HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 50

on appeal from: [2007]EWCA Civ 325
and [2008] EWCA Civ 39

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Chief Constable of the Hertfordshire Police (Original Appellant and Cross-respondent) *v* Van Colle (administrator of the estate of GC (deceased)) and another (Original Respondents and Cross-appellants)
Smith (FC) (Respondent) *v* Chief Constable of Sussex Police (Appellant)

Appellate Committee
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Lord Hope of Craighead
Lord Phillips of Worth Matravers
Lord Carswell
Lord Brown of Eaton-under-Heywood

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Third Interveners (Equality & Human Rights Commission)
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HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Chief Constable of the Hertfordshire Police (Original Appellant) and Cross-respondent) *v* Van Colle (administrator of the estate of GC (deceased)) and another (Original Respondents and Cross-appellants)

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[2008] UKHL 50

LORD BINGHAM OF CORNHILL

My Lords,

1. In these two appeals, heard together, there is a common underlying problem: if the police are alerted to a threat that D may kill or inflict violence on V, and the police take no action to prevent that occurrence, and D does kill or inflict violence on V, may V or his relatives obtain civil redress against the police, and if so, how and in what circumstances?

2. The two appeals arise on different facts and in a different way:

(1) In the first (*Van Colle*) case the threat was made by a man known in the case as Daniel Brougham against Giles Van Colle ("Giles") and culminated in the murder of Giles by Brougham. In the second (*Smith*) case, the threat was made against the respondent (Stephen Paul Smith) by his former partner (Gareth Jeffrey) and culminated in the infliction of serious injury on Mr Smith by Jeffrey.

(2) In the *Van Colle* case the claimants are Giles' parents, suing on behalf of his estate and on their own behalf. In the *Smith* case, Mr Smith is the only claimant, suing on his own behalf.

(3) In the *Van Colle* case, the claim is brought under sections 6 and 7 of the Human Rights Act 1998, in reliance on articles 2 and 8 of the European Convention on Human Rights, and no claim is made under the common law. In the *Smith* case the claim is made under the common law alone, and no claim is made under the Human Rights Act.

(4) In the *Van Colle* case there has been a full trial in which judgment was given for the claimants and damages awarded, and the Court of Appeal has upheld that judgment subject to a reduction in the damages. In the *Smith* case there has been no trial: Mr Smith's proceedings were struck out at first instance on the application of the appellant Chief Constable but were restored and remitted for trial on Mr Smith's successful appeal to the Court of Appeal. Thus in *Van Colle* there has been a finding of violation of article 2. In *Smith* the question of violation or breach does not at this stage arise: the only question is whether the Chief Constable owes a duty; only if it is held that he does or may will the question of breach arise, but that is not a question now before the House in *Smith*. Thus the House must consider the susceptibility of the police to claims for civil redress both at common law and under the 1998 Act.

Van Colle: the facts

3. In March 1999 DC Ridley of the Hertfordshire Police arrested Brougham (under another name) on suspicion of theft from an optical firm called "Southern Counties". Brougham was released without charge.

4. From September to December 1999 Giles employed Brougham as a technician dispenser at his optical practice in Mill Hill. After Brougham had been working for Giles for some weeks they had an argument which culminated in a physical confrontation. On Christmas Eve 1999 Brougham did not report for work, claiming to be unwell, and never returned. His departure was followed by some contentious correspondence.

5. On 17 February 2000 DC Ridley re-arrested Brougham on suspicion of theft from Southern Counties and searched Brougham's garage. He found a number of items of optical equipment which he suspected of being stolen. He showed these to Giles who confirmed that some of them were his and that he had not given Brougham permission to take them. He made statements to this effect. On 23 April 2000

Brougham was again arrested and was charged with three offences of theft and obtaining property by deception. He was bailed unconditionally to attend Stevenage Magistrates' Court. The victims were said to be Southern Counties, Giles and Alpha Optical, a company owned and run by Mr Peter Panayiotou. The total amount involved in the charges was about £4000. The items stolen from Giles were worth about £500.

6. On 10 August 2000 Brougham telephoned Mr Panayiotou and offered to pay for the equipment he had taken from Alpha. An arrangement was made for Brougham to meet a representative of Alpha the next day to hand over the money but Brougham cancelled it. Mr Panayiotou reported this to DC Ridley who took statements. Somewhat earlier Brougham offered a Mr Heward of Southern Counties £1000 not to give evidence, but Mr Heward did not report this approach and DC Ridley did not learn of it at the time.

7. On 24 September 2000 Giles' car was set on fire outside his parents' home in Wembley. A firefighter who attended told the family that the fire had been started accidentally by an electrical fault and the local police did not regard the fire as suspicious. Mr Van Colle did not report the incident to DC Ridley. In a letter dated 10 November 2000 the Van Colles' insurers passed on an investigator's conclusion that the fire was consistent with a malicious vandal attack, but the Van Colles did not pass on this information to DC Ridley.

8. On 13 October 2000 Brougham telephoned Mr Panayiotou and offered him a bribe not to give evidence. Mr Panayiotou immediately reported this to DC Ridley.

9. Also on 13 October Brougham telephoned Giles at his practice and said words to the effect: "I know where you live. I know where your businesses are and where your parents live. If you don't drop the charges you will be in danger". Giles was shocked by the call and told a customer he had just received a death threat. He dialled 999 and spoke to DC Campbell at Colindale Police Station who recorded:

> "the caller said words very like the following: Drop the charges, we know where you live and where your parents live and where your business is. You'll be in trouble (might have said danger) if you don't … The voice

> sounded to the victim like a former thieving employee [Brougham] … currently under investigation by Dave Ridley of CID at Hitchin ... ”

DC Campbell advised Giles to report the call to DC Ridley, which he did at some point around 16 – 18 October 2000. On 19 October DC Ridley took statements from Giles and Mr Panayiotou.

10. On about 17 October Brougham visited a Mr Atkinson who was a witness in the Southern Counties case and offered him a bribe of £400 not to give evidence. Mr Atkinson refused, but did not report the approach, of which DC Ridley was unaware at the time.

11. On 28 October 2000 Mrs Panayiotou’s car was set alight and suffered minor damage. The fire was put out by a neighbour and Mr Panayiotou did not learn of the incident until a day later. An AA inspector concluded the fire might have been caused by a firework.

12. In the early hours of 29 October 2000 there was a fire at Mr Panayiotou’s business premises. The fire was in an outbuilding used to store old equipment and spare parts. Mr Panayiotou told the police that the key was often left in the door as there was nothing of value inside. Mr Panayiotou was told by fire officers who attended that this fire and that affecting his wife’s car were accidental, and his understanding remained that there was no evidence of arson. But Mr Panayiotou was upset and reported the fires to DC Ridley. He told DC Ridley of the fire officers’ view that the fires were accidental, but asked if DC Ridley thought Brougham could be responsible. DC Ridley said that if he had concerns Mr Panayiotou should contact the Metropolitan Police, which he did. He told the officer investigating the fire at his business premises that there was nothing of value in the building and that “he could think of nobody who would do this or any reason for it to be done”. A fire officer (Mr Hodgens) attended the scene. According to contemporaneous records made by the police, Mr Hodgens was unable to confirm that the fire was a deliberate attack but said that it was possibly arson. The fire brigade had had to pull down most of the roof because the structure was unsound, and the evidence was accordingly not preserved. He repeated his opinion that he could not say whether the fire had been started deliberately. The Metropolitan Police officer in charge closed the investigation, noting that there was no evidence the fire had been started maliciously.

13. Mr Hodgens later made a statement inconsistent with his opinion recorded at the time. Later also, a forensic scientist with the Metropolitan Laboratory Forensic Science Service concluded that Mrs Panayiotou's car had been deliberately ignited, and that two wheel arches of Giles' car had been separately ignited. These opinions were not available at the time.

14. In preparation for the trial, due to begin on or about 27 November at Luton Crown Court, the Crown Prosecution Service, on 9 November 2000, served notices of additional evidence on Brougham. These contained the statements taken from Giles and Mr Panayiotou on 19 October.

15. Also on 9 November, Brougham telephoned Giles again. On this occasion Giles had no doubt that Brougham was the caller. Brougham said: "Give Alpha Optical a call and get them to drop the charges, you motherfucker ... Do you hear me? Do you hear me?". Giles did not respond and Brougham put the phone down. Giles then rang and left a message on DC Ridley's answerphone.

16. On 19 November 2000 Giles wrote an account of this call by Brougham and faxed it to DC Ridley on 20 November. DC Ridley saw it on 21 November and on 22 November spoke to Giles, arranging to meet him the next day, 23 November. At this meeting DC Ridley was intending to take a full statement from Giles and arrest Brougham.

17. At 7.25 pm on 22 November, as Giles was leaving work, he was shot dead by Brougham, who was later convicted of murder. The evidence at the trial suggested that Brougham had acted in association with others. Before his conviction of murder Brougham had three relatively minor convictions: for common assault (1993), disorderly behaviour (1999) and dishonesty (2000). He had been fined and ordered to undertake community service.

18. A disciplinary tribunal found DC Ridley guilty of failing to perform his duties conscientiously and diligently in connection with improper approaches to witnesses. It found that "the events ... amounted to an escalating situation of intimidation in respect of the witnesses Panayiotou and Van Colle. DC Ridley was in a unique position during this time with the fullest picture of the developing situation". DC Ridley was fined 5 days' pay.

19. Giles' parents issued these proceedings in November 2003, relying (as has been said) on the 1998 Act and the European Convention alone. A trial took place before Wakerley J in June 2005 and judgment was reserved. The judge, however, died before composing or delivering a judgment. There was little dispute on the evidence, and the parties sensibly agreed to conclude the trial before a new judge on the basis of the existing transcripts. This hearing took place before Cox J, who heard no fresh evidence, in December 2005 and on 10 March 2006 she gave judgment in favour of the claimants: [2006] EWHC 360 (QB), [2006] 3 All ER 963. She found for the claimants on all disputed points of law and ordered the Chief Constable to pay compensation in a total sum of £50,000, made up of £15,000 in respect of Giles' distress in the weeks leading up to his death and £35,000 for the claimants' own grief and suffering. The Chief Constable's appeal to the Court of Appeal (Sir Anthony Clarke MR, Sedley and Lloyd LJJ) was dismissed for reasons given in a judgment of the court delivered by the Master of the Rolls: [2007] EWCA Civ 325, [2007] 1 WLR 1821. But the award to the first claimant as administrator of Giles' estate was reduced to £10,000, and the award to the claimants to £7,500 each, a total of £25,000.

