Neutral Citation: [2014] IEHC 453

THE HIGH COURT

Record Number: 2002 No. 15244P

Between:

Paul Smyth

Plaintiff

And

The Commissioner of An Garda Siochana, The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General

Defendants

THE HIGH COURT

Record Number: 2003 No. 15671P

Between:

Brenda Flood and Philip Smyth

Plaintiffs

And

Colm Church, Raymond Murray, The Commissioner of An Garda Siochana, The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General

Judgment of Mr Justice Michael Peart delivered on the 10th day of July 2014:

1. In each case the plaintiffs (i.e. Paul Smyth and Philip Smyth) plead that the defendants were negligent and in breach of duty in the manner in which they carried out an investigation into complaints of criminal conduct made to them as far back as 1988. The intervening years have seen much litigation in relation to the events which form the background to these proceedings, and it is unnecessary to dwell on those details for present purposes. But for completeness I should add that Brenda Flood no longer pursues her claim for reasons which do not concern us at this stage.

2. The defendants assert that even on the facts pleaded by the plaintiffs they cannot succeed as a matter of law, since the law is settled that under no circumstances is there any duty of care or other duty owed to the plaintiffs or any other person who makes a complaint to An Garda Siochana to investigate the complaint fully and properly or at all, or to recommend to the Director of Public Prosecutions that charges be brought against those against whom the complaints are made.

3. A preliminary issue has been directed on a point of law, namely whether as a matter of law the plaintiffs can succeed, even where the defendants for the purpose of the preliminary issue accept every fact pleaded by the plaintiffs against them as true and established. I have already determined two issues – the first being whether or not these proceedings are statute-barred. I decided that they are not. The second issue was whether the plaintiffs should be entitled to an order for discovery against the defendants for the purpose of the preliminary issue now before the Court. I decided that discovery was not necessary for the purpose of the issue given the acceptance by the defendants of the facts as pleaded by the plaintiffs for the purpose of the determination of this preliminary issue.

4. The issue to be determined now is common to each plaintiff's claims. However, in the case of Paul Smyth there is an additional matter to be determined in the event that the Court determines the main issue against the plaintiffs, and that is whether the fact that Paul Smyth at all relevant times was himself a member of An Garda Siochana constitutes a special relationship between the parties such that a duty of care is owed to him by An Garda Siochana to carry out a full and proper investigation of his complaint, even if it is the law that without such a special relationship no such duty exists. I will come to that distinct issue if necessary, in due course. In the case of Philip Smyth there is said also to have existed a special relationship by virtue of certain engagements between him and An Garda Siochana in relation to certain matters unrelated to the facts of these proceedings, and, again, I will return to that. These special relationships are said to give rise to a duty of care owed to the plaintiffs, and to create an exception to the otherwise general rule that a duty of care is not owed by An Garda Siochana to members of the public who make complaints to them in relation to alleged criminal behaviour of others.

5. An important fact relied upon by the defendants on this preliminary issue is that neither of the plaintiffs has pleaded that there was *mala fides* on the part of An Garda Siochana in the manner in which they investigated or failed to investigate the complaints.

6. In summary, the case made by Philip Smyth is that the defendants failed to cause a full and proper investigation to be carried out into (a) the anonymous falls information which gave rise to the search by the first and second named defendants of his premises then known as Sachs Hotel on 12 September 1988, and (b) the falsity of and the persons responsible for the making of the anonymous telephone calls to the South East Regional Crime Squad of the Metropolitan Police Force in London between 1992 and 1995 alleging serious crimes of a subversive nature against him and his brother Paul Smyth, then a serving officer in An Garda Siochana of Chief Superintendent rank. The anonymous calls alleged complicity in drugs trafficking and a money-laundering operation on behalf of o the IRA through his companies. The effect of these matters is described in his Statement of Claim (paragraph 38) as follows:

"38. By reason of the matters aforesaid, the plaintiff has not been able to establish the source of the information which led to the unjustified search of his premises in 1988, has not been able to invoke the proper protection and vindication of his constitutional rights to which he is entitled either by way of redress against the person in question or by way of acknowledgement and confirmation that the search was carried out on foot of an anonymous source, has had to endure a continuing cloud of taint and suspicion over his reputation, has only been able to establish the untruth and malicious nature of the damaging telephone calls concerning him, made between 1992 and 1996, by his own efforts and at enormous cost and expense and has suffered significant upset, strain and distress, in consequence of which the plaintiff has suffered loss and damage and is entitled to the relief sought."

7. It is convenient to set forth the facts which are assumed to be true and established for the purpose of the issue, from a helpful summary thereof which is contained in the plaintiffs' written legal submissions.

8. ***Pleaded facts (taken from legal submissions):***

(a) The gardai quickly formed the view that the anonymous information may have been given falsely and maliciously to discredit Philip Smyth as is apparent from entries in various Garda records (see letter from Mr Smyth's solicitors to Commissioner Noel Conroy dated 23 November 2004).

(b) The Gardai requested Philip Smyth to remain silent regarding the search for about a week following it in order to allow Detective Garda Church to conduct an investigation into it. The Gardai expressly promised to conduct such an investigation and in reliance upon this assurance, Philip Smyth acceded to his request.

(c) It is not apparent at the time that any investigation was being carried out and Mr Smyth engaged in correspondence through his solicitors with the Gardai on the matter including making a report alleging an offence under section 12 of the Criminal Law Act 1976 (knowingly making a false report tending to show an offence has been committed).

(d) Ultimately Detective Supt Noel Conroy was appointed to carry out an investigation. The plaintiffs contend that this investigation and subsequent report to the DPP was deficient, negligently carried out and failed to deal with the key aspects surrounding the hoax calls such as the various entries in the Garda records on the day of the raid and subsequently. The then Asst Commissioner Noel Conroy's report to the DPP of 11th of April 1989 records evidence that Detective Garda Church had said their informant was a Garda "from the country" who had received it from an informant well-known to that Garda (see further paragraph E 96 and following page 13 below). At a meeting with Commissioner Conroy on 5th June 1989 Mr Smyth gave him certain information suggesting that the Garda in question was a brother of the factory manager in Mr Tunney's meat factory in Clones. It is not apparent that any adequate investigation took place into this lead and neither the Garda in question nor the factory manager appears to have been interviewed.

(e) Messrs. Church and Murray refused to name the source upon which they relied in seeking the search warrant on the ground that they were in fear of their lives from him. They persisted with this refusal in the face of an order to disclose the name from their superior officer. It was only in response to a High Court Order (Costello J.) that they named a supposed source. The person named was a small time Irish criminal living in Spain (not a Garda "upon the country") who had been killed in Spain some years previously and could not therefore have been a threat to the officers. In the view of the plaintiffs, this was a false and a patently false identification.

(f) Chief Superintendent Michael Reid investigated this issue of the alleged disclosure of the source and the evidence surrounding the hoax calls. This would not have been necessary if the original investigation had been properly carried out. No file was sent to the DPP as far as the plaintiffs know.

(g) Between 1992 and 1996 a malicious campaign was conducted against both Mr Philip Smyth and Chief Inspector Paul Smyth by means of anonymous telephone calls to the English police, the Revenue Commissioners and Phoenix magazine. In respect of the calls to the South East Regional Crime Squad, in or around March 1993 Inspector Ted Murphy was placed in charge of an investigation into the source of the hoax calls. The Gardai quickly became aware that these calls originated from Classiebawn Castle, Sligo (Mr Tunney's residence) and were made by Ms. Caroline Devine (Mr Tunney's manager and officer of his company). Despite knowing the identity of the principal suspects, the investigating Garda did not endeavour to interview her or Mr Tunney, nor did he inform the English police of the information in his possession, nor did he take steps to put a stop to the calls.

(h) Owing to these failures including the refusal of An Garda Siochana to request the cooperation of the UK authorities (who were prepared to assist if so requested), Mr Smyth was put to great expense by seeking to establish in civil proceedings between Crofter Properties Limited and Genport Ltd the truth about the telephone calls. After several years and on foot of an application for evidence on commission, the two English officers who had taken the calls gave evidence on commission in England before the trial judge, Mr Justice McCracken (as Commissioner). The outcome of the proceedings following an appeal to the Supreme Court was that Ms Devine was found to have made the telephone calls maliciously on behalf of Crofter Properties Limited, that she perjured herself in her evidence and that Genport Ltd was awarded substantial damages including exemplary damages.

9. The above facts, which I have taken from the plaintiffs written submissions are said to retain also in respect of the case being made by Paul Smyth. In addition however, he relies on the following as set forth in submissions:

(a) it was alleged in the malicious calls to the British Police that Chief Inspector Smyth abused his office by stifling attempts to investigate criminal activities undertaken by certain named criminals. It was alleged that he transferred "troublesome" Gardai in order to achieve this end.

