Convention foundation which *Van Colle* had, it does not help to answer the present question. Nor, with respect to Ms Williams' argument, does this court's decision in *Lawrence v Pembrokeshire County Council*[14] do so. There it was held that art. 8 did not come to the aid of parents who sought to establish a duty of care towards themselves in the investigation of possible child abuse.

23. *Van Colle* has this much present relevance, that the trial judge's finding of a particular nexus in the victim's status as a prosecution witness, which was upheld by this court, bears as much on common law liability as on liability under the Human Rights Act. After the conclusion of argument in this case another division of this court, in *Savage v S. Essex NHS Trust* [2007] EWCA Civ 1375, which concerned the striking out of a Human Rights Act claim relating to the absconding and suicide of a compulsorily detained patient, put it this way:

> "35. In these circumstances, we conclude that the relevant test in a case of this kind is the *Osman* test, which may be stated thus. In order to establish a breach of article 2, on the assumed facts the appellant must show that at the material time the Trust knew or ought to have known of the existence of a real and immediate risk

to the life of Mrs Savage from self-harm and that it failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. While we would not prohibit the appellant from arguing at the trial for a lower test, we see no warrant for such a lower test, especially in the light of the decision in *Re Officer L*."

24. There is nevertheless an unanswered question as to how, if at all, the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports. Ms Williams' written argument has placed some emphasis on this, although her oral submissions have focused almost entirely on the common law. We have accordingly not heard full argument on the issue.

25. Ms Williams does, however, rely (whether by way of analogy or by transposition) on the statements of principle contained in Lord Carswell's speech in *Re Officer L*[16]. She submits that, if the common law requires a claim to match the standard set under art. 2 in the interests both of individual justice and of public policy, Mr Smith's case does so. Lord Carswell cited from *Osman v United Kingdom* the by now well-known passage at §115-6 which includes this sentence:

> "In the opinion of the court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

Lord Carswell added:

> 20. Two matters have become clear in the subsequent development of the case-law. First, this positive obligation arises only when the risk is "real and immediate". The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in *Re W's Application* [2004] NIQB 67, where he said that:
> "… a real risk is one that is objectively verified and an immediate risk is one that is present and continuing."
> It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high. ….
> 21. Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they

> have to take to avoid being in breach of article 2. As the ECtHR stated in paragraph 116 of *Osman*, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations: ….

26. There is a lucid but necessarily inconclusive discussion of the possible impact of the Convention on common law duties of care in Markesinis and Deakin, *Tort Law* (6th ed.) pp. 132-7. Beyond this all that can perhaps be noted are two dicta. One is Lord Hoffmann's remark in §31 of his speech in *Wainwright v Home Office* [2003] UKHL 53:

> The English common law is familiar with the notion of underlying values - principles only in the broadest sense - which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

We were not invited by either party to consider the impact of the European Court of Human Rights' subsequent decision in *Wainwright v United Kingdom*[15] or subsequent domestic decisions on privacy. The other dictum is that of this court, per Lord Woolf CJ, in *A v B and C* [2002] 2 All ER 545, §4:

> "[Arts. 8 and 10] have provided new parameters within which the courts will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because under s6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which arts 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles."

Discussion and conclusions

27. If there is a Convention value in play here, it is the right to life enshrined in art. 2, with the derivative obligation upon states, developed in the Court's jurisprudence, to take reasonable steps to protect human life. This coheres well enough with the common law, which recognises that it is not reasonable to expect the police to answer in damages to every individual whose life or health might have been spared or saved by more competent police work, but that where, for example, someone's life or safety has been so firmly placed in the hands of the police as to make it incumbent on them to take at least elementary steps to protect it, unexcused neglect to do so can sound in damages if harm of the material kind results.

28. Adopting this approach to the facts set out at the start of this judgment, I consider that Mr Smith's claim is not doomed to failure and should not have been struck out. If the facts upon which it is founded are established, the claimant was both a key witness to a serious offence of making threats to kill and the potential victim. The police ought to have been alerted by the evidence he offered them, and Jeffreys ought to have been arrested promptly. Instead he was left at large and permitted to carry out the attack which he had been threatening to carry out.