Smith: the facts

20. Since the issue in this case has arisen on an application to strike out, the facts pleaded by the claimant (Mr Smith) are to be treated as proved. They are, in summary, as follows.

21. Mr Smith and Gareth Jeffrey lived together as partners. On 21 December 2000 Jeffrey assaulted Mr Smith at Abingdon, after Mr Smith had asked for a few days' break from their relationship. The assault was reported to the police, who arrested Jeffrey and detained him overnight. No prosecution followed.

22. After a time apart, during which Mr Smith moved to Brighton, Jeffrey renewed contact and stayed with Mr Smith on about two occasions in December 2002. Jeffrey wanted to resume their relationship. Mr Smith did not.

23. From January 2003 onwards Jeffrey sent Mr Smith a stream of violent, abusive and threatening telephone, text and internet messages, including death threats. There were sometimes ten to fifteen text messages in a single day. During February 2003 alone there were some

130 text messages. Some of these messages were very explicit: "U are dead"; "look out for yourself psycho is coming"; "I am looking to kill you and no compromises"; "I was in the Bulldog last night with a carving knife. It's a shame I missed you".

24. On 24 February 2003 Mr Smith contacted Brighton police by dialling 999. He reported his earlier relationship with Jeffrey, the previous history of violence and Jeffrey's recent threats to kill him. Two officers were assigned to the case and they visited Mr Smith that afternoon. He again reported his previous relationship with Jeffrey (including the earlier violence) and the threats. The officers declined to look at the messages (which Mr Smith offered to show them), made no entry in their notebooks, took no statement from Mr Smith and completed no crime form. They told Mr Smith that it would be necessary to trace the calls and that he should attend at Brighton Police Station to fill in the appropriate forms. Later that evening Mr Smith received several more messages from Jeffrey threatening to kill him.

25. Mr Smith filled in the forms the next day. The information he provided to the police included Jeffrey's home address and reference to the death threats he had received. Mr Smith then went to London, since Jeffrey had said he was coming to Brighton. He contacted the Brighton Police from London to check on progress, but was told it would take four weeks for the calls to be traced. The messages continued. One read "I'm close to u now and I am gonna track u down and I'm not gonna stop until I've driven this knife into u repeatedly". Mr Smith went to Saville Row Police Station to report his concern. An officer there contacted the Brighton Police and advised Mr Smith that the case was being dealt with from Brighton and he should speak to an inspector there when he returned home. On return to Brighton on 2 March 2003 Mr Smith told an inspector that he thought his life was in danger and asked about the progress of the investigation. He offered to show the inspector the threatening messages he had received, but the inspector declined to look at them and made no note of the meeting. He told Mr Smith the investigation was progressing well, and he should call 999 if he was concerned about his safety in the interim. On 10 March 2003 Mr Smith replied to a communication he had received from the police that day, giving the telephone numbers from which Jeffrey had been sending the text messages. He received a further text message from Jeffrey saying "Revenge will be mine".

26. Also on 10 March Jeffrey attacked Mr Smith at his home address with a claw hammer. He suffered three fractures of the skull and

associated brain damage, and has suffered continuing injury, both physical and psychological. Jeffrey was arrested at his home address (provided by Mr Smith to the police) on 10 March. He was charged and in March 2004 he was convicted of making threats to kill and causing grievous bodily harm with intent. He was sentenced to 10 years' imprisonment with an extended period on licence.

27. Mr Smith issued proceedings against the Chief Constable in the Brighton County Court on 2 March 2006. Following service of a defence the Chief Constable applied to strike out the claim as disclosing no reasonable grounds for bringing it or alternatively for summary judgment against Mr Smith on the ground that he had no real prospect of succeeding on the claim. For reasons given in a considered judgment delivered on 31 January 2007, His Honour Judge Simpkiss acceded to the first of these applications and struck out the claim. Mr Smith appealed, and on 5 February 2008 the Court of Appeal (Pill, Sedley and Rimer LJJ) allowed his appeal and remitted the case to the county court for hearing: [2008] EWCA Civ 39.

Van Colle: the law

28. Article 2 of the European Convention provides, in paragraph 1:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ..."

According to what has become a conventional analysis, this provision enjoins each member state not only to refrain from the intentional and unlawful taking of life ("Thou shalt not kill") but also to take appropriate steps to safeguard the lives of those within its jurisdiction: *Osman v United Kingdom* (1998) 29 EHRR 245, para 115. The state's duty in this respect (as this para of the judgment of the Strasbourg court in *Osman* makes clear) includes but extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 may also, "in certain well-defined circumstances", imply a positive obligation on national authorities to take preventative measures to protect an individual whose life is at risk from the criminal acts of another. The scope of this last obligation was the subject of dispute in *Osman*, and lies at the heart of this appeal.

29. In *Osman*, para 116, the court defined the circumstances in which the obligation arises:

> "... it must be established to [the court's] 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."

Every ingredient of this carefully drafted ruling is, I think, of importance.

30. The appellant Chief Constable, and the Secretary of State, relied on the ruling of my noble and learned friend Lord Carswell in *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, para 20, that the test of real and immediate risk is one not easily satisfied, the threshold being high, and I would for my part accept that a court should not lightly find that a public authority has violated one of an individual's fundamental rights or freedoms, thereby ruling, as such a finding necessarily does, that the United Kingdom has violated an important international convention. But I see force in the submission of Mr Owen QC, for the Equality and Human Rights Commission, that the test formulated by the Strasbourg court in *Osman* and cited on many occasions since is clear and calls for no judicial exegesis. It is moreover clear that the Strasbourg court in *Osman*, para 116, roundly rejected the submission of Her Majesty's Government that the failure to perceive the risk to life in the circumstances known at the time or to take preventative measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. Such a rigid standard would be incompatible with the obligation of member states to secure the practical and effective protection of the right laid down in article 2. That article protected a right fundamental in the scheme of the Convention and it was sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge.

31. It is plain from *Osman* and later cases that article 2 may be invoked where there has been a systemic failure by member states to enact laws or provide procedures reasonably needed to protect the right to life. But the article may also be invoked where, although there has

been no systemic failure of that kind, a real and immediate risk to life is demonstrated and individual agents of the state have reprehensibly failed to exercise the powers available to them for the purpose of protecting life. *Kontrová v Slovakia* (Appn no 7510/04, 24 September 2007, unreported) is such a case. It was acknowledged that the domestic authorities had failed to take appropriate positive action to protect the lives of the applicant's children (para 47) and the court agreed with the government that there had been a violation of article 2 (para 55).

32. In its formulation of the "real and immediate risk" test the Strasbourg court, in para 116 of its *Osman* judgment, laid emphasis on what the authorities knew or ought to have known "at the time". This is a crucial part of the test, since where (as here) a tragic killing has occurred it is all too easy to interpret the events which preceded it in the light of that knowledge and not as they appeared at the time. In the present case the Court of Appeal expressly warned itself against the dangers of hindsight (in para 13 of their judgment) but I do not think that the judge, in the course of her lengthy judgment, did so. Mr Faulks QC, for the Chief Constable, was in my view right to submit that the court should endeavour to place itself in the chair of DC Ridley and assess events as they unfolded through his eyes. But the application of the test depends not only on what the authorities knew, but also on what they ought to have known. Thus stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations: it is then to be treated as knowing what such further enquiries or investigations would have elicited.

33. In summarising the legal principles applicable to this case the trial judge included (at para 56(5) of her judgment) the following:

> "Where it is the conduct of the state authorities which has itself exposed an individual to the risk to his life, including for example where the individual is in a special category of vulnerable persons, or of persons required by the state to perform certain duties on its behalf which may expose them to risk, and who is therefore entitled to expect a reasonable level of protection as a result, the *Osman v UK* threshold of a real and immediate risk in such circumstances is too high."

This led the judge to regard Giles (para 91) as being, by virtue of his status as a witness, in a special category of persons separate and apart

from members of the public generally or from a broad section of the general public. As a prosecution witness who was threatened and intimidated by a defendant he was someone at special and distinctive risk of harm. She paid much attention to the Chief Constable's protocol on witness intimidation, which had not been brought to DC Ridley's attention. The Court of Appeal quoted and approved the judge's statement of principle (paras 75-76) and also attached importance (para 76) to the fact that Giles was not simply a member of the community, like Mr Osman, but was to be a witness for the prosecution at a criminal trial.

34. The principle that a test lower than the ordinary *Osman* test is appropriate where a threat to the life of an individual derives from the state's decision to call that individual as a witness was based on a passage in the judgment of the Court of Appeal in *R(A and others) v Lord Saville of Newdigate and others* [2001] EWCA Civ 2048, [2002] 1 WLR 1249. The issue in that case was whether soldiers or former soldiers should be called to give evidence to the "Bloody Sunday" Inquiry in Londonderry, where their lives were at risk from terrorist violence, or in some other place where the risk was smaller. In upholding the Divisional Court's decision that the witnesses should not be required to testify in Londonderry, the Court of Appeal referred to the *Osman* test of "real and immediate" risk and said (in para 28 of its judgment):

> "Such a degree of risk is well above the threshold that will engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context."

While I have no doubt that the Court of Appeal's decision in that case was correct, I would respectfully question whether that observation was correct.

35. In *Osman* the Strasbourg court propounded one test, and as Lord Carswell said (with the concurrence of all members of the House) in *In re Officer L*, above, para 20, "the standard is constant and not variable with the type of act in contemplation ...". As the case law shows, the *Osman* test falls to be applied in situations widely different from the present, as illustrated by cases such as *Edwards v United Kingdom* (2002) 35 EHRR 487 and *Öneryildiz v Turkey* (2002) 39 EHRR 253, (2004) 41 EHRR 325. Thus the *Osman* test remains the same, but the

crucial question is one which can only be answered in the light of all the circumstances of any particular case (*Osman*, para 116).

36. The central question to be asked in this case is, I think, this: should DC Ridley, making a reasonable and informed judgment on the facts and in the circumstances known to him at the time, have appreciated that there was a real and immediate risk to the life of Giles? If he should, there was a breach of article 2 since the officer did not take appropriate steps to avert the risk. Since the courts below misdirected themselves in law by attaching undue significance to Giles' status as a witness, and treating the *Osman* test as lowered on that account, it is incumbent on the House to answer the central question, and to do that it is necessary to review the facts:

(1) The offence of theft from an employer, Giles, with which Brougham was charged was, in the catalogue of acquisitive crime, minor. The other two offences, although involving goods of greater value, were also minor. An experienced detective constable would not see this as a big case, or as in any way unusual. He would see custody as a possible, but improbable, penalty if Brougham were convicted.