(b) Phoenix Magazine alleged a breach of Garda Disciplinary Regulations by Chief Superintendent Smyth in that he controlled various licensed premises (and that he had a beneficial interest in his brother's company, the business of which depended in part upon maintaining valid licenses), the licensing of which might be posed by An Garda Siochana.

(c) as a result of the phone calls and the article a suspicion was formed in the minds of various members of An Garda Siochana that the Chief Superintendent was untrustworthy and potentially involved in criminality. Rather than investigating the truth of these claims, the relevant persons accented the session as, at least, potentially true or failed to make clear that the allegations were entirely groundless so that the suspicion and taint lingered over the Chief Superintendent. It is his case that this suspicion and taint denied him various promotion s (including promotion to Asst.

Commissioner) which but for those suspicions he would have received in light of his exemplary record and qualifications.

The Special Relationships asserted:
10. Each of the plaintiffs as search a special relationship with the defendants, but of a different nature. The existence of a special relationship, or the lack of it, has relevance in relation to some of the case law upon which the plaintiffs rely in defence of this preliminary issue. Again, for convenience, I will set out the facts relied upon in relation to these special relationships, as they are set forth in the plaintiffs' written legal submissions.

***Mr Philip Smyth*:**
11. Mr Smyth has a long relationship with the Gardai, partly by reason of the fact of his brother being a member of the force and partly through Mr Smyth's business which in the past necessitated frequent dealings with the Gardai on licensing applications, planning applications and the like and the operation of his hotel and sports centres. Some years ago when in Monaghan he was approached by a man (a Mr Johnston) who was eager to sell a collection of paintings which had been stolen from Mr Justice Murnaghan. Mr Smyth not only reported the matter to the local Gardai but accented the request from the local Chief Superintendent to assist the Gardai in the recovery of the stolen property by purporting to accept Mr Johnston's offer to purchase the paintings. Mr Smyth's assistance placed him in considerable personal danger and necessitated many trips across the border into Northern Ireland. The paintings were recovered owing in large part to Mr Smyth's bravery.

12. On the basis of further information obtained from Mr Johnston the Gardai again requested the assistance of Mr Smyth, this time in connection with the recovery of paintings stolen from the Beit collection. Mr Smyth again and agreed to assist the Gardai. Over a period of several months he again undertook great personal risk in attending a number of meetings in both Northern Ireland and the Republic under the direction of An Garda Siochana. At one stage in the operation, Gardai advised Mr Smyth to refuse to continue to meet subordinate members of the criminal gang but instead to demand to deal personally with the infamous Dublin criminal Martin Cahill. This Mr Smyth did, following assurances from Gardai that the meetings would never eventuate. In fact, Cahill contacted Mr Smyth and a number of meetings took place between the two. Mr Smyth was at all times acting under the direction and supervision of An Garda Siochana. Mr Smyth's meetings with Cahill (and a criminal associate of his) eventually resulted in Mr Smyth travelling to Antwerp to 'inspect' the stolen paintings which were duly recovered a short time thereafter.

13. Details of the operation were leaked to the deceased journalist Veronica Guerin. The subsequent article did not refer to Mr Smyth by name but the reference to a 'Dublin Hotelier' was sufficient that criminals involved in the robbery soon ascertained that Mr Smyth had been assisting the Gardai along. During this time Mr Smyth was informed by Gardai on a number of occasions that his life was in danger, and indeed on one occasion that he ought to take specific precautions as it was believed a threat to his life was imminent.

14. Mr Smyth was also in a particular class of persons (himself and his brother) which was, to the knowledge of the Gardai, the target of a specific malicious and continuing campaign designed to damage them, Mr Smyth's business and Chief Inspector Smyth's career and where the identity of the person responsible was known to the Gardai. Furthermore, the Gardai assumed a responsibility to Mr Smyth by initiating investigations at his request and assuring him that the investigations were proceeding in circumstances where proper investigations were necessary to dispel the clouds of suspicion which had been created over the Smyth brothers.

***Chief Inspector Paul Smyth*:**
15. In relation to Paul Smyth, he joined An Garda Siochana in 1963. He was promoted to Sgt in 1970, and Inspector in 1984. He was appointed as Inspector in Charge of in-Service Training in 1984, a position in which he remained until 1989 at which time he was appointed as senior Garda representative to the Moriarty Ministerial Advisory Group. He was promoted to Superintendent in 1990 and to Chief Superintendent in 1992.

16. Despite his wide experience he has been passed over for promotion in favour of more junior and less qualified candidates on numerous occasions. Between 1992 and 2002 sixteen Chief Superintendents were promoted to the rank of Assistant Commissioner. Only one successful candidate was more experienced than Chief Superintendent Smyth.

17. Chief Superintendent Smyth was thus in a position analogous to that of an employee with the associated duties of the Commissioner towards him. He was also in the class of persons targeted by the malicious campaign as explained above in the case of Mr Philip Smyth. Similarly he requested that an investigation carried out into the allegations against and the Gardai undertook to do so, thus assuming a further responsibility to him.

18. The above represent the facts relied upon by the plaintiffs, and as gleaned from their own helpful written legal submissions, and against which the legal submissions must be considered.

Legal Submissions:
19. From the defendants perspective the above facts which are taken by them to be established for the purpose of this preliminary issue are not particularly pertinent since their position in relation to the issue is that even if the defendants or any of them are assumed to have conducted a negligent investigation and negligently failed to recommend that a prosecution be brought against any person thought to be responsible for the matters about which the plaintiffs made complaints, the state of the law in this jurisdiction is such that as a matter of law the plaintiffs cannot in any circumstances succeed against the defendants.

20. The defendants rely on a number of authorities all of which have consistently held that no duty of care is owed by An Garda Siochana to any victim of an alleged crime in relation to how an investigation is carried out following a complaint being made. This position is based on public policy. The defendants submit that in order to succeed the plaintiffs would have to persuade the Court that the facts of this case are so egregious and the overall circumstances so exceptional (yet falling short of any suggestion of *mala fides* or misfeasance in public office since that is not pleaded by the plaintiffs) that it would be fair and reasonable that a duty of care should be found t o exist in circumstances where no such duty of care has ever in this jurisdiction been found to have existed. Shane Murphy SC for the defendants has submitted that nothing of such an egregious and exceptional nature has been put forward by the plaintiffs in this case, even when their cases are taken at their highest.

21. Mr Murphy has referred to a consistent line of authority which has held that there is no duty of care owed to victims of crime by An Garda Siochana in relation to the manner in which an investigation is carried out. His first port of call is the judgment of Costello P. in *W v. Ireland (No.2)* [1997] 2 IR 141. That was a case arising out of an alleged failure of the then Attorney General to consider and speedily process an extradition request so that the person would be returned to Northern Ireland to face prosecution for offences, including offences in respect of which she was a victim. It was contended by the plaintiff that the Attorney General breached a duty of care owed to her, and that this foreseeably caused her shock, distress, loss and damage. Before setting out the relevant passage

from the judgment of Costello P. I should refer to the fact that section 7(1)(f) of the Garda Siochana Act, 2005 provides that the function of the Garda Siochana is to provide policing and security services for the State with the objective of bringing criminals to justice, including by detecting and investigating crime. Other subparagraphs set out other objectives of this function. Although in W, Costello P. was dealing with an alleged breach of a duty of care in the context of the Extradition Acts rather than the Garda Siochana Act, 2005, he was addressing the question of whether there was a duty of care owed by the Attorney General to a victim of a crime, arising from his statutory function in relation to the processing of an extradition request. In this regard he stated at pp. 157-158:

> *"The Extradition Act 1965 (as amended) imposed no statutory duty on the Attorney General in relation to victims of the crimes referred to in the warrant which he was required to consider. The statute imposed a function on him (not a duty or a power). His statutory function is (a) to consider whether or not there is a clear intention on the part of the authorities in Northern Ireland to prosecute the person named in the warrant for the offences with which he is charged and (b) to consider whether such an intention (if it exists) is founded on sufficient evidence (section 44B). Having satisfied himself on these points, he is then required to decide whether to give a direction to the Commissioner under section 44A. His function is a professional one, which the Oireachtas requires him to perform as part of the extradition process in relation to persons accused of crimes committed in Northern Ireland. In considering whether or not there is a clear intention to prosecute the person named in the warrant, the circumstances of the victim of the crime are in no way relevant. Likewise in considering whether or not the intention to prosecute is founded on the existence of sufficient evidence, the circumstances of the victim are in no way relevant. The statute conferred a public professional function on the Attorney General, which created no relationship of any sort between him and the victims of the crimes referred to in the warrants he was considering. This is in striking contrast to the statutory provisions of the Housing Act, 1966 which were designed to assist a class of persons and which the Supreme Court held in Ward v. McMaster [1988] I.R.337, conferred a special relationship between them and the housing authority which resulted in the imposition of a common law duty of care.*
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> *In the absence of any relationship between the plaintiff and the Attorney General, I must hold that the Extradition Acts imposed no common law duty of care on the Attorney General in relation to the plaintiff."*

22. Mr Murphy submits that the same reasoning applies with equal force in relation to the functions carried out by An Garda Siochana in connection with the investigation and prosecution of crimes arising on foot of a victim's complaint. He submits that there is no relationship of proximity, and that accordingly any assertion of a duty of care fails at the first hurdle. But he goes further and submits that even if there was considered to be sufficient proximity by virtue of some special relationship existing, any loss and damage capable of arising to either of the plaintiffs is not foreseeable. He emphasises also the public policy considerations which have always been held to outweigh any interest of the victims of crime, such as these plaintiffs. Finally, it is submitted that the final hurdle that the plaintiffs have to surpass is that it is "just and reasonable" that the law should impose a duty of care of such a scope upon An Garda Siochana, and he submits that there can be no circumstances in which this would be so. In relation to these submissions Mr Murphy has referred to the well-known judgments in *Ward v. McMaster* [1988] I.R. 337 (McCarthy J.), and *Glencar Explorations Plc v. Mayo County Council* [2002] 1 I.R. 84 (Keane C.J.).