29. Whether under art. 2 or at common law, it cannot be a valid ground of distinction that an informer is entitled to protection while a witness is not, nor that a witness to a crime which has been charged is entitled to a measure of protection not available to a witness to a crime which should have been charged but through neglect has not been. If, as may be the case, we are required to choose between the rationale of *Alexandrou* and that of *Osman*, I consider that *Osman* is to be preferred. It seems to me, with great respect, not possible without more to equiparate a member of the public who has fallen victim to a criminal whom the police ought to have caught, but who has no other nexus with the police (the *Hill* situation), with a member of the public who has called the police to the scene of a crime of which he is or will be the victim (the *Alexandrou* scenario). There may be good answers on the merits to the latter claim, among them that there has been no assumption of responsibility. But there must come a point at which police officers, once alerted, cannot entirely escape such responsibility: their public office will require them, unlike the ordinary passer-by, to do something. I consider it cogently arguable, if the pleaded facts are established, that this is such a case.

30. I recognise that in developing the common law case by case there is a risk of creeping liability: each case proceeds by analogy with the last, but always in the direction of enlarging the liability of the police. This has to be guarded against; but it has also to be remembered that there has been no such process in the many years since the *Dorset Yacht* decision. On the contrary, the red line drawn by *Hill* has had to be modified in *Brooks* to take account, among other things, of *Osman v United Kingdom.* The process has been, and can be expected to continue to be, a cautious one. It has also to be a process which attempts, as the courts must always do, to close the gap between law and justice, remembering

that justice to society and its institutions can be as relevant as justice to individuals.

31. There may for example be a distinction to be drawn in this area, though not explored in this appeal, between neglect by inefficiency and wilful neglect. The present case, on its pleaded facts, is clearly capable of coming into the second category. There may also be a distinction to be made at common law, as there is in the Convention, between the protection of property (which was the issue in *Alexandrou*) and the protection of life (which was the issue in *Osman* and is the issue here). This too is for future consideration in the light of ascertained and evaluated facts: none of it is in my opinion sufficiently certain to found the striking out of a claim.

32. I would accordingly allow this appeal and restore the action.

Lord Justice Rimer:

33. I too would allow the appeal. I have read in draft the judgment delivered by Sedley LJ and gratefully adopt his summary of the facts that must, for present purposes, be assumed to be capable of being proved at trial. The issue before the judge, as before us, is whether those facts disclose a reasonable cause of action: in particular, whether, on those facts, the police arguably owed a duty of care to the claimant requiring them to arrest Mr Jeffrey and so protect the claimant from the risk that Mr Jeffrey's threats would be carried out, as in the event they were. There is no issue that, on the assumed facts, the type of harm the claimant suffered was reasonably foreseeable. Nor is there is any challenge to the judge's rejection of the contention that the claimant has no prospect of proving, as a matter of causation, that different action by the police would have prevented Mr Jeffrey from assaulting him.

34. The twin bases on which the judge struck the claim out were that the claimant had no prospect of proving a sufficient relationship of proximity so as to establish the necessary duty of care; and that the claim would anyway fail on public policy grounds. The latter is a reference to the policy considerations forming the second basis on which, in *Hill v. Chief Constable of West Yorkshire*[1989] AC 53, at 63 (per Lord Keith of Kinkel), the House of Lords dismissed the appeal against the striking out of the claim brought by the estate of one of the victims of Peter Sutcliffe. Those considerations (cited by Sedley LJ) were formerly sometimes regarded as conferring upon the police a blanket immunity from suit, but are now better regarded simply as reasons why it would not be fair, just and reasonable for a duty of care to be imposed (see *Caparo Industries plc v. Dickman* [1990] 2 AC 605, at 617, 618, per Lord Bridge of Harwich; and *Brooks v. Commissioner of Police of the Metropolis and others* [2005] 1 WLR 1495, at [27], per Lord Steyn).

35. As regards authority, the circumstances in *Hill* were far removed from this case. The primary difficulty in the way of that claim was that "Miss Hill was one of a

vast number of the female general public who might be at risk from [Sutcliffe's] activities but was at no special distinctive risk in relation to them…." ([1989] AC 53, at 62, per Lord Keith). There was therefore no sufficiently proximate relationship between the police and Miss Hill for a duty of care to arise. Her case was, in that respect, contrasted with that of the yacht owners who sued in *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004 (see at 1070, per Lord Diplock). The claim in *Hill* failed on proximity grounds, but would also have failed on the policy grounds that Lord Keith explained.

36. *Alexandrou v. Oxford* [1993] 4 All ER 328, a decision of this court, is closer in kind to the circumstances of this case than *Hill*. It was a claim for negligence against the police for failing to protect the plaintiff's property following the activation at the police station of a burglar alarm in his shop. The police focus was therefore on a particular plaintiff who had sought protection from the risk of loss, a feature which distinguished the case from *Hill* and made easier the argument that there was a sufficiently proximate relationship between the police and the plaintiff. The claim nevertheless failed, Glidewell LJ expressing the view ([1993] 4 All ER 328, at 338) that the police could not ordinarily come under a duty of care in tort to *any* person who informs them that a crime against himself or his property is about to be committed, one with which Parker and Slade L.JJ agreed. If that is a comprehensive statement of the relevant law, and its development had ended there, it is difficult to see how the present claim could succeed.