(2) Brougham's record was that of a petty offender, the only hint of violence in his record a seven year-old conviction of common assault. He could not have appeared to be a man given to violence. There was nothing before Giles' death to suggest that Brougham was a member of any gang or had criminal associates.

(3) Brougham's first approach to a witness, to Mr Heward of Southern Counties, was not reported to DC Ridley. It is thus, as the Court of Appeal held (para 19), "irrelevant for present purposes".

(4) Brougham's approach to Mr Panayiotou on 10 August, offering to pay for the equipment he had taken and arranging to do so, was reported to DC Ridley. But this approach, if irregular, was not sinister, and not suggestive of violence to Mr Panayiotou, let alone Giles.

(5) The fire which damaged Giles' car on 24 September was not reported to DC Ridley. It was thus entirely irrelevant to his state of mind at the time.

(6) The bribe offered by Brougham to Mr Panayiotou on 13 October 2000 was serious criminal conduct, suggesting that Brougham was willing to go to some lengths to avoid conviction. But it did not suggest, and might well have appeared inconsistent with, a resort

to violence. It could not have been interpreted as any threat to the life or security of Giles.

(7) Brougham's telephone call to Giles on 13 October 2000 was on any showing an attempt to intimidate Giles into dropping the charges. Brougham was thought to be, although not positively identified as, the caller, and although there was no explicit death threat it is not surprising that Giles took it as such. However, having telephoned the local police station at once and been advised to call DC Ridley, Giles took some days to do so. DC Ridley then took a statement. In the context of this case, the prospect of the threat being implemented could reasonably be seen as remote.

(8) Brougham's offer of a bribe to Mr Atkinson, a witness in the Southern Counties case, on about 17 October was not reported to DC Ridley, and was thus irrelevant to his state of mind at the time.

(9) The fire which damaged Mrs Panayiotou's car on 28 October was thought by Mr Panayiotou at the time to have been possibly accidental and by an AA inspector to have been possibly caused by a firework. If the fire were thought to have been malicious, and were attributed to Brougham, it would again have suggested that Brougham was willing to go to some lengths to avoid conviction, but could scarcely have suggested a threat to the life or security of Giles.

(10) The fire at Mr Panayiotou's business premises on 29 October was investigated by fire officers and the Metropolitan Police, none of whom concluded at the time that the fire had been started deliberately. Even if the fire had been thought to have been malicious, and to have been started by Brougham, the burning of an unlocked outbuilding used to store old equipment and spare parts could scarcely have been seen as a threat to the life of anyone, and certainly not Giles.

(11) The telephone call made by Brougham to Giles on 9 November 2000 was unpleasant in content and aggressive in tone, but it contained no threat. This was the last contact between Brougham and Giles before their fatal encounter.

37. After Giles' death a full-blown murder investigation was launched, in the course of which different views were expressed on the cause and significance of the Panayiotou fires. This is information which, it is said, DC Ridley ought to have known since if he had pursued his inquiries into the fires at the time he could have unearthed this material then. He was himself prepared to accept that he should

have done so. Any conscientious officer, mindful of the tragedy which ensued, would no doubt have reproached himself for failing to take all the steps which the wisdom of hindsight might suggest. But it is unrealistic to suppose that, at the time, a minor case of theft could have been thought to merit an intensive investigation of the kind which properly follows a murder.

38. In argument, Ms Carss-Frisk QC, for the Van Colles, laid considerable emphasis on the findings made by the disciplinary panel adverse to DC Ridley. The charge which he faced was that he failed to perform his duties conscientiously and diligently in connection with improper contacts with witnesses by Brougham. It was charged against him that he should have investigated offences of intimidation more fully, analysed the evidence more carefully, taken account of the guidelines on witness intimidation and considered whether to arrest Brougham. The panel found that there was sufficient evidence to justify the arrest of Brougham for attempting to pervert the course of justice and that he should have been arrested. Notably absent is any suggestion that DC Ridley should have apprehended any imminent threat to the life or safety of Giles. That the panel did not regard his delinquency in such a way is evidenced by their reference to his errors of judgment and by their imposition of a very modest penalty.

39. Both the judge (para 20) and the Court of Appeal (para 28) quoted answers given by DC Ridley in cross-examination before Wakerley J at the trial when he said that the question of the protection of Giles never really came into his mind. The reason for this is plain: that he did not at the time perceive a real and immediate risk to Giles' life. He was proposing to arrest Brougham on 23 November, but this was because there was evidence to support charges of witness intimidation; it was not to protect Giles against apprehended violence. The question is whether, making a reasonable and informed judgment on the facts and circumstances which were or should have been known to him at the time, he should have apprehended such violence. The fact that Giles was a witness in a forthcoming Crown Court trial was of course a relevant fact, but not one of great weight having regard to the minor character of the charges and the unlikelihood of a severe penalty. Approaching the matter in this way, and applying the standard *Osman* test, I cannot conclude that the test was met in this case. If a comparison be made with *Osman*, the warning signs in this case were very much less clear and obvious than those in *Osman*, which were themselves found inadequate to meet the test.

40. Ms Carss-Frisk sought to contend that the Van Colles' claim under article 8 could succeed even if the claim under article 2 failed. But the police did not themselves interfere with Giles' right to respect for his family life and his personal autonomy. Thus any complaint must, I think, rest on DC Ridley's failure to prevent the interference by Brougham, and article 2 is clearly the article under which this claim is to lie if it is to lie at all.

41. Having reached these conclusions, I do not think it necessary or helpful to address, unauthoritatively, a number of other issues which were argued. I would allow the Chief Constable's appeal, set aside the order of the Court of Appeal, and enter judgment for the Chief Constable. I would invite the parties (other than the interveners) to make written submissions on costs within 14 days.

Smith: the law

42. The common law of negligence seeks to define the circumstances in which A is held civilly liable for unintended harm suffered by B. Liability turns, in the circumstances of the particular case, on the relationship between A and B. Usually that relationship is a direct one, as where A fails to treat or advise B with the degree of care reasonably to be expected in the circumstances, or where A drives carelessly and collides with B. But the relationship may be more indirect, and in some circumstances A may be liable to B where harm is caused to B by a third party C, if A should have prevented C doing such harm and A failed to do so. Of this indirect source of liability *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 is the classic example. In some cases A's liability has been found to depend on an assumption of responsibility by A towards B, in some on the finding of a special relationship between A and C, by virtue of which A was responsible for controlling C: see *Dorset Yacht*, above; *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 272. Currently, however, the most favoured test of liability is the three-fold test laid down by the House in *Caparo Industries plc v Dickman* [1990] 2 AC 605, by which it must be shown that harm to B was a reasonably foreseeable consequence of what A did or failed to do, that the relationship of A and B was one of sufficient proximity, and that in all the circumstances it is fair, just and reasonable to impose a duty of care on A towards B.

43. In the present case, Mr Smith's case is that on the information available to them the Sussex Police owed him a duty to take reasonable

steps to prevent Jeffrey causing him injury. The argument has centred on the applicability of the *Caparo* test. It was not argued by the Chief Constable before the judge that the type of harm suffered by Mr Smith was not reasonably foreseeable. The argument focused on proximity and the threefold *Caparo* test. The judge held (para 49 of his judgment) that on the proximity issue Mr Smith was certain to fail and that he would certainly fail on public policy grounds. Giving somewhat differing reasons, the three members of the Court of Appeal considered it arguable that, if the pleaded facts were established, the Chief Constable owed a duty of care to Mr Smith, and allowed the appeal on that basis.

44. Differing with regret from my noble and learned friends, I consider that the Court of Appeal were right, although I would go further: if the pleaded facts are established, the Chief Constable did owe Mr Smith a duty of care. The question whether there was a breach of that duty cannot be addressed until the defence is heard. I would hold that if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed. I shall for convenience of reference call this "the liability principle".

45. I do not consider the liability principle to be in any way inconsistent with the ratio of either *Hill v Chief Constable of West Yorkshire* [1989] AC 53 or *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495, the two decisions of the House on which the Chief Constable most strongly relies.

46. The facts of *Hill* are very familiar and need not be rehearsed. The plaintiff's essential complaint was that the West Yorkshire Police had investigated the spate of killings by Peter Sutcliffe in a negligent manner and that if they had performed their duties with appropriate care Sutcliffe would have been detected and detained before he had murdered the plaintiff's daughter. Thus at the time to which the complaint related, there was no identified suspect (even if there should have been) and no specific threat to the life or physical safety of the plaintiff's daughter. The facts of the case fell well outside the liability principle.

47. The facts of *Brooks* are less well known. Duwayne Brooks was a friend of Stephen Lawrence and was present when the latter was abused and murdered. He also was abused and attacked. He was deeply traumatised by the experience and Sir William Macpherson of Cluny in his Report on the Stephen Lawrence Inquiry (1999)(Cm 4262-I) was very critical of the way in which Brooks had been treated, as he was of the manner in which the investigation had been conducted. But there was at the time to which his complaint related no identified suspect, and there was no evidence of any threat at all to the life or physical safety of Brooks. His pleaded case was that whilst the attackers remained at large he was frightened for his own safety, not least because he lived in the same locality (see [2005] 2 All ER 489, 511), but he did not suggest that anyone had threatened him. The facts of this case also fall well outside the liability principle.

48. Much attention has rightly been directed to the public policy considerations which weighed heavily with the House in *Hill*, leading to the decision that no duty of care should be imposed. They were listed by Lord Keith of Kinkel at pages 63-64 of his opinion. His first reason was that although in some situations recognition of a potential duty of care might tend towards a raising of standards, no such incentive was necessary in the case of the police. It is unnecessary to discuss this ground further, since in *Brooks* Lord Steyn recognised (para 28) that it could not now be supported. Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed with his opinion (paras 37 and 39). I expressed unwillingness to endorse the full breadth of what the House had been understood to decide in *Hill* (para 3). Lord Nicholls of Birkenhead similarly did not wish to be taken as endorsing the full width of all the observations in *Hill* (para 6).

49. Lord Keith's second reason was that in some instances the imposition of liability might lead to the exercise of a function being carried on in a detrimentally defensive frame of mind, and the possibility of this happening in relation to the investigative operations of the police could not be excluded. This was, with respect, an entirely apt observation on the facts of *Hill*, where the plaintiff's complaint was directed to the investigative operations of the police. It is not, however, easy to see how acceptance of the liability principle could induce a detrimentally defensive frame of mind. All that would be called for in the first instance would be a reasonable assessment of the threat posed to an identified potential victim by an identified person.