23. Mr Murphy has referred to the following passage from the more recent judgment of O'Donnell J. in *Whelan v. Allied Irish Bank Plc and others* [2014] IESC 3 in relation to the policy considerations which must underpin the 'just and reasonable' test referred to in Glencar:

> *" … The just and reasonable test in Glencar is also essentially a policy consideration and it has been determined long ago that it is just and reasonable that a solicitor, or indeed any other professional advisor, should owe a duty of care in such circumstances. It is also important that the question must be approached at that level of abstraction. As Lord Browne-Wilkinson observed in Barrett v. Enfield London Borough Council [2001] 2 A.C.550 (pp..559 – 560):*
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> *'… The decision has to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered … Questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors the liable to shareholders for negligent auditing, are not liable to those proposing to invest in the company … That decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case'.*
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> *The test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson."*

24. Mr Murphy has referred the Court to three decisions of the High Court which have stated that there is no duty of care upon An Garda Siochana in relation to their investigation of crimes. Firstly, he referred to *L v. Ireland* [2011] 1 IR 374 – a case decided on a preliminary issue. It was a case in which the plaintiff was the complainant in a prosecution for rape. The trial collapsed because during the trial it emerged that the accused person had been arrested pursuant to the common law power of arrest for rape, such a power of arrest having ceased to exist by virtue of section 3 of the Criminal Justice Act 1984. The result of the arrest being unlawful was that any evidence obtained from the accused person while in unlawful detention was inadmissible at his trial. The plaintiff brought proceedings in negligence and breach of duty, but, as in the present case, there was no allegation of *mala fides*.

25. In his judgment, Kearns P. considered the cases which Mr Murphy has relied upon as well as others, and concluded by stating:

> *"Given that it is my view that a claimant must establish mala fides to bring her claim within the law of tort within this jurisdiction, I am satisfied to conclude that no duty of care arises in respect of bona fide actions and decisions carried out by An Garda Siochana in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by enquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Siochana, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the*

investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step of the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on the Garda Siochana in respect of those suspected of crime, to constraints of unimaginable proportions."

26. Mr Murphy has relied also on two decisions of a similar kind by Hedigan J. in both *L.M. v. Commissioner of An Garda Siochana [*2011] IEHC 14 and *G v. Minister for Justice* [2011] IEHC 65 which firmly hold the line on the non-existence of a duty of care. In LM – again a case decided upon a preliminary issue – he adopted the conclusion of Kearns P. in *L v. Ireland*, which I have set forth in the preceding paragraph, and went on to state:

> *"The starting point in relation to a claim of negligence is to examine whether each element that is required to establish a duty of care is present. The necessary elements are proximity, foreseeability, considerations of public policy and also the test of whether it is just and reasonable to impose a duty of care. The key issue in this case is whether it would be contrary to public policy to impose a duty of care on the Gardai. It seems to me that the cases cited above establish that no duty of care exists in Irish law upon the defendants in respect of their investigatory or prosecutorial functions. This is because it would be contrary to the public interest that such a duty to be imposed by reason of the inhibiting effect this would have on the proper exercise of those investigatory and prosecutorial functions. It is in the public interest that those bodies should perform the functions without the fear or threat of action against them by individuals. The imposition of liability might lead to the investigators operations of the police being exercised in a defensive frame of mind. A great deal of police time, trouble and expense might have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. While the recognition of individualised justice may militate in favour of the recognition of the duty of care, there are compelling considerations rooted in the welfare of the whole community, which outweigh the dictates of individualised justice. This view of the law is entirely consistent with the jurisprudence of the European Court of Human Rights as set out in Z v. United Kingdom [2002] 34 E.H.R.R.3.*
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> *The fact that the defendants are carrying out functions which are in the public interest outweighs any duty of care to private individuals. This is not to say that such bodies are immune from actions for damages arising from ordinary principles of negligence. The absence of duty relates only to their actions arising from the prosecutorial or investigatory functions. For all the above reasons the court finds that the defendant did not owe a duty of care to the plaintiff …".*

27. I should add that Mr Murphy has noted a number of decisions of the English courts which have held to the view that no duty of care is owed in relation to the investigative and prosecutorial functions of the police there – cases such as *Hill v. Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v. Commissioner of Police for the Metropolis* [2005] 1 WLR 1495; *Vicario v. Commissioner of Police for the Metropolis* [2007] EWCA Civ. 1361; *Van Colle v. Chief Constable of Hearts* [2009] 1 AC 225; *B v. Reading LBC* [2009] 2 FLR 1273; *Desmond v. Chief Constable of Nottinghamshire Police* [2011] All ER (D) 37; and finally, *Robinson v. Chief Constable of Yorkshire* [2014] EWCA Civ. 14.

28. In the face of these established principles, repeated by now so often, any plaintiff seeking to assert successfully that a duty of care is owed to him/her arising from a negligent investigation of his/her complaint, might with some justification be compared to the hapless Sisyphus who for his sins was condemned forever to roll a heavy boulder to the top of a steep hill, only to find as he nears the top that it slips his grasp and rolls back down again, forcing him once more to set off upon his hopeless task.

29. Nevertheless, Michael Collins SC for the plaintiffs seeks to persuade the Court not to dismiss these proceedings on the basis that they must fail, even taking the plaintiffs' pleaded facts at their highest. He submits that given that there can be no blanket immunity from suit in respect of negligence on the part of An Garda Siochana, there must therefore be some exceptional or special circumstances in which, albeit rarely, a duty of care is owed to certain victims of crime and may be found to have been breached. In such circumstances, it is submitted that the defendants cannot successfully say to this Court on this preliminary issue that, regardless of all facts pleaded by the plaintiffs and any that might be later discovered by a process of discovery or at trial through cross-examination or otherwise, this claim cannot as a matter of law succeed.

30. He refers to the so-called 'core principle' in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 in this regard, which is that absent special circumstances the police when investigating or combating crime owe no duty to protect individuals from the criminal behaviour of others. Mr Collins emphasises the use of the words "absent special circumstances". This in his submission provides a window (albeit of narrow aperture) for a party such as either plaintiffs herein to attempt to pass through at a full hearing by establishing particular and special facts, and that it cannot therefore be said, as the defendants say, that there are no circumstances in which a claim in negligence can be maintained against An Garda Siochana in relation to how an investigation is conducted.

28. He accepts, as he must, that the task ahead of the plaintiffs is difficult one, but he submits that their right to at least have the case dealt with substantively at trial rather than dismissed on a preliminary issue is one which this Court should not deprive them of at this early stage. He makes that submission in the glaring light of the various cases already referred to which have decided that there is no duty of care upon the Gardai in the matter of their investigations of crimes. He suggests that, if necessary, those decisions should be distinguished, or even departed from on the basis of what he sees as the more comprehensive submissions made herein. I inquired if any of those decisions are the subject of a pending appeal to the Supreme Court, but that information was not known at the time of submissions to me.

29. The starting point for the plaintiffs is their submission that on an application of this kind, the plaintiffs are not required to prove anything, not even a prima facie case, and that the entire burden of satisfying the Court that the plaintiffs' cases have no chance of success rests upon the defendants. Mr Collins submits that the Court should be slow to exercise its undoubted jurisdiction to dismiss at a preliminary issue stage, and should do so only in a very clear case. In that regard he has referred to the judgment of McCracken J. in *Ruby Property v. Kilty* [1999] IEHC 50 when, on such a preliminary issue, he stated that "*it is quite clear that the court can only exercise the inherent jurisdiction to strike out proceedings where there is no possibility of success*". He refers also to the judgment of Denham J. (as she then was) in *Aer Rianta v. Ryanair* [2004] 1 I.R. 506 where she stated that the jurisdiction should be exercised where the Court is "*convinced that a claim will fail*". In addition, Mr Collins has referred to the judgment of McCarthy J. in *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425 in which he stated:

> *"By way of qualification of the jurisdiction to dismiss an action at the statement of claim stage, I incline to the view that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.*

Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceeding; oftentimes it may appear that the facts are clear and established but the trial itself will disclose a different picture."