37. In the later case of *Osman and another v. Ferguson and another* [1993] 4 All ER 344, however, this court can be regarded as adopting a different approach. In that case, on the assumed facts, the police were aware of a course of conduct by PL, a teacher, involving the harassment of a boy at his school and the latter's father, including the inflicting of damage to the father's house and car. In due course PL's conduct escalated into an incident in which PL shot and killed the father and wounded the boy. The boy and his mother (as administratrix of the father's estate) sued the police for negligently failing to arrest PL prior to the shooting for various alleged offences. This court, by a majority (McCowan and Simon Brown LJ), accepted that it was arguable that, because the family was exposed to a risk from PL over and above that of the public at large, there existed a sufficiently close degree of proximity between the family and the investigating police officers amounting to a special relationship (and, by implication, although this was not said in terms, one in which a duty of care could arise): see [1993] 4 All ER 344, at 350j, per McCowan LJ. Those observations were made immediately after a reference to Glidewell LJ's remarks in *Alexandrou* as to why no duty of care was capable of arising in that case. The court therefore regarded the circumstances in *Osman* as relevantly different in character from those in *Alexandrou,* although it did not explain why. But if the court was right to conclude that there was arguably a sufficiently proximate relationship between the plaintiffs and the police in *Osman,* I would regard the present case as also one in which a like relationship of sufficient proximity could arguably be said to exist. Having said that, the assistance to be derived from *Osman* is nevertheless limited, because the

claim was struck out on the basis that the policy grounds in the *Hill* case anyway precluded the arising of a duty of care.

38. There is, therefore, obviously a compelling argument that those grounds are equally fatal to the arising of a duty of care in this case, as the judge held. In my view, however, the subsequent development of the common law has not demonstrated conclusively that that is its certain outcome. It did not, for example, preclude the prosecution of the negligence claim in *Swinney and Another v. Chief Constable of Northumbria Police Force* [1997] QB 464. In that case the plaintiffs had provided information to the police as to the identification of a criminal whom the police knew to be of a violent character. It was said that the police realised the sensitive nature of that confidential information and owed a duty of care to the plaintiffs not to allow it to become known by the criminal fraternity. The police negligently allowed it so to become known, and the claim against them followed what were said to be consequential threats of violence and arson. This court regarded it as arguable that there was sufficient proximity between the plaintiffs and the police, on the basis that, as compared with the general public, the plaintiffs were particularly at risk. The key feature of the case, which the court held gave rise to an arguable duty of care that was not trumped by policy considerations, was the confidential nature of the information that had been provided to the police and the recognition of the special position of an informant.

39. That distinction may ultimately prove fatal to the success of the present claim, but for myself I would question whether the common law ought so to draw the boundaries of principle that a claim by an informant can succeed in circumstances such as those in *Swinney* whereas a claim brought in the stark circumstances of this case cannot. I recognise, however, that the decision of the House of Lords in *Brooks v. Commissioner of Police of the Metropolis and others* [2005] 1 WLR 1495 provides no positive encouragement to that viewpoint, the decision being one in which the House applied the *Hill* policy principles in holding *inter alia* that the police owed no duty of care to Mr Brooks to afford him the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence. The view was that the claimed duty was impossible to separate from the police function of investigating crime, one that should in principle not be made the subject of investigation in civil litigation. Mr Faulks placed heavy reliance on *Brooks*.

40. The story of the common law to date would not, therefore, appear to promise a favourable outcome to the present claim. But, like Sedley LJ, I would nevertheless also not regard it as inevitably doomed to failure. First, Lord Steyn, who delivered the principal speech in *Brooks,* twice indicated, at [26] and [32], that *Hill* was not the subject of challenge in that case. Secondly, the House also indicated that what Lord Keith had said in *Hill* on policy issues may now need to be re-considered. Lord Bingham of Cornhill said, at [3], that he would "be reluctant to endorse the full breadth of what [*Hill*] has been thought to lay down,

while readily accepting the correctness of that decision on its own facts." Lord Nicholls of Birkenhead, at [6], said:

> " … in reaching this conclusion I am not to be taken as endorsing the full width of all the observations in [*Hill*]. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy."