50. Lord Keith's third reason was that if potential liability were to be imposed it would not be uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that the criminal went on to commit further crimes, which might raise issues touching deeply on the conduct of a police investigation. That, as Lord Keith observed, is what the plaintiff in *Hill* sought to do, and the observation was again apt on the facts of the case. But it has little bearing on the liability principle, which calls for no more than an appropriate response to a specific and apparently credible threat of death or physical injury by an identified person to an identified victim, a situation quite unlike those which fell to be considered in cases such as *Clough v Bussan* [1990] 1 All ER 431 and *Ancell v McDermott* [1993] 4 All ER 355.

51. Lord Keith's fourth reason, closely linked with the third, was that if actions were allowed to be brought a great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence and the attendance of witnesses at the trial, which would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. This reason was elaborated by Lord Steyn in para 30 of his opinion in *Brooks* where he said:

> "But the core principle of *Hill's* case has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill's* case, arose for decision today I have no doubt that it would be decided in the same way. It is, 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: 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*, 4th ed reissue (1999), vol 36(I), para 524; *The Laws of Scotland, Stair Memorial Encyclopaedia*, vol 16, (1995), para 1784; *Moylan*,

> *Scotland Yard and the Metropolitan Police*, (1929), p 34. 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."

52. It is evident that both Lord Keith and Lord Steyn were addressing the situations raised on the facts before the House: in *Hill*, an ex post facto inquiry into the conduct of a police investigation (see also the observations of Lord Templeman at pp 64-65); in *Brooks*, a duty to give appropriate protection, support, assistance and treatment to witnesses and alleged victims of crime (see paras 2, 5, 12, 33). Both decisions, on their facts, were in my opinion correct. But neither conflicts with the liability principle, acceptance of which does not distract the police from their primary function of suppressing crime and apprehending criminals but calls for reasonable performance of that function.

53. Lord Keith did not in *Hill* absolve the police from liability in negligence. In the course of his opinion (at p 59) he said:

> "There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: see *Reg v Dytham* [1979] QB 722, where a

> constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene."

The cases cited by Lord Keith are instructive. In *Knightley v Johns* [1982] 1 WLR 349 a police inspector was held by the Court of Appeal to be liable when he failed to close a tunnel after an accident and negligently ordered a constable to ride his motor cycle through the tunnel against the flow of traffic, with the result that the constable was injured. The inspector was held liable to the constable, and to that extent the decision is comparable with the later decision in *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, but it can scarcely be supposed that police officers owe duties of care only to each other. Such was not the case in *Gibson v Orr* 1999 SC 420, where the defendant was held vicariously liable to a member of the public. In *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, a decision of Taylor J, the Chief Constable was held to be negligent where officers used CS gas without readily available fire-fighting equipment. This decision would be inconsistent with a rule that operational decisions are immune from scrutiny. In *R v Dytham* [1979] QB 722 the charge against the constable, tried and convicted on indictment, was that he had wilfully omitted to take any steps to preserve the Queen's peace or to protect a man beaten to death before his eyes. It would suggest a defect in our law if a constable were criminally liable in such circumstances but owed the victim no common law duty of care.

54. A general rule of immunity subject to very limited exceptions would be hard to reconcile with earlier statements of high authority, albeit made in a different legal and factual context. Thus in *Glamorgan Coal Company Ltd v Glamorganshire Standing Joint Committee* [1916] 2 KB 206, 229, Pickford LJ said:

> "[The defendants] are the police authority and have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong ..."

This statement was expressly approved by Viscount Cave LC (pp 277-278), Lord Shaw of Dunfermline (p 288) and Lord Carson (p 291) in *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270,

but their Lordships in that case went further. The Lord Chancellor (p 277) said:

> "No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; ... "

Viscount Finlay (at pp 285, 287) spoke to similar effect:

> "There is no doubt that it is the duty of the police to give adequate protection to all persons and to their property ... Beyond all question it is the duty of the police to give protection to the persons and property of all His Majesty's subjects."

Lord Carson (at p 292) agreed with the Lord Chancellor's formulation, although preferring to lay down that it was the duty of the police to take all steps that were necessary for the purposes mentioned by the Lord Chancellor. Lord Blanesburgh (at p 306) referred to the absolute duty of the police to afford protection to life and property, limited only by the extent of their available resources and by the urgency of competing claims upon their services.

55. These statements would support a principle broader than the liability principle I have formulated. But the law attaches particular importance to the protection of life and physical safety, and I do not think it necessary for present purposes to analyse in detail the cases on property damage. The Chief Constable relied on *Alexandrou v Oxford* [1993] 4 All ER 328, which related to a burglary which the police allegedly failed to prevent. *Kent v Griffiths* [2001] QB 36, by contrast, concerned a failure by the ambulance service to act promptly, with the result that serious injury was suffered: the Court of Appeal held that *Alexandrou* should be confined to its own facts (paras 21, 26) and upheld the trial judge's decision that a duty of care had been owed in the case before it. The Court of Appeal's judgment in *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 was very largely concerned with the prevention of damage to property. I would wish to reserve my opinion on its correctness in the light of later authority.

56. There are two authorities which I should consider in a little more detail. The first is *Osman and another v Ferguson and another* [1993] 4 All ER 344, the domestic predecessor of the better known Strasbourg decision in *Osman v United Kingdom* (1998) 29 EHRR 245. The case concerned a schoolmaster named Paget-Lewis who developed an infatuation for a teenage pupil, Ahmet Osman, and culminated in the killing of Ahmet's father, Ali, the wounding of Ahmet, the wounding of a deputy headmaster and the killing of the deputy headmaster's son. The domestic proceedings were brought by Ali Osman's widow and Ahmet against, with another, the Commissioner of Metropolitan Police. The Commissioner applied, unsuccessfully before the judge but successfully before the Court of Appeal, to strike out the claim as disclosing no cause of action because the Commissioner and his officers owed Ali and Ahmet no duty of care. For purposes of the application the pleaded facts were to be assumed to be true. The pleaded facts (taken from the somewhat fuller summary in the reported decision of the Strasbourg court) showed that Paget-Lewis had spread offensive rumours about an alleged sexual relationship between Ahmet and another boy (LG); had followed LG home and stalked him; had written obscene graffiti about Ahmet and LG; had stolen the files relating to the two boys from the school office; had changed his name to Osman (not the first time he had taken the name of a pupil); had aroused fears that he might abscond with Ahmet; had thrown a brick through the Osmans' window; had twice burst the tyres of Ali Osman's car; had poured engine oil and paraffin outside the Osmans' family home; had smashed the windscreen of Ali's car; had jammed the lock of the Osmans' front door with superglue; had smeared dog excrement on the Osmans' doorstep and car; had more than once stolen the bulb from the Osmans' outside porch; had broken all the windows of the Osmans' car; had spoken of doing something criminally insane; had driven his car into a van in which LG was a passenger; had suggested that in a few months he would be "doing life"; had told LG that he would "get him" whether it took "30 days or 30 years"; and had spoken of "a sort of Hungerford". All this was reported to the police, who assured the Inner London Education Authority that the Osman family would be protected and assured Ahmet's headmaster that the police would undertake the necessary measures to protect the deputy headmaster and the plaintiffs. But the police took no effective action beyond taking steps to lay an information for careless driving. A majority of the Court of Appeal (McCowan and Simon Brown LJ) were of opinion that on these facts a sufficient relationship of proximity existed between the plaintiffs and the police (pp 350, 354). Beldam LJ preferred to express no opinion on the point (p 354). But all three members of the court were of opinion that the considerations of public policy propounded by Lord Keith in *Hill* precluded any duty of care. So the case was struck out. I find this an unsatisfactory result. It does not seem to have been suggested that

serious physical injury was not foreseeable. A majority of the Court of Appeal found the necessary proximity. I find it strange that public policy should be thought to preclude redress in such circumstances since in my opinion, accepted by Lord Browne-Wilkinson (with whom the other members of the House agreed) in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 749, the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and very potent considerations are required to override that policy. I can recognise no potent policy considerations which should have denied relief to Ahmet and his mother, a view which is not affected by the failure of the Strasbourg court to find a violation of article 2.

57. The second authority I should consider did not involve the police but did involve injury to the person: *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897. The judgment was given at first instance on an application to strike out the claim as disclosing no reasonable cause of action, so the facts pleaded by the plaintiff were assumed to be true. The facts were that a party of eight children with a teacher and two instructors set off on a canoeing trip in Lyme Bay at about 10.00 am. They were due back at noon but did not return. They ran into severe difficulties at sea. Two members of the party became separated from the rest. The canoes capsized and sank. Some tried to swim ashore. Two more members became separated. They were all eventually rescued between 5.30 and 6.40 pm, but four of the children died and the other members of the party suffered severe hypothermia and shock. Proceedings were brought against the organisers of the trip, who sought redress against the Secretary of State as the minister responsible for HM Coastguard. The facts (pleaded with obvious reference to the decision in *Capital & Counties*) were that by 2.42 pm or shortly after the coastguard knew or ought to have realised that the party was missing and overdue and that at least one of the party might be in the sea and parted from his or her canoe. Soon after 3.0 pm the coastguard intervened, telling the manager of the organisers not to worry and saying that the coastguard would conduct a search limited to a land search. From then, the coastguard was in effective control of the search and rescue operation. They made the position of the party worse by taking no steps to launch an appropriate search and rescue operation until about 3.48 pm. They made the position of the party worse by mis-directing a lifeboat to search inshore rather than offshore or in the area of a certain point. They made the position of the party worse by directing a Royal Navy helicopter from an appropriate search to an inappropriate sweep up and down the coastline. They made the position of the party worse by failing to ask the Royal Navy to scramble a second helicopter until 5.0 pm although they were asked at 4.26 pm whether a further aircraft was required. The claim was struck out on the basis that

no duty of care was owed and the claim was bound to fail. My Lords, I feel bound to say that a law of delict which denies a remedy on facts such as these, in the absence of any statutory inhibition, fails to perform the basic function for which such a law exists.