30. By way of emphasising the heavy onus upon a defendant on a motion of this kind, Mr Collins has referred also to the judgement of Mr Justice Clarke in *Salthill Properties v. Royal Bank of Scotland* [2009] IEHC 207 where Clarke J. Held that:

"It seems to me that counsel for [the plaintiffs] is correct when he says that the court need not and should not require a plaintiff to be in a position to show a prima facie case at the stage of an application to dismiss, in order that that application should fail. There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories. That is not to say that it is legitimate for a party to instigate such proceedings when the party concerned has no basis for so doing. However, there is, in my view, a significant difference between circumstances where a plaintiff has a legitimate basis for considering that it may have a claim at the time of commencing proceedings on the one hand, and a situation where that party has, at that time, available to it admissible evidence which it can put before the court to establish a prima facie case on the other hand.

It is clear from all the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a prima facie case to the contrary effect."

31. Having regard to what is stated above by Clarke J., Mr Collins has pointed out that the plaintiff will be seeking discovery of documents for the purpose of the substantive hearing should this Court not accede to the plaintiffs' application, and urges the Court to have regard to the distinct possibility that further facts and circumstances may well emerge from that process of discovery and which would assist the plaintiffs in seeking to come within the narrow window which presents itself under the jurisprudence, where a plaintiff may succeed in establishing particular facts to justify a Court in holding that in this particular case a duty of care was owed by An Garda Siochana, and showing that there was a breach of the duty and that loss and damage resulted to the plaintiffs as pleaded. He again refers to the plea that the plaintiffs stood in a special relationship with An Garda Siochana for the reasons already set forth. I should add of course that the plaintiffs sought and were refused an order for discovery for the purpose of this preliminary issue. I concluded that given the acceptance by the defendants for the purpose of this issue of the facts pleaded by the plaintiffs in their Statements of Claim, discovery was not necessary.

32. As I have said already, the facts of the present case as pleaded, and therefore assumed to be true for the purpose of this preliminary issue, are less important to the defendants than to the plaintiffs, since the defendants' submission is that whatever the facts and even if it is accepted for the preliminary issue that the investigation conducted by the Gardai into the plaintiffs' complaints was negligent, they cannot as a matter of law succeed. They say that regardless of the facts pleaded the plaintiffs simply cannot succeed. The facts are more important to the plaintiffs because they seek to distinguish the present cases on their facts from those cases where it has been already decided in a number of cases that no duty of care to victims of crime arises at law in this country, apart from their submission that perhaps it is open to revisit the law as stated in the cases referred to, namely L, LM and G [supra].

33. The plaintiffs accept that in seeking to recover damages for negligence against the defendants in this case they are seeking to have the principles of negligence applied to a novel category of claim and that in order to achieve that they must satisfy the well-known three tier test stated in *Caparo Industries v. Dickman* [1990] 2 *AC 605, and which has been adopted in differing forms here in cases such as Ward v. McMaster* [1985] I.R. 29, *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, *Beatty v. Rent Tribunal* [2006] 2 I.R. 191, and most recently in *AIB v. Whelan* [IEHC] 3. As summarised in *Beatty* at p. 206 by Fennelly J. the three steps to be satisfied by such a plaintiff are:

1. that there is a relationship of such proximity between the parties as to call for the exercise of care by one party towards the other;

2. that it is reasonably foreseeable that breach of the duty of care will occasion loss to the party to whom the duty is owed; and

3. that it is just and reasonable that the duty should be imposed.

34. It is the last of these tests that gives rise to the most controversy in the present case. It has in the past, such as in Ward v. McMaster, been spoken of in terms that if the first two steps are satisfied then absent some very powerful public policy reason liability in negligence should be found against the defendant. In more recent times that public policy consideration becomes part of the consideration of whether it is just and reasonable to impose a duty of care of such a scope. In the cases of L, LM and G referred to the line was firmly held that there are sound public policy reasons for not finding a duty of care to exist on the part of An Garda Siochana in relation to the investigation of crime. While recognising the importance attaching to the individual's right to a remedy in respect of a negligent act, these cases have nevertheless concluded that such individual right must yield to a greater public interest in allowing An Garda Siochana to go about their function of investigating and prosecuting crime unencumbered by the risk that their actions and inactions in that regard could result in them being found to have been negligent. I have already set forth a passage from the judgment of Kearns P. in L v. Ireland in which he elaborates on the potential consequences if such a duty of care was to be imposed on An Garda Siochana. It will be recalled that L was a case where a rape trial collapsed because at trial it emerged that the accused had been arrested on foot of a non-existent common law power of arrest. It is argued that the facts of the present case are different in as much as there never has been a charge brought on foot of the plaintiffs' complaints. Their complaint includes that the complaint was never properly investigated at all rather than that steps were taken and a mistake made. They say that they even told the relevant Gardai who was responsible for the hoax calls in question, and yet nothing was done. They seek to make a distinction between the present case and L on that basis that An Garda Siochana failed to investigate at all, rather than that a mistake in the investigation resulted in an acquittal as in L.

35. In relation to the judgment of Hedigan J. in *G v. Minister for Justice, Equality and Law Reform*, the plaintiffs point to the very different facts of that case, and would take issue with a finding of fact in that case by the learned trial judge that the action by the Gardai in bringing the man in question to the house of the plaintiff so that he could have somewhere to spend the night was something done in the course of the investigation as such. They would characterise it more as an assumption of responsibility on the

part of the defendant given the knowledge that they had. Be that as it may, in the event he raped her that night. She sued the Minister on the basis of a duty of care owed to her and breached. On a strike out application by the defendants the learned judge concluded as follows:

> *"The crucial question is as to whether their action in bringing J.K. to A.G's house was something done in the course of their investigatory functions that night. I do not think it is possible to hold that it was not … it was inextricably a part of their investigatory functions that night. This I think disposes of the case. On the basis of the now well established law as outlined above no duty of care arises from the circumstances herein."*

In so far as the defendants in the present case seek to rely on this conclusion as further support for the total absence of any duty of care on the part of An Garda Siochana in relation to anything that happens during the investigatory process, Mr Collins suggests that the basis for the decision could be revisited, or perhaps that no great reliance should be placed upon it. He submits that the decision is *per incuriam* on the basis that more comprehensive submissions in the case could on the very stark facts of that case have allowed at least that the case would not be dismissed on a strike out application based on their being no possibility that the plaintiff might succeed.

36. The plaintiffs submit that while there may well be good sound public policy reasons why An Garda Siochana ought not to be found to owe a duty of care generally to victims of crime in relation to how they go about their function of investigating and prosecuting crime for fear that if such a duty of care was to exist there would be a flood of cases brought by dissatisfied complainants, the present case is so different that no such flood-gates argument applies. They are saying that the Gardai are under a duty to investigate crime (notwithstanding that it is described as a function in section 7 of the Garda Siochana Act, 2007), and that in breach of that duty, and negligently, they carried out no proper investigation. They contend also that there was an assumption of responsibility by An Garda Siochana by assurances given to Philip Smyth, and also that a special relationship existed in relation to Paul Smyth and developed with Philip Smyth as outlined. They submit that the public policy considerations which have been highlighted in the decided cases and which have been found to trump the individual rights of plaintiffs to a remedy are not applicable in the present case. In that respect they say that imposing a duty of care which requires that they carry out a proper investigation is in the public interest as opposed to being against it, and would serve the public interest in ensuring that crimes are investigated rather than being simply ignored or overlooked.

37. Mr Collins has submitted that the jurisprudence upon which the defendants rely is tantamount to a blanket immunity from a duty of care for An Garda Siochana, and that such an immunity is something not permitted, at least according to the ECtHR. In that regard he is referring to the defendants' submission that there can be no circumstances in which a duty of care can be found to exist on the part of the Gardai when they are investigating crime. Taken at face value it appears very like an immunity that is being contended for by the defendants. However, whether the conclusion that there is no duty of care owed to victims of crime in relation to an investigation of the offence amounts in fact to an immunity arose in the United Kingdom in *Osman v. United Kingdom* [1998] 29 EHRR 245, but was revisited in *Z v. United Kingdom* [2002] 34 EHRR 3 when the Osman conclusions were refined to take account of objections and clarifications uttered by such as Lord Bingham in the aftermath of Osman. It was felt that the common law had not been correctly understood by Strasbourg in relation to how the duty of care principles are applied in the United Kingdom.