41. Lord Steyn (with whose speech Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed) observed at [27] that since *Hill* there had been developments that affected the reasoning of that decision in part; and he said at [28] that:

> "With hindsight not every observation in *Hill's* case [1989] AC 53 can now be supported. Lord Keith of Kinkel observed, at p 63 that
>
> > 'From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it'.
>
> Nowadays, a more sceptical approach to the carrying out of all public functions is necessary."

42. Those observations in *Brooks* show that the final chapter on the destiny of claims such as the present has not yet been written. If the policy guidance in *Hill* requires re-consideration, how can it be done except in a case such as this? Can it not anyway fairly be argued that this case - in which, on the assumed facts, the police failed, despite repeated requests, to take any steps to protect the claimant from threats to his life from an identified third party– either is, or (if not) should at least be regarded as, an "exceptional" one of the type to which Lord Nicholls referred? If so, then the suggestion appears to be that it should not be automatically met with the *Hill* policy defence.

43. An additional feature of the present case is that, whilst it is brought exclusively as a claim in common law negligence, it is also one that engages considerations arising under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the right to life). The European Court of Human Rights considered Article 2 in *Osman v. United Kingdom*(1998) 29 EHRR 245. On the assumed facts in the present case, the police knew "of the existence of a real and immediate risk to life of an identified individual … from the criminal acts of a third party …", knowledge which [116] of the judgment in *Osman* shows is sufficient to impose an obligation upon a public authority, including the police, to take positive, albeit proportionate, preventive operational measures. The duty will be breached if they "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (see again [116]). Although the present claim is not brought under the Human Rights Act

1998, the substance of the complaint in it is that the police failed to take preventive operational measures that they ought reasonably to have taken.

44. *Van Colle and another v. Chief Constable of the Hertfordshire Police* [2007] 1 WLR 1821 is an example of a successful human rights claim brought against the police for failing to take such measures to protect a witness. It was unnecessary for this court in that case to review the earlier common law authorities on duties of care in negligence, although it did offer its view at [9] that any claim brought on the basis of common law negligence would have been "fraught with difficulty". At [63] it also referred to the critical distinction between (i) the solution "so far" adopted by the common law, under which the effect of *Hill* and *Brooks* is that no duty was owed to the witness, and (ii) the solution under the Convention in which there is a *positive* obligation that can be actionable at the suit of an individual, although it is one that is interpreted as not to impose an impossible or disproportionate burden on the authority.

45. The common law and the Convention therefore approach the present type of situation in a different way. Ms Williams submitted that no case, at any rate at appellate level, has yet considered whether the positive obligations imposed by Article 2 on public authorities, including the police, have or should have a relevant impact upon the development of the common law principles of negligence in this area. As it seems to me, it is arguable that they should, on the basis that where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it; if so, the common law may well require a re-visiting of the *Hill* policy considerations, at least in the context of cases raising considerations of the right to life. It appears to me odd that, in that particular context, our jurisprudence can apparently acknowledge two parallel, but potentially inconsistent, approaches to the same factual situation: (i) the common law position, which is said to excuse the police from any duty to do anything at all to assist someone such as Mr Smith, whose life they knew was being threatened by an identified third party, and (ii) the position under Article 2, under which they were arguably required to take positive, albeit proportionate, preventive measures to protect him.

46. In summary, whilst I too regard the claimant's case, in the present state of the law, as "fraught with difficulty", I would not strike it out. It should be allowed to go to trial where the facts can be found and full consideration given to the law applicable to them. I would allow the appeal.

Lord Justice Pill:

47. I agree that the appeal should be allowed and the action restored.

48. I gratefully adopt Sedley LJ's recital of the assumed facts. The claim is in negligence but the assumed facts also arguably demonstrate a breach of Article 2 of the European Convention on Human Rights ("the Convention").

49. In *Osman v The United Kingdom* [2000] 29 EHRR 245, paragraph 116, the ECtHR considered the effect of *Hill v Chief Constable of Yorkshire* [1989] 1 AC 53. The court held that there was no breach of Article 2 on the facts of that case but that what it saw as a blanket immunity granted in *Hill* was a breach of Article 6 of the Convention. In the later case of *Z v The United Kingdom*[2001] 2 FLR 612, the court appeared to retreat from the blanket immunity view of the law of England and Wales but that is not material for present purposes.

50. There is no doubt that the ECtHR would have been prepared to find a breach of Article 2 on the basis of action, or inaction, by police authorities. In *Re Officer L* [2007] UK HL 36, Lord Carswell considered the effect of *Osman* in that context. Sedley LJ has cited the relevant passage from Lord Carswell's speech at paragraph 25 of his judgment.