58. Considerable argument was devoted to exploration of the relationship between rights arising under the Convention (in particular, the article 2 right relied on in *Van Colle*) and rights and duties arising at common law. Should these two regimes remain entirely separate, or should the common law be developed to absorb Convention rights? I do not think that there is a simple, universally applicable answer. It seems to me clear, on the one hand, that the existence of a Convention right cannot call for instant manufacture of a corresponding common law right where none exists: see *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406. On the other hand, one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention: see the judgment of the Court of Appeal in *D v East Berkshire Community NHS Trust*, [2003] EWCA Civ 1151, [2004] QB 558, paras 55-88. There are likely to be persisting differences between the two regimes, in relation (for example) to limitation periods and, probably, compensation. But I agree with Pill LJ in the present case (para 53) that "there is a strong case for developing the common law action for negligence in the light of Convention rights" and also with Rimer LJ (para 45) 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". Since there is no reliance on the Convention in this case I do not think it profitable to consider whether, had he chosen to do so in time, Mr Smith could have established a breach of article 2 on the facts of this case.

59. My noble and learned friends Lord Hope, Lord Carswell and Lord Brown, in paras 77, 109 and 129 of their respective opinions, criticise the liability principle I have formulated. Who, they ask, is to judge whether the evidence is apparently credible? Who is to judge whether the threat is imminent? The answer is that given in any case where it is said that a professional should have been alerted to and should have responded to a risk. In the first instance the judgment is made by the professional in question. If that judgment is challenged, a judge must decide. In the present case it may be said that the police dismissed the threats to Mr Smith as incredible. If that was a reasonable judgment, no duty to respond arose. But it must be doubted whether

that was their judgment, given that they embarked on the time-consuming (and on the facts unnecessary) exercise of tracing the calls.

60. On the assumed facts as set out above, I am satisfied that the liability principle is satisfied and that the Brighton Police owed Mr Smith a duty of care. He, as a member of the public, furnished them with apparently credible evidence that Jeffrey, whom he identified and whose whereabouts were known, presented a specific and imminent threat to his life or safety. It has not been argued that death or injury was not a foreseeable result of a failure to assess the threat and, as appropriate, act. The relationship between Mr Smith and the police was one of close proximity, based on direct, face-to-face meetings. If, as some of the cases suggest, it is necessary to find a special relationship for a duty of care to arise, this relationship was in my view special as a result of Mr Smith's approach to the police and their response to it. If, as other cases suggest, it is necessary for responsibility to be assumed for a duty of care to arise, then in my opinion the police assumed responsibility by visiting Mr Smith, initiating what was regarded by them as an investigation, assuring him that the investigation was progressing well and inviting him to call 999 if he was concerned for his safety. Public policy points strongly towards imposition of a duty of care: Mr Smith approached a professional force having a special skill in the assessment of criminal risk and the investigation of crime, a professional force whose main public function is to maintain the Queen's peace, prevent crime and apprehend criminals. He was entitled to look to the police for protection and they, in my opinion, owed him a duty to take reasonable steps to assess the threat to him and, if appropriate, take reasonable steps to prevent it.

61. I would dismiss the appeal and remit the case to the Brighton County Court for the hearing to continue.

LORD HOPE OF CRAIGHEAD

My Lords,

62. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. His account of the background to these two cases, which I accept with gratitude, enables me to go directly to the issues of law that they raise. There is a close

relationship between them because they both concern failures by the police to respond to requests for help by members of the public in time to prevent threatened attacks on them by third parties, with tragic consequences. They led in one case to death and in the other to serious physical injury.

63. Normally the law does not attach responsibility to any individual for harm caused to another by the tortious acts of a third party. The police, in common with members of the other emergency services, provide a service which is available on demand to members of the public. People who are being intimidated by threats of death or serious injury are not permitted to take the law into their own hands. They are encouraged to report these threats to the police. If they do, this creates a relationship between them and the police which might suggest that the police should accept civil liability if they do not respond to these reports. It is only natural to blame the police if, despite these reports, the intimidator makes good his attack. But the fact that the police may be blamed for what took place is not in itself sufficient to make them liable to the injured party or his close relatives in damages. For reasons of public policy the law sets a threshold which must be surmounted before civil liability will attach to the police for the harmful acts of third parties. The issue in each case is whether, on the proved or assumed facts, this threshold has been crossed.

64. The grounds of action which raise this question in each case are different. In *Van Colle* the claim is brought under sections 6 and 7 of the Human Rights Act 1998. The claimants maintain that the defendant, the Chief Constable of the Hertfordshire Police, acted unlawfully in violation of article 2 of the European Convention on Human Rights by failing to discharge a positive obligation of the police to protect the life of their son Giles, who was murdered by his former employee Daniel Brougham on 22 November 2000. In *Smith* the claim is brought in negligence at common law. Mr Smith maintains that officers of Sussex Police owed him a duty of care to prevent his former partner Gareth Jeffrey from carrying out his threats to kill him, and that it was because they were in breach of that duty that Jeffrey was able to attack him with a claw hammer on 10 March 2000 causing him serious and permanent injury. Despite the inter-relationship between the two cases, the fact that the grounds of action are different makes it necessary to examine them separately.

65. The legal framework in this case is quite straightforward. The defendant, the Chief Constable, is a public authority within the meaning of section 6 of the Human Rights Act 1998. It is unlawful for a public authority to act in a way that is incompatible with any of the Convention rights. Among those rights is the right to life which is guaranteed by article 2(1) of the Convention. The first sentence of that article states: "Everyone's right to life shall be protected by law." The claimants say that the defendant's failure to protect Giles from being murdered by Brougham was a violation of that right. If they can make good this claim the defendant will be liable to them under section 7 of the 1998 Act and the judge will have power under section 8 of that Act to award them damages.

66. The extent of the positive obligation has been defined by the Strasbourg court in *Osman v United Kingdom* (1998) 29 EHRR 245, para 116. The relevant part of that paragraph has been quoted by Lord Bingham in para 29 of his opinion. It declares that the court must be satisfied 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 from the criminal acts of a third party. If they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk, the positive obligation will have been violated. In *In re Officer L* [2007] 1 WLR 2135, para 20, Lord Carswell said that the real and immediate test is one that is not readily satisfied, the threshold being high. I read his words as amounting to no more than a comment on the nature of the test which the Strasbourg court has laid down, not as a qualification or a gloss upon it. We are fortunate that, in the case of this vitally important Convention right, the Strasbourg court has expressed itself in such clear terms. It has provided us with an objective test which requires no further explanation. The question in each case will be whether on the facts it has been satisfied.

67. The *Osman* test tells us that the facts must be examined objectively at the time of the existence of the threat, and that the positive obligation is breached only if the authorities knew or ought to have known at that time that it was a threat to life which was both real and immediate. In this case everything depends on what DC Ridley knew or ought to have known as the events unfolded before him. As Lord Bingham's review of the facts that were established at the trial shows, this was a relatively minor case of theft. It was the kind of case that

might well not have attracted a custodial sentence in the event of a conviction – a factor highly relevant to the issue of bail in the event of an arrest. There was nothing in Brougham's record that showed that he had a propensity to commit acts of violence. The telephone call on 13 October 2000 was regarded by Giles as a death threat and he reported it to the police. But there was no indication, taking the other circumstances known at that time into account, that the threat to life was seriously meant or, more importantly, was imminent. The telephone call on 9 November 2000 was clearly intended to intimidate. But there was nothing in the words used, which Giles reported to DC Ridley about 10 days later, to indicate that Brougham was seriously intent on physical violence or that a violent act amounting to a threat to life was imminent at that stage. There was no further indication of what he may have had in mind until the tragic events of 22 November 2000 when Giles was murdered.

68. The murder was the action of a seriously disturbed and unpredictable individual. In my opinion it cannot reasonably be said that DC Ridley should have anticipated, from the information available to him at the time, that Brougham constituted a risk to Giles's life that was both real and imminent. I regret that, for the same reasons that Lord Bingham has given, I cannot say that the *Osman* test is met in this case.

69. The case was however pleaded in a way that sought to escape from the very high threshold that was laid down in *Osman*. It was said that the defendant owed a duty of care to Giles because, by involving him in the prosecution of Brougham, in particular by requesting him to be a witness at Brougham's trial, he had exposed Giles to a risk to his life. The argument was that Giles was thereby placed into a special category of witnesses, not shared by all members of the public, to whom a lower threshold applied. This argument was encouraged by the Court of Appeal's observation in *R (A and others) v Lord Saville of Newdigate and others* [2002] 1 WLR 1249, para 28, that it was not appropriate to apply the *Osman* test in the case of soldiers or former soldiers who were to be called by the authorities to give evidence in circumstances where their lives were said to be at risk of terrorist violence. The judge in this case said that where it was the conduct of the state authorities that has exposed an individual to the risk of his life the *Osman* threshold is too high. If there is a risk on the facts, she said, then it is a real risk, and "immediate" can mean just that the risk is present and continuing. The Court of Appeal said that this proposition was supported by the authorities [2007] 1 WLR 1821, para 76.

70. I would confine the decision in *Lord Saville's* case to its own facts. The way the test was expressed in *Osman* offers no encouragement to the idea that where the positive obligation is invoked the standard to be applied may vary from case to case. The standard is, as Lord Caswell said in *In re Officer L* [2007] 1 WLR 2135, para 20, constant and not variable with the type of act in contemplation. The Strasbourg court said in para 115 that, while the scope of the positive obligation was in dispute between the parties, it was accepted by the parties that it applied in certain well-defined circumstances. Its conclusion on the scope of the obligation in para 116 begins with this sentence:

> "For the court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."

The court might have said that the question whether to impose the obligation would be impossible or disproportionate was a matter to be decided on the facts of each case. It chose not to do that. The solution which it adopted was to define the limits of the obligation. Those limits must be observed in every case where it is alleged that a public authority has violated its positive obligation under the article. Of course the answer to the question whether the positive obligation was breached will always depend on the individual facts of the case, as the judge said. But the test itself is invariable.

71. There are undoubtedly cases where things done by the police can give rise to negative or positive duties under article 2 if life is to be protected. Placing an apprehended person into the same cell as a person known to have a tendency to violence is an example. The negative duty obliges the police to refrain from doing this. The need to protect a person who is known to have been exposed to a real and immediate risk to life because he has agreed to become a police informer is another example. But Giles's case falls well short of these examples. I would allow the appeal and make the order which Lord Bingham has proposed in para 41 of his opinion.

Smith

72. There was in Mr Smith's case a highly regrettable failure to react to a prolonged campaign by Jeffrey threatening the use of extreme criminal violence. The question is whether, on the assumed facts which Lord Bingham has set out, it is at least arguable that the Sussex Police owed him a duty to take reasonable care to prevent these threats from being carried out. It raises an important issue of principle. On the one hand there is the liability principle which Lord Bingham has enunciated: see para 44. According to this principle a police officer who is furnished with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to the life or safety of a member of the public owes a duty to that person to take reasonable steps to prevent its being executed. On the other hand there is what in *Brooks v Commissioner of Police of the Metropolis and others* [2005] 1 WLR 1495, para 30, Lord Steyn described as the core principle in *Hill's* case: *Hill v Chief Constable of West Yorkshire* [1989] AC 53. Is this a case to which the core principle in *Hill's* case must be applied? Or is it one where the relationship between Mr Smith and the police was such that, on ordinary delictual grounds, a duty of care ought to be imposed on the police?