38. Before seeing whether the way the jurisprudence has evolved in this regard both in the United Kingdom as well as Canada and South Africa by reference o certain cases to which Mr Collins has referred, it is useful to look at the judgment in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53, and how matters have evolved subsequently since it is that case which has set the scene for the present state of the law. It is that case also which seems to have founded the decisions here in L, LM and G to which I have referred. Mr Collins submits that the result of that evolution in judicial thinking has not as yet seen its way into the cases which have been decided in this jurisdiction, and he submits that the plaintiffs herein should be permitted to have their case decided substantively at trial, after discovery and the emergence of the full facts and circumstances of the investigation which took place, and have an opportunity to address that developing case law in a comprehensive way, and not simply at the stage of a preliminary issue when all facts may not be known. He submits that when properly understood, the core Hill principles as they have been refined and have evolved since Hill was first decided leaves a window open for cases with special and unusual facts to be resolved on the basis that it is fair and reasonable that a duty of care was owed to these plaintiffs in relation to the manner in which the investigation was carried out by An Garda Siochana. It is in such circumstances that it has been submitted that this case is not so clearly bound to fail that it out to be dismissed at this stage and without a full hearing at trial.

39. The facts of Hill are well-known. The plaintiff was the mother of a lady who was killed by Sutcliffe, otherwise known as 'The Yorkshire Ripper'. The plaintiff alleged that the police investigation was negligent, and that if a proper investigation had been carried out Sutcliffe would have been apprehended sooner and her daughter would therefore not have died. It will be immediately apparent that Hill is factually very different to the present case. The plaintiff mother claimed that the police were under a duty to use their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator – who was unknown at the relevant time – and so protect members of the public who might be his future victims. Quite a number of matters were alleged as to how the police had failed to exercise reasonable care in the investigation. The defendant brought a motion to strike out the claim on the basis that it disclosed no reasonable cause of action. The facts as pleaded were assumed to all be true for the purpose of that issue, and therefore that if the mistakes which were alleged to have been made by the police during the investigation had not been made, the plaintiff's daughter would not have died. Distinguishing the facts from the Dorset Yacht case, Lord Keith noted that in Hill firstly that Sutcliffe had never been in the custody of the police. His identity was unknown, and the potential future victims to which any duty of care would be owed if such a duty was found to be fair and reasonable was unconfined, except to say that it was likely to be any young female person. He concluded that although there existed reasonable foreseeability of harm to a person such as the plaintiff's daughter if Sutcliffe was not apprehended there was absent any such ingredient as led the Court to impose liability in the Dorset Yacht case.

40. While Lord Keith stated that was sufficient to decide the case in *Hill*, he went on to elaborate on another reason why the plaintiff's action had to be dismissed, namely public policy grounds. It is worth stating his reasoning in full:

> *"Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying out of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns that function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would 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 he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure – for example that a police officer negligently tripped and fell while pursuing a burglar – others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not the object of bringing any criminal justice but to ascertain whether or not they had been competently conducted."

It will be noted that the phrase '*immune from an action of this kind'* is used towards the end of this passage, and it is this which gave rise to the Strasbourg decision in *Osman*, and later controversy addressed in cases such as *X v. United Kingdom* [supra]. In his brief speech in *Hill* Lord Templeman stated at p. 65:

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

41. A few years after *Hill* was decided, the Court of Appeal in *Osman and another v. Ferguson another* [1993] 4 All ER. 344 followed the House of Lords decision in Hill and dismissed the plaintiff's claim on public policy grounds and on even stronger facts than in Hill. Again, it was dismissed on a motion to strike out as showing no reasonable cause of action.

42. Mrs Osman and her son brought their complaint to the ECtHR which in its judgment noted that the civil claim in the United Kingdom had been dismissed on a strike out motion without a full hearing on the merits, based on the reasoning in Hill that on grounds of public policy the action was not maintainable and bound to fail. The Court saw the ruling in Hill as "*an exclusionary rule to protect the police from negligence actions …. based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the constant risk of exposure to tortuous liability for policy and operational decisions*" (para. 149). It saw the Court of Appeal in Osman as having proceeded on the basis that the rule in Hill provided a "*watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime*" (para. 150). The Court went on to state that "*the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on the applicants' right to have a determination on the merits of his or her claim against the police in deserving cases*".

43. The Court reached a conclusion firstly that the exclusionary rule effected a violation of Article 6.1 of the Convention being a disproportionate restriction on the applicants' right of access to a court. In so finding it stated "*they may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings*". The Court decided that no separate issue arose under Article 13 of the Convention (right to an effective remedy).

44. Of interest too is that in a concurring judgment the United Kingdom member of the Court, Sir John Freeland explained his reasons for concurring in the decision in relation to Article 6 violation. While he accepted that the public policy exception from liability had a legitimate aim, and that in some cases it could be applied proportionately to that aim, he stated "*The difficulty for me arises primarily from the fact that in the present case it appears to have been applied as if conferring on the police a blanket exemption from liability in negligence so far as concerns their function in the investigation and suppression of crime, to the exclusion of any examination by the court of considerations which might pull in another direction*".

45. It was not long before the House of Lords had an opportunity to express its dismay and disagreement with the Osman ruling. Lord Browne Wilkinson found an opportunity to do so in his speech in *Barrett v. Enfield Borough Council* [2001] 2 AC 550 though not a case against the police but rather against a local authority which had taken the plaintiff into care under a care order when he was 10 months old. Having remained in care until he was aged 17 the plaintiff then claimed that the council had fallen short of the standard of care which would be expected of a responsible parent, and that he had suffered severe emotional, psychological and psychiatric problems as a result. The Court of Appeal upheld a decision to strike out the claim as disclosing no reasonable cause of action. However, that decision was reversed on appeal to the House of Lords.

46. Again, policy considerations had been relied upon in the courts below so as to rule out any liability on the local authority arising from any negligent performance of its statutory functions. Lord Woolf in the Court of Appeal had considered that "*to hold a local authority or its agents liable in cases such as the present would be to encourage a safety-first approach by social workers which would be detrimental to children in care as a whole i.e. it would be bad public policy*". He had also considered that any injury to the plaintiff as alleged must have flowed from policy decisions "*which were not actionable and not from operational acts which might be actionable*". In his speech in the House of Lords, Lord Browne Wilkinson homed in on this distinction between operational acts and policy decisions. In concluding that the Court of Appeal's decision on the strike out application should be reversed, he stated:

"I find it impossible to say that all careless acts or omissions of a local authority in relation to a child in its care are not actionable: indeed I do not read the Court of Appeal so to have held. If certain careless conduct (operational) of a local authority is actionable and certain conduct (policy) is not, it becomes necessary to divide the decisions of the local authority between those which are "policy" and those which are "operational". It is far from clear what the expressions "operational" and "policy" connote. Therefore unless it can be said (as did the Court of Appeal) that operational carelessness could not have caused the damage alleged in the present case it would be impossible to strike out any part of the claim. But causation is quintessentially a matter of fact and one would have thought that where there is substantial doubt as to what is an operational decision there must equally be doubt as to the extent or nature of the damage capable of being caused by negligence in making such an operational decision."

47. In so concluding he went on to state that there had been two developments since the parties had argued the case before the

House of Lords, and "*both emphasise the extreme care which must be taken in striking out claims in this confused and developing area of the law, and clearly reinforce the conclusion that the case cannot be struck out*". One of those developments was that certain dicta of his own made on a strike out application in X (Minors) v. Bedfordshire County Council [1995] 2 AC 633 and which had been relied upon by subsequent plaintiffs had been based on facts which turned out to have been wrongly assumed for the purpose of the preliminary strike out application. He stated in that regard:

> *"This erroneous dictum of mine made in the course of seeking to determine a striking out application on hypothetical facts has apparently given rise to a proliferation of claims against psychology services provided by local authorities in dealing with those suffering from reading disability. It vividly illustrates how important it is to decide these cases on actual facts and not upon mistaken hypotheticals".*

48. The other development to which Lord Browne Wilkinson was referring was the decision by the ECtHR in Osman holding in that case that the strike out decision made in the domestic court was a breach of the plaintiffs' right of access to a court. He stated that he found it "*extremely difficult to understand".* He referred to the terms of Article 6 and identified two separate features. Firstly that a plaintiff must have "right" which he is entitled to have determined, for example a contractual right or a tortuous right", and only then, has one the further right to have that right determined in a court of law. Referring to these as right A and right B, he stated that unless right A exists, then right B does not come into play. However, he was dismayed that this was not how Article 6 was viewed in Strasbourg, and considered that it indicated a misunderstanding of the law of negligence in the United Kingdom. He opined that when the law requires that before tortuous liability is imposed upon a defined class of persons defendants it must be considered that it is "fair, just and reasonable" to hold them liable, this does not create an immunity as such (though he accepted that the word "immunity" was sometimes wrongly used), but rather "*it is a pre-requisite to there being any liability in negligence at all, that as a matter of policy it is fair just and reasonable in those circumstances to impose liability in negligence*". He went on:

> *"In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered".*

49. Lord Browne-Wilkinson went on to say that in the light of the Osman decision in Strasbourg:

> *"it is difficult to foretell what would be the result in the present case if we were to uphold the striking out order. It seems to me that it is at least probable that the matter would then be taken to Strasbourg. That court, applying its decision in the Osman case if it considers it to be correct, would say that we had deprived the plaintiff of hid right to have the balance struck between the hardship suffered by him and the damage to be done to the public interest in the present case if an order were to be made against the defendant council. In the present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 article 6 will shortly become part of English law, in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out" (emphasis added)*

50. In the same case Lord Slynn of Hadley in his speech returned to the distinction between so-called purely operational decisions on the one hand and policy decisions in which some discretion was to be permitted as to how a statutory function was exercised. He expressed the view (p. 571) that the two tests, namely whether the decision was a policy one or an operational one were guides to whether or not the particular issue raised was justiciable or whether the courts had no role in the matter. He went on at p. 572 to state:

> *"A claim in negligence in the taking of a decision to exercise a statutory discretion is likely to be barred, unless it is wholly unreasonable so as not to be a real exercise of the discretion, or if it involves the making of a policy decision involving the balancing of different public interests; acts done pursuant to the lawful exercise of the discretion can, however, in my view be subject to a duty of care, even if some element of discretion is involved. Thus, accepting that a decision to take a child into care pursuant to a statutory power is not justiciable, it does not in my view follow that, having taken a child into care, an authority cannot be liable for what it or its employees do in relation to that child without it being shown that they have acted in excess of power. It may amount to an excess of power but that is not in my opinion the test to be adopted; the test is whether the conditions in the Caparo case … have been satisfied."*

51. With regard to the doubt expressed by the Court of Appeal in its decision to uphold the strike out that the plaintiff would not be able to show that the injuries he suffered resulted from operational decisions rather than policy decisions by the council, Lord Slynn stated:

> *"With great respect to the opinion of the members of the Court of Appeal, I have come to the view that this claim should not be struck out at this stage on that ground. It may well be that many of the allegations will be difficult to establish and that they will fail. In my opinion, however, the importance of seeing in each case whether what has been done is an act which is justiciable, or whether it is an act pursuant to the exercise or purported exercise of a statutory discretion which is not justiciable requires in this kind of matter, except in the clearest cases, an investigation of the facts. This is not the clearest case taken as a whole, even though some allegations if they stood alone might justifiably be struck out. I consider also that the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved."*

52. He concluded by saying that although he foresaw great difficulty ahead for the plaintiff at trial, "*he is entitled to have these matters investigated and not to have them summarily dismissed*".

53. The ECtHR had occasion in X to revisit the question of whether Article 6 was breached in circumstances where the applicants' case against a local authority arising from a failure by the local authority to protect them from neglect and abuse by their parents and of which the authority was aware was happening, was struck out as disclosing no cause of action. In its conclusions the Court resiled from its earlier decision in Osman that the striking out of the claim breached Article 6 rights. In so doing it stated:

> *"The Court considers that its reasoning in the Osman judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords. The Court is satisfied that the law of negligence as developed in the domestic courts since the case of Caparo, and as recently analysed in the case of Barrett v. Enfield London Borough Council includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element of the duty of care does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that*

the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court ……".

54. Nevertheless, the Court held that given that the plaintiffs case was struck out on the basis that they had no cause of action under the law of negligence as interpreted by the House of Lords, no matter how foreseeable and severe the harm suffered was and no matter how unreasonable the conduct of the local authority in failing to take steps to prevent that harm from occurring, there was a gap in the domestic law which gave rise to an issue under Article 13 of the Convention (right to an effective remedy), if not under Article 6 thereof. The applicants argued that the exclusionary rule (which was found not to violate Article 6) deprived them of an effective remedy under the domestic law. They argued that the only remedy in domestic law capable of determining the substance of their complaint (but for the exclusionary rule/immunity) was the tort of negligence. The Court concluded that "*Article 13 requires the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision*".

55. The scope of the obligation under Article 13 does of course, as stated by the Court in X, vary depending on the nature of the applicant's complaint under the Convention, and the Court stated "*nevertheless the remedy required has to be effective in practice as well as law …… there should however be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention*." The Court found by a majority of 15 votes to 2 that there was a violation of Article 13. I notice in passing that the majority on this issue included both Lady Justice Arden of the United Kingdom, and Mr Justice Hedigan.

56. In so far as the plaintiffs in the present case have been attempting to clear their good name and reputation, and say that they have suffered loss and damage to their good name by reason of the failure of An Garda Siochana to properly investigate their complaints and bring to justice those who have injured their good name in the manner pleaded, it is certainly arguable that Convention rights are in play and that the plaintiffs are entitled to an effective remedy, even though the fundamental right at stake is not in the category of Articles 2 and 3 as was the case in X. It might remain to be argued by them in the event of a strike out of their claims at this preliminary stage of the case that their rights under Article 6 have been infringed, and if not, then certainly under Article 13, if the Court did so on the basis of the exclusionary rule or immunity enjoyed by An Garda Siochana in relation to matters pertaining to their investigatory functions. I should add that section 2 (1) of the European Convention on Human Rights Act, 2003 provides:

> *"2. – (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions".*

In addition section 4 thereof provides, inter alia, that "*a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments*".

57. I want to refer to two further judgments related to this topic generally, namely the later speeches of Lord Bingham of Cornhill and of Lord Steyn in *Brooks (FC) v. Commissioner of Police for the Metropolis* [2005] 1 WLR 1495, and that of Lord Bingham in *Smith (FC) v. Chief Constable of Sussex Police* [2008] UKHL 50. Again, Brooks was a strike out application. It was a case where the assumed facts were that the police investigation was very badly conducted. Three particular duties of care were contended for. Both Lord Bingham and Lord Steyn concluded that it was appropriate that the claims be struck out at that stage of the proceedings. Lord Bingham relied on the fact that it was a case in which all the facts were ascertained. There was nothing more to find out about what had happened since the facts had been exhaustively investigated, and if the case was permitted to go to a substantive hearing the same facts would be before the court as were already available. Secondly, he was convinced that even under some modified version of the Hill principles the duties of care contended for by the plaintiff could not even arguably arise in respect of the police investigating serious crime. It was a clear case for early strike out. But before stating those conclusions in his speech. Lord Bingham stated the following:

> *"For reasons elaborated at some length in my dissenting opinion in JD v. East Berkshire Community NHS Trust and others [2005] UKHL 23, I would be very reluctant to dismiss without any exploration of the facts a claim raised in a contentious and developing area of the law where fuller factual enquiry might enable a claimant to establish that a duty of care had been owed to him and had been broken. I would also be reluctant to endorse the full breadth of what Hill v. Chief Constable of West Yorkshire [1989] AC 53 has been thought to lay down, while readily accepting the correctness of that decision on its own facts."*

58. Lord Steyn in his speech noted that Hill had not been followed in Canada or South Africa, but that a decision of the High Court of Australia in *Sullivan v. Moody* [2002] LRC 251 was generally consistent with Hill. He then went on to consider the status of the Hill decision in England. He concluded that in the light of recent developments and particularly in the light of the ECtHR's decision in *Z and others v. United Kingdom* 34 EHRR 97 "*it would be best for the principle in Hill to be reformulated in terms of the absence of a duty of care rather than a blanket immunity*". He went on to state that "*with hindsight not every observation in Hill can now be supported"* and then referred to the fact that in Hill Lord Keith has stated that "*From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it*". Lord Steyn then remarks: "*Nowadays, a more sceptical approach to the carrying out of all public functions is necessary*". Nevertheless he opined that the core Hill principles still applied and that if such a case arose again today it would be decided in the same way. He concluded his speech by stating:

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

59. In 2008 these questions arose again in the House of Lords in two cases which were dealt with together, namely *Chief Constable of the Hertfordshire Police v. Van Colle; and Smith v. Chief Constable of Sussex Police* [2008] UKHL 50. It is the opinions in the Smith case that I wish to refer to, since in the latter the claim was brought only under the common law of tort, whereas in Van Colle the claim was brought under the Human Rights Act 1998 alone based on breaches of articles 2 and 8 of the Convention. The facts in each case were at the extreme end. In each case a clear and explicit threats to the life and limb was made. The threats were made known to the police by each threatened person. In Van Colle's case the person threatened was shot dead by the person who had been named as having issued the threats. In Smith's case he sustained skull fractures and brain damage at the hands of the named person who had issued the threats against him. The perpetrator was convicted of making threats to kill and of causing grievous bodily harm

and received a ten year prison sentence.