51. In *Van Colle v Chief Constable of Hertfordshire* [2007] 1 WLR 1821, a finding that the police were in breach of Article 2, when a man was shot dead shortly before he was due to give evidence for the prosecution at a trial for theft, was upheld in this court. Damages were awarded on the principles stated in the case law of the ECtHR. No common law claim was made and Sir Anthony Clarke MR stated, at paragraph 95, that the question for discussion did not depend on the position at common law.

52. The relationship between Convention rights and common law rights was considered in *A v B and C* [2002] 2 All ER 545. Section 6 of the Human Rights Act 1998 ("the 1998") makes it unlawful for a public authority, which includes a court, to act in a way which is incompatible with a Convention right. When considering Articles 8 and 10 of the Convention, and having referred to Section 6, Lord Woolf stated, at paragraph 4:

   > "The court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles".

53. In *D v East Berkshire Community Health NHS Trust & Others* [2005] 2 AC 373, Lord Bingham of Cornhill considered the relationship in the context of Article 8 of the Convention. When dissenting on the issue whether a common law duty of care existed on the facts of that case, Lord Bingham stated, at paragraph 50:

   > "But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult, and, in human terms, very important problems be swept up by the Convention. I prefer evolution".

In my view, there is a strong case for developing the common law action for negligence in the light of Convention rights. I accept that there have been cases where, on a consideration of Convention rights, that approach has not been followed, for example, *Wainwright v Home Office* [2004] 2 AC 406 per Lord Hoffmann, at paragraphs 33 and 34. The submission that Article 8 of the Convention created a general law of invasion of privacy was rejected. Lord Hoffmann stated at paragraph 31:

> "There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. . . . . But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works."

54. *Wainwright* was cited in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17. The ingredients necessary to establish the tort of misfeasance were in issue. Lord Rodger of Earlsferry stated, at paragraph 64:

> "The Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights, albeit not one tailor-made for this country. In general, at least, where the matter is not already covered by the common law but falls within the scope of a Convention right, a claimant can be expected to invoke his remedy under the Human Rights Act rather than to seek to fashion a new common law right".

Unlike those cases, however, the present case does not require fashioning a new common law right. It involves considering the impact of Article 2 of the Convention on a very familiar common law exercise: whether on the facts a duty of care exists and whether there is a breach of it. Whether it is fair, just and reasonable to impose a duty of care can readily accommodate the existence of a right to life.

55. In my view, it is appropriate to absorb the rights which Article 2 protects into the long-established action of negligence. A claim in negligence should, on appropriate facts, have regard to the duties imposed and standards required by Article 2 of the Convention which, as, Lord Carswell recognised in *Re Officer L*, include safeguards for the police.

56. The case of *Van Colle* demonstrates that an action in damages may be based on Article 2 of the Convention. Given the structure of our legal system, as now constituted, I do not consider it acceptable, in circumstances such as the present, to place a claim under Article 2 and a claim in negligence in quite separate compartments, each with its own limitation period. The two rely on the same facts and, essentially, the same considerations arise; the requirement to protect human

life but in the context described by Lord Keith in *Hill*, at page 63, cited by Sedley LJ at paragraph 9. In *Re Officer L,* Lord Carswell, at paragraph 21, considered the standard required by Article 2. He stated:

> "The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available".

57. I consider it unacceptable that a court, bound by Section 6 of the 1998 Act, should judge a case such as the present by different standards depending on whether or not the claim is specifically brought under the Convention. The decision whether a duty of care exists in a particular situation should in a common law claim require a consideration of Article 2 rights.

58. The general time limit for a Convention claim is a period of one year beginning with the date on which the act complained of took place (Section 7(5) of the 1998 Act). On the same facts, and applying the same policy considerations, the court's conclusion should not depend on whether the claim is brought 10 months after or 14 months after the acts complained of.

59. I agree with Sedley LJ and Rimer LJ that the claim is not doomed to failure. Beyond that, I would not attempt to direct how the case is to be tried and do not necessarily accept that the test to be applied is that mentioned by Sedley LJ in the second part of paragraph 27 of his judgment (nor I think does he). Whether a duty existed, and whether there has been a breach, will depend on the facts found and further analysis of the law in the light of them. The ECtHR stated in *Osman*, at paragraph 116: "This is a question that can only be answered in the light of all the circumstances of any particular case".

60. Sedley LJ has given examples, in the concluding paragraphs of his judgment, of distinctions the soundness of which it may become necessary to consider. I agree that there are problems ahead, including those he identifies. I do not consider it is appropriate to attempt to resolve them, or to indicate, at this stage, the conclusions to be drawn from particular findings of fact.

61. The appeal is allowed.