73. As Lord Bingham has explained, the reasons which Lord Keith gave in *Hill* for saying that an action of damages for negligence should not lie against the police on grounds of public policy do not all stand up to critical examination today. The more important authority for present purposes therefore is the recent decision of this House in *Brooks*. I need not repeat para 30 of Lord Steyn's opinion in that case, with which Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood expressed their unqualified agreement. I would however draw attention to the following sentences in that paragraph which have a direct bearing on the issue that confronts us in this case:

> "A retreat from the [core] 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."

74. Lord Bingham says in para 52 that it is evident that both Lord Keith and Lord Steyn were addressing the situations raised on the facts before the House and that neither decision conflicts with the liability principle, acceptance of which calls for reasonable performance of the public function. 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 Commissioner of Police of the Metropolis* [1995] QB 335. That was, as he said, a different case altogether, as it raised the question whether the Crown Prosecution Service 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. It is an unfortunate feature of the human experience that the breakdown of a close relationship leads to bitterness, and that this in its turn may lead to threats and acts of violence. So-called domestic cases that are brought to the attention of the police all too frequently are a product of that phenomenon. One party tells the police that he or she is being threatened. The other party may say, when challenged, that his or her actions have been wrongly reported or misinterpreted. The police have a public function to perform on receiving such information. A robust approach is needed, bearing in mind the interests of both parties and of the whole community. Not every complaint of this kind is genuine, and those that are genuine must be sorted out from those that are not. 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.

77. I appreciate, of course, that Lord Bingham's liability principle is confined to cases where a member of the public has furnished apparently credible evidence to the police that a third party represents a specific and imminent threat to his life or physical safety. It matches the facts of this case. But, if adopted, it would lead to the uncertainty in its application and to the detrimental effects that Lord Steyn warned against. Who is to judge whether the evidence is apparently credible? Who is to judge whether the threat is imminent? These are questions that the police must deal with on the spot. A robust approach would leave the matter to the judgment of the police officer. The decision in *Brooks* adopts this approach, leaving the police free to form their own

judgment. The liability principle says that, if that judgment is challenged, a judge must decide.

78. As in the case of the *Osman* test, the test for the judge must be an objective one. How then is the police officer to deal with evidence which, for one reason or another, he or she does not find convincing but about which there is a risk that, after the event, a judge might take a different view? Subjecting the officer's judgment to an objective test would tend to lead to what my noble and learned friend Lord Carswell describes as defensive policing, focussed on preventing, or at least minimising, the risk of civil claims in negligence. It could deny the police the freedom they need to act as the occasion requires in the public interest. In my opinion the balance of advantage in this difficult area lies in preserving the *Hill* principle. In *Brooks* Lord Nicholls of Birkenhead said, in para 6, that there might be exceptional cases where the circumstances compelled the conclusion that the absence of a remedy sounding in damages would be an affront to the principles that underlie the common law. I respect his approach, which is to guard against the dangers of never saying never. But in my opinion the present case does not fall into that category. That is why, if a civil remedy is to be provided, there needs to be a more fundamental departure from the core principle. I would resist this, in the interests of the wider community.

79. There are, of course, cases in which actions of the police give rise to civil claims in negligence in accordance with ordinary delictual principles. These cases were reviewed by Lord Hamilton in the Outer House in *Gibson v Orr* 1999 SC 420. His opinion in that case, which was cited but not referred to in *Brooks*, deserves to be read carefully. The action had been brought by the passenger in a car which was driven onto a bridge which had collapsed as a result of flooding after an exceptionally heavy rainfall. The police were aware of the danger and had been on the scene to warn approaching traffic earlier. But they had left it without leaving any cones or barriers or other signs there, and when the car went onto the bridge it fell into the river causing the death of two of its occupants and injury to the surviving passenger. Lord Hamilton said at p 436 that he saw no close analogy as regards the policy issue described in *Hill* between the exercise by the police of their function of investigating and suppressing crime and the exercise by them of their civil function of performing civil operational tasks concerned with human safety on the public roads. There was, in his view, no immunity in respect of the manner in which road safety civil operational tasks are carried out by police officers where there was no inherent problem of conflict with instructions issued by superior officers or with duties owed to other persons. *Knightley v Johns* [1982] 1 WLR

349, where a police motor-cyclist was injured when he drove the wrong way down a tunnel on the instructions of another police officer, and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, where the police fired a gas canister into the plaintiff's premises without having fire fighting equipment on hand to deal with the fire that resulted from this, both of which were referred to by Lord Keith in *Hill*, provide examples of cases where operational decisions taken by the police can give rise to civil liability without compromising the public interest in the investigation and suppression of crime.

80. Lord Hamilton said at p 437C that he was not convinced by the reasoning in *Alexandrou v Oxford* [1993] 4 All ER 328, which the Court of Appeal in *Kent v Griffiths* [2001] QB 36 was later to hold should be confined to its own facts, or *Ancell v McDermott* [1993] 4 All ER 355. He saw those cases as indications of a tide towards a wide interpretation of *Hill* which he thought was running less strongly in the light of the decisions in *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 and *Capital & Counties plc v Hampshire County Council* [1997] QB 1004. In *Swinney*, where information that had been supplied to the police in confidence was stolen from a police vehicle, Ward LJ said at p 486 that there was no overwhelming dictate of public policy to exclude the prosecution of the claim. But, as Lord Hamilton recognised at p 437B, these cases fall outside the area of application of the core principle, which protects the police function of investigating and suppressing crime in the public interest. All these cases were, of course, before the House in *Brooks*, where the core principle was re-affirmed. The present case falls within its area of application, as the reports that Mr Smith made to the police were that he was being subjected to threats that were in themselves criminal and with criminal violence if those threats were carried out. Applying the ratio of *Brooks*, I do not see how Mr Smith's case could succeed if it were to go to trial.

81. This leads me to the question to which Lord Hamilton referred in *Gibson* at p 437, whether the policy of the common law should be reconsidered in the light of the decision of the Strasbourg court in *Osman*. It is tempting to do this in a case in which article 2 of the Convention was not founded on directly but has been heard together with a case where it was. Indeed Lord Bingham's liability principle owes much to the way the threshold for the positive obligation has been described by the court in Strasbourg, although it goes further as it extends to imminent threats to physical safety as well as imminent threats to life. But there is another side to this argument. Lord Hoffmann has expressed the opinion, extra-judicially, that the maintenance of police efficiency is better secured by other methods than

having the question of whether they have acted reasonably in a given case expensively investigated in civil proceedings at the instance of a private litigant: *Human Rights and the House of Lords* (1999) 62 MLR 159, 162. As he put it, the prospect of such an investigation and the payment of compensation might in fact be detrimental to good policing, since it might make the police defensively unwilling to take risks.

82. In cases brought under sections 6 and 7 of the Human Rights Act 1998 where the article 2 positive obligation is said to have been breached by a public authority, the relevant principle is that described by the Strasbourg court in *Osman.* But in my opinion the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy. Indeed the case for preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the *Osman* principle can now be dealt with in domestic law under the 1998 Act. Like Lord Bingham I express no opinion on whether, if he had chosen to do so in time, Mr Smith would have succeeded in establishing that the positive obligation was breached in his case.

83. I would allow the appeal, set aside the order of the Court of Appeal and restore the order made by the judge by which the proceedings were struck out.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Van Colle

84. I have had the advantage of reading in draft the opinions of each of your Lordships. So far as the *Van Colle* case is concerned, I agree that the appeal should be allowed for the reasons in which your Lordships all concur.

85. My noble and learned friend Lord Bingham of Cornhill has set out, at paragraph 29 of his opinion, the very precise definition given by

the Strasbourg Court in *Osman v United Kingdom* (1998) 29 EHRR 245 at paragraph 116 of the circumstances that give rise to a positive obligation under article 2 of the Convention to take action to protect an individual whose life is threatened. The only matter that is left unclear by that definition is the test to be applied when deciding whether the relevant authority, in this case the police, 'ought to have known' of the risk to the individual's life.

86. There are at least two possibilities. The first is that 'ought to have known' means 'ought to have appreciated on the information available to them'. The alternative meaning is 'ought, had they carried out their duties with due diligence, to have acquired information that would have made them aware of the risk'. The reasoning of the Court leads me to believe that the former was the meaning intended. But, whichever is the right meaning, there was, for the reasons given by Lord Bingham, no valid basis for concluding that the police ought to have known that there was a real and immediate risk to the life of Giles.

87. I agree with your Lordships that the fact that Giles was to be a witness in a criminal prosecution did not place him in a category to which the test in *Osman* did not apply.

Smith

88. I have found the appeal in *Smith* less easy to resolve. It raises the vexed question of whether, where the law imposes a public duty for the benefit of individuals, a common law duty is owed to exercise reasonable care in carrying out that duty. The public duty, as stated in the declaration made by every police constable, is to "cause the peace to be kept and preserved and [to] prevent all offences against people and property". Whether, there is a cause of action in negligence for breach of that duty has given rise to a substantial body of litigation, some of which has received consideration by your Lordships' House.

89. As so often in this field, public policy has been at the heart of the consideration of whether a duty of care exists. In *Hill v Chief Constable of West Yorkshire* [1989] AC 53, the facts of which Lord Bingham has summarised, this House held that there was insufficient proximity between the victim and the police to give rise to a duty of care. However, both Lord Keith of Kinkel, with whom three of the other members of the Committee agreed, and Lord Templeman identified

four objections of principle to the existence of a duty of care on the facts of that case. Again these have been summarised by Lord Bingham. Two are relevant in the context of the present case. The first is the danger that the existence of a duty of care would alter, detrimentally, the manner in which the police performed their duties in as much as they would act defensively out of apprehension of the risk of legal proceedings. The second is that time and resources would have to be devoted to meeting claims brought against the police which could better be directed to their primary duties.

90. In *Osman v Ferguson* [1993] 4 All ER 344 the assumed facts were very different from *Hill.* The police were aware that a schoolteacher was committing serious acts of harassment against a male pupil and his family. They did nothing to apprehend the culprit, who then broke into the family home, shot and severely injured the boy and killed his father. The Court of Appeal held that it was arguable that there was sufficient proximity between the police and the family to give rise to a duty of care, but that they were precluded from finding such a duty because of the considerations of public policy that had been identified in *Hill.* The action was struck out.