60. Smith brought a claim for negligence against the police for the failure to protect him from known threats from a known individual. That claim was met by a strike out application on the basis that no cause of action was disclosed against the police. The judge at first instance acceded to the application to strike out the claim. However, the Court of Appeal (Pill, Sedley and Rimer LJJ) allowed the appeal, and remitted the claim for hearing in the County Court. When the matter was heard in the House of Lords, Lords Hope, Bingham, Phillips, Carswell and Brown) the appeal was allowed and the proceedings were struck out.

61. The Court of Appeal had unanimously allowed the appeal on the basis of assumed facts, and stated that the plaintiff's case was not doomed to failure, that the common law should evolve in the light of rights under the Convention, and that the question whether or not a duty of care existed and whether it had been breached would depend on facts found and further analysis of them at trial. Lord Justice Pill noted that in Osman the ECtHR had stated that "*this is a question that can only be answered in the light of all the circumstances of a particular case*". In the Court of Appeal importance was placed on the existence of a special relationship which, it was felt gave rise to greater proximity between Smith and the police. In fact Sedley LJ was of the view that since the Human Rights Act, 1998 "*the law of negligence did not bar actions against the police but recognised that it would be contrary to public policy to allow any to proceed which were not founded upon a high degree of proximity …… in this way the two tests – the one relating to proximity, the other whether it is fair, just and reasonable that there should be liability – have in large part merged". He went on to state: "Hence, in Brooks, the acceptance by Counsel for the Commissioner that cases of assumption of responsibility fell outside the Hill principle*."

62. During the course of his judgment, Sedley LJ referred to the case of *Swinney v. Chief Constable of Northumbria* [1997] QB 464, noting that it was a case in which the police had negligently disclosed the identity of an informer whom they had undertaken to protect, and in which the Court held "*that the public interest in the protection of informants had to be weighed against the public interest in protecting the police from lawsuits over the way in which they discharged their duties, and that on the alleged facts the proper place for this was at trial*". He went on to state that Swinney had been decided before the Osman case had reached the Strasbourg court, and hence before the moderation its Osman view of the Hill principle in Z v. United Kingdom. But he went on to express his view that "*It remains the case that any rule of law which had the effect of immunising the police against any and every negligence claim would fall foul of art.6*".

63. Rimer LJ in his judgment in the Court of Appeal in Smith also referred to Swinney, and the effect of a "close proximity" or special relationship. Having referred to the Hill principle, and to what he described as "*a compelling argument that that those grounds are equally fatal to the arising of a duty of care in this case*", he went on at para. 38 to state: "*In my view, however, the subsequent development of the common law has not demonstrated conclusively that that is its certain outcome*". He remarked also at para. 40 that "*The story of the common law to date would not, therefore, appear to promise a favourable outcome to the present claim; but like Sedley J. I would nevertheless also not regard it as inevitably doomed to failure*".

64. Another interesting aspect of the decision in the Court of Appeal in Smith is what is stated by Sedley LJ at paragraphs 30- 31 of his judgment in which he posited a possible distinction between cases arising from "neglect by inefficiency" and others arising from "wilful neglect". He stated in that regard:

> *"I recognise that in developing the common law case by case there is a risk of creeping liability: each case proceeds by analogy with the last, but always in the direction of enlarging the liability of the police. This has to be guarded against; but it has also to be remembered that there has been no such process in the many years since the Dorset Yacht decision. On the contrary, the red line drawn by Hill has had to be modified in Brooks to take account, among other things, of' Osman v. United Kingdom. The process has been, and can be expected to continue to be, a cautious one. It has also to be a process which attempts, as the courts must always do, to close the gap between law and justice, remembering that justice to society and its institutions can be as relevant as justice to individuals.*
>
> *There may for example be a distinction to be drawn in this area, though not explored in this appeal, between neglect by inefficiency and wilful neglect. The present case, on its pleaded facts, is clearly capable of coming into the second category. The may also be a distinction to be made at common law, as there is in the Convention, between the protection of property (which was the issue in Alexandrou) and the protection of life (which was the issue in Osman and is the issue here). This to is for future consideration in the light of ascertained and evaluated facts: none of it is in my opinion sufficiently certain to found the striking out of the claim."*

65. I am not overlooking the fact that the decision in the Smith in the Court of Appeal was reversed in the House of Lords. But UK authority is not binding in this jurisdiction, and voices uttered in the other jurisdiction in favour of not striking out a claim on the basis that there can be no general immunity from suit enjoyed by the police, and that exceptional cases might arise where a duty of care might be owed, may be listened to in order to inform judicial thinking in this jurisdiction. The cases decided here to date have necessarily been decided on their own particular facts. In so far as there may be a suggestion in the present case that the Irish cases to which reference has been made and which have been struck out as showing no reasonable cause of action have been struck out on the basis that no claim in negligence against An Garda Siochana can ever succeed on policy grounds, I would respectfully disagree with such an absolute interpretation of the Hill principle, especially in the light of the English cases to which I have made such extensive reference. That is not to say that the hill up which Sisyphus must continue to push his boulder is not a steep and treacherous one! But nevertheless I believe that there may be cases which should be left to trial rather than be struck out on the basis that they are doomed to fail as it has been put. In so far as the Courts here might in the future develop its thinking in cases such as these, and take a less rigid view of the policy considerations which seem to dominate judicial thinking in the United Kingdom, we would not be the only common law country to do so. I have referred to the fact that somewhat different views have been taken in Canada and in South Africa.

66. Before concluding, I want to refer to the dissenting opinion of Lord Bingham in the House of Lords in Smith. He was a lone voice against the striking out of the claim in Smith; yet a lone voice can sometimes serve as a beam of light directed to the future. The view of such a pre-eminent judge gives comfort to one such as I who is deciding in this case not to follow blindly earlier decisions in previous similar yet different cases, and who feels simply that the present case, given its unusual and thus far unique facts, perhaps suggesting a relationship of closer proximity giving rise to a duty of care where otherwise none might exist, should be permitted to go to trial so that the important issue of liability for possible negligence against the defendants can be decided on the full facts as established at trial.

67. In his dissenting opinion, Lord Bingham spoke of what he called "the liability principle" as follows:

> *"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 unknown presents a specific and imminent threat to his life or physical safety, B owes 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 called this 'the liability principle'."*

He went on to state that he did not consider this liability principle to be in any way inconsistent with the ratio in either *Hill* or *Brooks*, which he described as the two decisions on which the Chief Constable was relying upon in his defence of the Smith claim. He also stated that the facts in *Hill* fell outside this liability principle, as did the facts in *Brooks*. He referred also to the fact that a number of his brother judges in *Brooks* had stated that one of the *Hill* conclusions could no longer be supported, namely 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". *Brooks* displayed a marked reluctance to endorse the full extent of all the observations in *Hill*. I refer also to the disagreements expressed by Lord Bingham in relation to a number of the justifications for the Hill exclusionary rule as stated by Lord Keith in *Hill*. These appear at paras. 48-52 of his opinion. He agreed that neither Hill nor Brooks were wrongly decided but stated at para. 52 that "*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*".

68. Lord Bingham also referred to a number of cases to which Lord Keith had referred in Hill, which of course pre-dated the decision in *Swinney*. Interestingly, Lord Bingham states at para. 53 that Lord Keith "*did not absolve the police from liability in negligence*", and he quoted from Lord Keith's opinion in Hill as follows:

> *"there is no question that a police officer, like anyone else, maybe 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 negligence has been established are Knightly 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."*

To those cases could now be added *Swinney* [supra].

69. It seems clear from some of the cases to which I have referred that there has been a movement way from the absolute exclusion of a duty of care on the part of police in the matter of their investigation and prosecution of crime – perhaps less so in the House of Lords, though even there exceptions to the full force of the Hill principle have been identified. The Court of Appeal in a number of cases have been prepared to permit some such claims go to trial rather be struck out on a preliminary application to strike out. The cases decided in this jurisdiction thus far seem to apply the full exclusionary principle of Hill based on public policy without permitting of exceptions.

70. Each of the Irish cases to which I have referred are cases decided of course on their own facts. I am not to be taken as in any way saying that they were wrongly decided. But I do think that on an application to strike out, as in this case, the plaintiffs' case must be looked at very carefully. The assumed facts must be taken at their highest, and as in the present case the existence of a special relationship must be assumed to be established as it is what is pleaded. Consideration of a special relationship does not appear to have been a feature of the cases already decided here to which I have referred. In the present case it is pleaded. The Court cannot therefore on this application assess the merits of that argument as it would have to do at trial. The defendants have conceded the facts and pleas of the plaintiffs for the purpose of this issue. It may well be that the basis for the claim of a special relationship may founder at the hearing. But in spite of the decided cases here to date and the resolute adherence to the total exclusionary principle in Hill, I would be prepared to hold that such a relationship may in a particular case give rise to a closer proximity between the parties than in the ordinary case such as *L v. Ireland* where simply a trial collapsed because a mistake had been made in relation to the arrest of the accused person. I can readily agree that public policy would require that An Garda Siochana should not be exposed to claims arising from such matters, absent *mala fides*.

71. An exception to the rule has been permitted where there has been an assumption of responsibility by the police. Again, it has been submitted in the present case that there was an assumption of responsibility by An Garda Siochana for fully investigating the plaintiffs' complaints and uncovering the author of the hoax calls when assurances were given that this would be done. Again, that may or may not turn out to accord with the evidence at trial, but it is pleaded and must be assumed. Even though in *G v. Minister for Justice, Equality and Law Reform* [supra], Hedigan J. on the facts of that case concluded that what happened was part of the investigatory process and that that was sufficient to dispose of the case, there may again be cases where what leads to injury and loss is the result of something which happens outside the investigatory process. This case may be such a one or it may turn out not to be; but I think the plaintiffs' ought not to be barred from at least attempting to make the case that they plead, on the basis of what if, though not in name, in practice seems to operate as a blanket immunity.

72. The argument for a possible distinction between operational actions and policy actions might need to be considered also. I have referred to comments in this regard made by Lord Browne Wilkinson in *Barrett*, and the reference to same in *Osman v. United Kingdom*. In the present case it may be arguable that while things actually done by An Garda Siochana during the course of the investigation may, though negligent or falling short of an acceptable standard, not result in a cause of action because there is no duty of care owed in relation to acts done in the course of an investigation, the position is different if no investigation was carried out at all. If there was no investigation embarked upon, one might ask how it can be said that an immunity arises for actions taken during the course of the investigation. Again, the plaintiffs maintain that nothing was done. That has to be assumed, and it should await the trial to see whether that argument stands up or not.

73. Again, one can see through the cases to which I have been referred that on occasion some doubt has been raised as to the evidential basis for the public policy exclusion of liability. Kearns P. has set out the rationale for the public policy exclusionary rule in his judgment in *L v. Ireland* [supra].It follows closely the justification for the exclusion of liability which appears in many of the English decisions. Other judgments, and certainly some academic commentary has wondered whether there is any evidential basis for justifying the exclusionary rule on the basis that such a duty of care would not increase police efficiency or have any positive effect on the way in which go about their statutory functions. It is now a quarter of a century since Hill was decided. I do not think it can be assumed that in the meantime in any jurisdiction including this one, the basis for that presumption, considered solid at that time, might not be reconsidered in the light of later events and findings.

74. I do not consider that these policy justifications must be taken as holding good for all time. As I have said, the Hill principles as

originally enunciated have been diluted over time. Exceptions have been identified, and it is right that such be the case in my view. That is not in any way to under-estimate the benefit to policing generally that some form of exclusion from liability in relation to investigations confers. As Kearns P. stated in L "*It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process*". But it may be time to reconsider whether the Hill principle should continue to be applied here in full force without regard to the possibility of exceptions, bar *mala fides*. The defendants in the present case have contended for an absolute exclusion in all circumstances. They permit of no exceptions in line perhaps with the cases decided here to which I have referred. That in my view may be putting the bar too high, and should not form the basis for a strike out where, on assumed facts, there is at least some room for argument that the facts and circumstances of this case might permit of an exception. I am not for one moment to be taken as concluding that an exception arises in this case. I am simply saying that it cannot on the assumed facts and in the light of an evolving jurisprudence (at least in the United Kingdom and Canada) which is yet open for consideration here, perhaps giving consideration to Lord Bingham's liability principle, it cannot be unequivocally stated that these plaintiffs' cases are doomed to failure, and should be struck out without permitting them an opportunity to make their arguments and present their evidence.

75. I have had occasion to read and consider Prof. Dermot Walsh's contribution to the Irish Jurist, Vol. XLIX, under the title *'Liability for Garda Negligence in the Prevention and Investigation of Crime'*. The author considers all the issues and controversies which this particular case has thrown up, and many of the cases to which I have already referred. It is clear that the learned author considers that there is scope here for a re-evaluation of the strict application of the Hill principles in the light of later cases which have resiled somewhat from the absolutism of Hill as originally pronounced. I will not attempt a summary of his interesting and informative article, but will gratefully include his final concluding paragraph:

> *"In the course of this article I have argued that the Hill policy-based exclusion rests on questionable assumptions. It has not been followed by courts in several other common law jurisdictions, while the European Court of Human Rights has made clear that it is an acceptable in the form originally presented in Hill. Even the courts in England and Wales have departed from it in the context of social worker investigations into cases of suspected child abuse. They have carved out a number of exceptions to it in the context of police operations, and retreated from some of the arguments on which it had been built. It is all the more puzzling, therefore, by the Irish High Court should have embraced the Hill policy-based exclusion in such an unquestioning and unadulterated form. Ultimately it is argued that the familiar elements of the tort of negligence can be developed sensibly to strike a fairer, more discriminating and transparent balance between the competing interests at stake. There should be no need to resort to a blunt public policy instrument that rides roughshod over the rights and expectations of individuals."*

76. The present case on its own facts, looked at objectively, and as presently known, may not appear to be the strongest case imaginable. One must not overlook that in many of the cases in this area of the law the alleged negligence on the part of police has resulted in murder, rape and other forms of serious physical and mental illness, and trauma. It may be tempting to consider that the harm alleged to have been suffered in the case of these two plaintiffs is of a lesser order – being, inter alia, damage to reputation, as well as in the case of Paul Smyth, a financial loss due to a failure to be promoted where in other circumstances he could have expected promotion during the years leading up to his retirement. One should not under-value the value of a person's reputation. At the end of the day it may well be all that he/she has left by the time life's course is run. It is one of the personal rights specifically enumerated in Article 40.3.2 of the Irish Constitution which the State guarantees to protect and vindicate. While such a case may not present as harrowing a set of facts as some others, nevertheless the person whose reputation has been cast in doubt feel may the insult as deeply as the deepest cut, and be entitled to the same right to its vindication, and if necessary under the law of negligence. Only at trial should a decision be made in my view to dismiss these plaintiffs' claims, when their full substance, or the lack of it, can be properly assessed.

77. Before finally concluding, I should refer also to the decision of the House of Lords in *Waters v. Commnissioner of the Police of the Metropolis* [2000] 4 All ER 934. It has some relevance to the argument in the case of Paul Smyth that his position as a member of An Garda Siochana puts him in a special relationship, and therefore one of closer proximity than an ordinary member of the public, with the defendants. It is a case where the plaintiff was a female police officer who claimed that she had been raped and buggered by a fellow male officer in police accommodation while off-duty. She made a complaint to her reporting sergeant. She claimed that he did not carry out any proper investigation. In addition she complained that officers had subjected her to a campaign of harassment and victimisation because she had broken a workplace taboo by making the complaint. Lord Slynn (with whom all others concurred) concluded in relation to the employer/employee relationship issue as follows:

> *"… I do not find it possible to say (any more than Evans LJ was prepared to say) that this is a plain and obvious case that (a) no duty and analogous to an employer's duty can exist; (b) that the injury to the plaintiff was not foreseeable in the circumstances alleged and (c) that the acts alleged could not be the cause of the damage. As to the last of these whilst I accept that many of the individual items taken in isolation are at the least very unlikely to have caused the illness alleged, the appellant's case puts much emphasis on the cumulative effect of what happened under the system as it existed."*

He went on at page 940 to state:

> *"It is true that one of her complaints is the failure to investigate the assault upon her, and that, if taken as own, would not constitute a viable cause of action. But the complaints she makes go much wider than this and she is in any event not pursuing as a member of the public but as someone in an employment relationship with the respondent. Even the failure to investigate is part of her complaint as to that. Entirely different factors to those considered in Hill's case arise … .*
>
> *It has been said many times that the law of negligence develops incrementally so that the fact that there is no reported case succeeding against the police similar to the present one is not necessarily a sufficient reason for striking out."*

As with many judgments relied upon by a party there is good and bad in the decision for the Paul Smyth, but in so far as there is some support for his proposition, it is a case of some relevance, and assists this Court in deciding that his case should not be considered at this preliminary stage to be 'doomed to fail'. There may be an argument to be made at trial that he was owed a duty of care by virtue of his employment status where otherwise he may not, when all the facts and circumstances are considered cumulatively. But all that in my view is for another day.

78. Even though I am taking a different path from that taken in the cases of L, LM and G referred to, I do so in the knowledge that the facts of the present cases are very different, so that the present case is distinguishable, and perhaps provide an opportunity for the principles applicable to be revisited. I cannot conclude, as I am invited to by the defendants and as I would be required to if I am

to accede to their application, that these cases must necessarily fail, and should be now brought to an end without any hearing on the merits.

79. I therefore refuse the reliefs sought in the defendants' Notices of Motion.