91. The sequel to this action was the claim brought by the Osman family against the United Kingdom at Strasbourg (1998) 29 EHRR 245. Although the Court found, perhaps as a result of a limited appreciation of the basis of the strike-out procedure, that there had been a breach of article 6, it held that there had been no breach of article 2. This was because the facts did not satisfy the stringent test that had to be satisfied if a duty to act was to be established. In propounding that test the court had regard to "the difficulties involved in policing modern societies, the unpredictability of human conduct, the operational choices which must be made in terms of priorities and resources" and the need not to "impose an impossible or disproportionate burden on the authorities". Those factors could be said to reflect, to a degree, some of the policy considerations identified in *Hill.* In the result the test propounded by the Court was much more stringent than that under the common law duty of care in the law of negligence.

92. In *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495 the issue of whether the police owed a duty of care arose in a very different context. The plaintiff was a friend of Stephen Lawrence, who had been present when he was murdered. He claimed to have suffered severe post-traumatic stress disorder. He brought proceedings against the police on the grounds, among others,

that they had been in breach of duties of care owed to him at common law in the manner in which they treated him in the course of their enquiries into the murder. His claim was struck out at first instance on the ground that it disclosed no reasonable cause of action. His appeal was allowed by the Court of Appeal on the ground, among others, that it was arguable that the police had owed him three duties of care:

i) To take reasonable steps to assess whether he was a victim of crime and then to accord him reasonably appropriate protection or support, assistance and treatment;

ii) 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;

iii) To afford reasonable weight to the account that he gave and to act upon it.

93. On appeal this House unanimously reversed the decision of the Court of Appeal Lord Bingham held that he would be reluctant to endorse the full breadth of what was thought to be the reasoning in *Hill*. He held, however, that the three duties pleaded could not arguably be imposed on police officers investigating a very serious crime because they could not be imposed "without potentially undermining the officers' performance of their functions, effective performance of which" served an important public interest (paragraph 4).

94. Lord Nicholls of Birkenhead agreed, observing that the three duties asserted "would cut across the freedom of action that the police ought to have when investigating serious crime" (paragraph 5). He also observed that he would not endorse the full width of all the observations in *Hill.*

95. Lord Steyn, in a lengthy speech with which Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed, cited at length from *Hill's* case and observed that the 'core principle' had remained unchallenged (paragraph 30) What he meant by the 'core principle' can be deduced from what followed. Lord Bingham has set out the relevant passage in paragraph 51 of his opinion.

96. Lord Steyn went on to hold that the three duties relied on were inextricably bound up with the police function of investigating crime,

which was covered by the principle in *Hill's* case. It followed that those duties could not stand. Lord Steyn went on to observe:

> "It is unnecessary in this case to try to imagine cases of outrageous negligence by the police, unprotected by specific torts, which could fall beyond the reach of the principle in *Hill's* case. It would be unwise to try to predict accurately what unusual cases could conceivably arise. I certainly do not say that they could not arise. But such exceptional cases on the margins of the principle in *Hill's* case will have to be considered and determined if and when they occur."

97. Lord Bingham concludes at paragraph 52 of his opinion that in *Hill* and *Brooks* the statements of respectively Lord Keith and Lord Steyn were directed at the particular facts of those cases. He suggests that those statements can be reconciled with the 'liability principle' that he has formulated in paragraph 44 of his opinion. 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.

98. My Lords, it is no easy question whether these considerations in fact justify restricting the common law duty of care in the manner required by the reasoning in *Hill* and *Brooks.* No general attack has been made in the present case on those decisions, but the respondents have submitted that the considerations of policy underlying the decisions in *Hill* and *Brooks* have ceased to be compelling as a result of the decision of the Strasbourg Court in *Osman.* As the police are already at risk of being held to account for a breach of the duty owed under article 2, it is suggested that the imposition of a common law duty of care will have little further effect on the manner in which the

police carry out their duties. Reliance is placed on the approach of the Court of Appeal in *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151; [2004] QB 558.

99. I am not persuaded that this case provides, as the respondents suggest, "a very close analogy". This is because the Strasbourg Court has so restricted the circumstances where a positive duty arises under article 2 that it is far from coextensive with the duty that the police would be under if the common law duty of care were applicable. The existence of a positive duty under article 2 has not destroyed the reasoning that underlies the principle in *Hill.*

100. I turn to consider whether the 'core principle' in *Hill* can stand with, or accommodate by way of exception, the 'liability principle' formulated by Lord Bingham. I have not found it easy to identify the essential parameters of the principle in question. Will the principle apply when the evidence emanates, not from the member of the public under threat, but from some other source? What if the whereabouts but not the identity of the third party is known? What if the threat is specific, but not imminent, or imminent but not specific? And why is the principle restricted to a threat to life or physical safety, but not to a threat to property? – a question that Lord Bingham himself raises at paragraph 55 of his opinion. It seems to me that the elements in Lord Bingham's 'liability principle' are facts which would render particularly egregious a breach of a duty of care that can be more simply stated: 'where the police have reason to believe that an individual is threatened with criminal violence they owe a duty to that person to take such action as is in all the circumstances reasonable to protect that person'. Such a duty of care is in direct conflict with the principle in *Hill.*

101. For these reasons I find myself reluctantly unable to accept the 'liability principle' formulated by Lord Bingham. I say reluctantly, because lack of action in the face of the individual facts that he postulates, and indeed the lack of action on the assumed facts of this case, comes close to constituting the 'outrageous negligence' that Lord Steyn contemplated as being potentially outside the reach of the principle in *Hill's* case. I have not, however, found any principled basis for placing this case outside the reach of that principle.

102. The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the

existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts. For this reason I have been pleased to observe that the Law Commission has just published a Consultation Paper No 187 on 'Administrative Redress: Public Bodies and the Citizen' that directly addresses the issues raised by this appeal.

103. For these reasons, together with those given by the majority of your Lordships, I would allow the Chief Constable's appeal, set aside the Court of Appeal's order and restore the order of the judge below striking out the respondent's claim.

LORD CARSWELL

My Lords,

104. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hope of Craighead. I entirely agree with it and wish to add only a few observations, largely because your Lordships are not all of the same mind on some of the issues in these appeals.

105. In *Van Colle's* case, I agree with the reasons and conclusion of Lord Hope and my noble and learned friend Lord Bingham of Cornhill and do not wish to add anything to them. The appeal of the Chief Constable in *Smith's* case has caused your Lordships greater difficulty, a difficulty which I share, but after careful reflection I remain of the view that the appeal should be allowed.

106. The principles laid down in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 were reviewed and affirmed by the House as recently as 2005 in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 and I do not think that it is necessary to depart from them. One must acknowledge at once that the price of the certainty of the rule and the freedom from liability afforded to police officers is that some citizens who have very good reason to complain of the police handling of matters affecting them will not have

a remedy in negligence (cf Lord Steyn's observation in *Brooks* at para 31). One has to face this and decide whether in the wider public interest the law should allow that. I am of opinion, in agreement with Lord Hope (para 78) that in the interests of the wider community it is necessary that it should do so for the better performance of police work.

107. One cannot escape feelings of some concern when one applies the broad general rule to the facts of Mr Smith's case, which tests the principle severely. Mr Smith, on the assumed facts of the case, reported the lurid death threats made by Jeffrey on several occasions to the police, but for some reason for which no explanation has been put forward they declined to look at the messages containing the threats, make an entry in their notebooks, take a statement from Mr Smith or complete a crime form. Instead they commenced a rather slow procedure for tracing Jeffrey's telephone calls, which inexplicably they continued to pursue even after Mr Smith had given them Jeffrey's home address in the forms which he completed at their request and then given them the telephone numbers from which Jeffrey sent threatening text messages. He received similarly dismissive treatment from an inspector in Brighton, who again declined to look at the threatening messages or make a note of the meeting. One must recognise that police officers may quite properly be slow to engage themselves too closely in such domestic type matters, where they may suspect from experience the existence of a degree of hysteria or exaggeration on the part of either or both persons involved. Making all allowances for that factor, however, the inertia of the police was such, on the assumed facts, that if there is a duty of care in law it would be entirely wrong to strike out the claim.

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

109. It remains to be considered whether there are any exceptions to the generality of the rule. Lord Hope has referred in paragraph 79 to the existence of a duty of care in respect of operational matters. As he says, imposing liability in such cases does not compromise the public interest in the investigation and suppression of crime. I also agree with his view (para 78) that the test propounded by Lord Bingham, dependent on the production of apparently credible evidence of a specific and imminent threat to the life or physical safety of the complainant, would be difficult to operate and would tend to lead to a defensive approach to the carrying out of police work. I would not dissent from the view expressed by Lord Nicholls of Birkenhead in *Brooks* at para 6 that there might be exceptional cases where liability must be imposed. I would have reservations about agreeing with Lord Steyn's adumbration in para 34 of *Brooks* of a category of cases of "outrageous negligence", for I entertain some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept. I should accordingly prefer to leave the ambit of such exceptions undefined at present.

110. I therefore would allow both appeals, make the order proposed by Lord Bingham in *Van Colle's* case and restore the order made by the judge in *Smith's* case.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

111. Threats to witnesses are a real problem for the criminal justice system: in the *Van Colle* appeal the court below ([2007] 1 WLR 1821, para 11) noted Home Office/Association of Chief Police Officers statistics showing that 10% of crimes lead to incidents of intimidation. So too, more generally, high levels of violence within our society—domestic violence, gang violence, violence amongst young people and so forth—involve the police frequently learning in advance of grave threats to people's safety. Sometimes the police are alerted to the risk by those threatened. But often not, and in these latter cases it is the police who warn those they believe to be at risk. A recent article in The Times (9 June 2008) stated that last year the police warned over a thousand people "that they were the subject of a murder plot"—"at serious risk of being killed by individuals with the resources to arrange their death"—these being (inappropriately) described as "so-called *Osman* warnings".

112. These two appeals concern occasions when it was the eventual victims themselves who alerted the police to threats received and they raise in different contexts the possibility of civil actions against the police when, as here, the threats come to be carried out and the victim suffers death or serious injury. *Van Colle* is a Human Rights Act claim following the murder of the respondents' son and it asserts that the police were in breach of article 2 of the Convention in failing to do all that could reasonably have been expected of them to avoid the risk to his life to which he had alerted them. Mr Smith claims in negligence at common law for the very serious injuries which he suffered and he must therefore establish that the police owed him a duty of care.

113. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead and, like others, gratefully adopt Lord Bingham's exposition of the facts in both cases.

Van Colle

114. I am in full agreement with everything said by Lord Bingham both as to the facts and the law regarding this case and there is little I wish to add.

115. The test set by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245 and repeatedly since applied for establishing a violation of the positive obligation arising under article 2 to protect someone from a real and immediate risk to his life is clearly a stringent one which will not easily be satisfied. This is hardly surprising given, as the *Osman* judgment itself recognises (at para 116), "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources". It is, indeed, some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself—rehearsed by Lord Bingham at para 56—the Strasbourg court found it not to be satisfied.

116. No less clear is it that the *Osman* test is a constant, to be applied whatever the particular circumstances of the case. So much was decided by the House in *In re Officer L* [2007] 1 WLR 2135—see Lord Carswell's leading opinion there at para 20. In so far as the Court of Appeal's decision in *R (A) v Lord Saville of Newdigate* [2002] 1 WLR

1249, has been understood to the contrary (as by the court below), it should not be followed. The decision in that case was amply justified without resort to article 2, merely by the application of ordinary public law principles of fairness, reasonableness and proportionality.

117. I agree entirely with Lord Bingham (at para 39) that the fact that Giles Van Colle was a witness was plainly relevant. But it was relevant only to the extent that realistically it increased the likelihood that Brougham would actually carry out his threat to kill (or seriously injure) him. Nothing in the facts here is comparable, for example, to the increased risk to life experienced by political journalists and others considered by the Strasbourg Court in *Kiliç v Turkey* (2000) 33 EHRR 1357, paras 65-68.

118. I cannot hope to improve upon Lord Bingham's factual analysis of the present case and respectfully concur with his conclusion that, tragic though Giles' death was, this claim does not satisfy the *Osman* test—by a wider margin, indeed than the *Osman* claim which itself failed. I too would allow the Chief Constable's appeal and enter final judgment in his favour.

Smith

119. In what circumstances ought the police to be subject to civil liability at common law for injuries deliberately inflicted by third parties i.e. for crimes of violence? When, in short, should they in this type of case be held to owe a duty of care to the victim?

120. That there are such cases is not in doubt. *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 provides one example, the facts there suggesting that the police had assumed responsibility for the complainant informer's safety (although his claim in the event failed at trial). Another example (again on the basis of assumption of responsibility) is *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550 where a police inspector was found liable to a woman police constable for injuries inflicted on her by a woman prisoner in a police station cell. The factual findings were stark. The inspector was present specifically to help the plaintiff if she needed it and himself acknowledged that he had a duty to do so, yet he stood by and did nothing when in fact she was attacked. By the same token it may well be that the family of the victim whose death underlay

the criminal conviction in *R v Dytham* [1979] QB 722 (referred to by Lord Bingham at para 53) would nowadays have a common law claim against the police. The constable in that case was, after all, convicted not merely of non-feasance but of deliberate failure and wilful neglect.

121. For my part I would be disposed to accept that a common law duty of care would be found to exist also in circumstances such as arose in *Edwards v United Kingdom* (2002) 35 EHRR 487 (in fact a successful article 2 application in Strasbourg) where the applicants' son was killed by his cell-mate whilst on remand. Had such a death occurred in a police cell, it would be difficult to argue that the police had not assumed a clear responsibility for the safety of those in their custody.

122. All these cases, however, are of a different character from that now before your Lordships and the question arising here is whether a duty of care should similarly be found to exist when the police, without having assumed any particular responsibility towards the eventual victim, are engaged rather in discharging their more general duty of combating and investigating crime.

123. Generally speaking, it is accepted that in the discharge of this function the police owe no legal duty of care to individuals affected. Lord Steyn in *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 more than once referred to this as the "core principle in *Hill's* case" (*Hill v Chief Constable of West Yorkshire* [1989] AC 53). Can this "core principle", however, accommodate Lord Bingham's "liability principle": the proposition that "if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed"?

124. For my part I would acknowledge that the facts of the present case are vastly different from those either in *Hill* or in *Brooks* and that it is easier to contemplate civil liability here than in either of those cases. The particular reasons for rejecting the contended for duty of care in each of them were compelling: in *Hill* because it was surely unthinkable that the conduct of the entire Yorkshire Ripper investigation should be subject to minute examination; in *Brooks* because the main complaint was of psychiatric injury caused by the police's cavalier treatment of the

claimant when they were first called to Stephen Lawrence's horrific murder, unsure at that stage whether he was a suspect or a witness, and intent above all on finding out who were the killers.

125. I recognise too that the facts of the present case are really very strong—as, indeed, I clearly recall having regarded the facts in *Osman* when originally that case was before the Court of Appeal in 1992: [1993] 4 All ER 344.

126. But all that said, is it really possible to find a satisfactory basis upon which to distinguish this class of case (it would, of course, have to be distinguished on a class basis since, if a duty of care were found to exist, claims a good deal less meritorious than this one would inevitably be brought) from all the many other situations in which the *Hill* principle would clearly apply?

127. Not without hesitation—for Lord Bingham's opinion is undoubtedly persuasive and it is tempting to provide redress in as meritorious a case as this— I conclude not.

128. In the first place, it seems to me difficult to limit "the liability principle" in the way my Lord does. Why, logically, should the principle apply only to threats to "life or physical safety" and not also to property? Paragraphs 54 and 55 of my Lord's opinion, indeed, invite that very question. I do not question for a moment the highly authoritative statements made by the House in *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 as to the "absolute and unconditional obligation" on the police to protect property, as well as persons, from criminal injury. But nothing said there suggests that a breach of this obligation would give rise to civil liability for damages and, indeed, the authors of those statements would surely have been astonished by any such suggestion.

129. Secondly, as Lord Hope asks at para 77, who is to judge whether the evidence is both (a) "apparently credible" and also (b) of "a specific and imminent threat"? These, of course, are critical preliminary questions since "the liability principle" would determine whether or not a duty of care arises in the first place.

130. Thirdly, although it is tempting to regard the police's function from which this duty is said to spring as something different from that of "investigating crime" (the function which prompted the *Hill* principle)—as, perhaps, the exercise of a protective function—this really would be a false dichotomy. Not only are the threats themselves criminal offences which, like other reported crimes, fall to be investigated but, as I indicated earlier, the police have to investigate many other risks of physical violence which come to their attention.

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.

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 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.

134. Just such policy considerations as these (the conflicts of interest involved and the desirability of limiting litigation against those concerned to act in the interests of the wider community) informed the judgments of the House, not only in *Hill* and *Brooks* but also (of the majority) in *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373.

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

136. That brings me to the final argument advanced for finding a common law duty of care in these cases. It is suggested that the common law should now be developed to reflect the Strasbourg jurisprudence about the positive obligation arising under articles 2 and 3 of the Convention. This, indeed, it was which so clearly influenced the Court of Appeal in the present case. For my part, however, I would reject the argument. To the extent that articles 2 and 3 of the Convention and sections 7 and 8 of the Human Rights Act already provide for claims to be brought in these cases, it is quite simply unnecessary now to develop the common law to provide a parallel cause of action—although it might have been otherwise had the *Osman* line of authority become established before the Human Rights Act came into force. And to the extent that the proposed development of the common

law would go further than Strasbourg jurisprudence—as undoubtedly it would under the liability principle—this would seem to me undesirable and to give insufficient weight to the public policy considerations already referred to which to my mind militate against the creation of civil liability in these cases. Indeed it is plainly because of Strasbourg's own recognition of these public policy considerations (see the passage from para 116 of *Osman* cited at para 115 above), that the *Osman* test itself has been so narrowly drawn.

137. True it is that the possibility of a Human Rights Act claim now to some extent weakens the value of the *Hill* principle insofar as that is intended to safeguard the police from the diversion of resources involved in having to contest civil litigation. That, however, is no good reason for mirroring the *Osman* principle by the introduction of a common law duty of care in this very limited class of case, still less for weakening the value of the *Hill* principle yet further by creating a wider duty of care.

138. There is this too to be said as to why, certainly in the present context, your Lordships should not feel tempted to develop the common law "in harmony with" Convention rights (as Rimer LJ put it below). As Lord Bingham pointed out in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. That is why time limits are markedly shorter—the one year (albeit extendable) limitation period under section 7(5) of the Human Rights Act comparable to the one year permitted for defamation claims intended, analogously, to vindicate a claimant's reputation. It is also why section 8(3) of the Act provides that no damages are to be awarded unless necessary for just satisfaction. It also seems to me to explain why a looser approach to causation is adopted under the Convention than in English tort law. Whereas the latter requires the claimant to establish on the balance of probabilities that, but for the defendant's negligence, he would not have suffered his claimed loss—and so establish under Lord Bingham's proposed liability principle that appropriate police action would probably have kept the victim safe—under the Convention it appears sufficient generally to establish merely that he lost a substantial chance of this.

139. Clearly the violation of a fundamental right is a very serious thing and, happily, since the Human Rights Act, it gives rise to a cause

of action in domestic law. I see no sound reason, however, for matching this with a common law claim also. That to my mind would neither add to the vindication of the right nor be likely to deter the police from the action or inaction which risks violating it in the first place. Such deterrence must lie rather in the police's own disciplinary sanctions (as, indeed, were applied in *Van Colle*) and, in a wholly exceptional case like *R v Dytham*, in criminal liability. Rather I am satisfied that the wider public interest is best served by maintaining the full width of the *Hill* principle. There is, of course, in these cases (as in *D v East Berkshire*) always a price to be paid by individuals denied for public policy reasons (as not being "fair, just and reasonable" within the *Caparo* principle—*Caparo Industries plc v Dickman* [1990] 2 AC 605) a civil claim in the interests of the community as a whole. At least in the present context the state makes some payment under the Criminal Injuries Compensation Act (albeit nowadays a tariff sum far short of common law damages). But nonetheless one sympathises with Mr Smith for paying the price as well as for his severe injuries.

140. As a final comment I add only this. In common, I think, with all your Lordships, I regards this issue as plainly one which the House should decide one way or the other on the pleaded facts. Either a duty of care arises on these facts or it does not. No useful purpose would be served by allowing the action to go to trial for facts to be found and then for further consideration to be given to the applicable law. In my judgment the Court of Appeal erred in this respect as well as in supposing that the claim might ultimately succeed.

141. For these reasons, together with those given by Lord Hope, I too would allow the Chief Constable's appeal, set aside the Court of Appeal's order and restore the order of the judge below by which the respondent's claim was struck out.