OPINION OF LORD HAMILTON

in the cause

JAMES STUART MULVEY GIBSON (AP)

Pursuer;

against

JOHN ORR, CHIEF CONSTABLE STRATHCLYDE POLICE

Defender:

01794/5/97

Pursuer: McEachran Q.C. , Ms Carmichael; Robson McLean W.S.

Defender: C. J. M. Sutherland Q.C., Bowie; Simpson & Marwick W.S.

26 February 1999

On 10 and 11 December 1994 there was heavy rainfall in central Scotland. By the afternoon of 11 December exceptionally high and fast flowing waters were running in the River Kelvin. Between 2.45pm and 2.55pm the Gavell Bridge, which carried a public road across the Kelvin, collapsed as a result of the height and speed of those waters, combined with the effect of cross-flows from surrounding flooded areas. At about 4.20pm a motor car in which the pursuer was a passenger was travelling from the south on the public road towards the Gavell Bridge. Neither the pursuer, the driver of the motor car nor the other passenger was aware that the bridge had collapsed. There were no cones, barriers or other signs in place on the road approaching the bridge from the south. The motor car was driven onto the collapsed bridge and fell into the river. The driver and the other passenger were killed. The pursuer survived but maintains that, as a result of the accident, he has sustained the loss, injury and damage for which he seeks in this action reparation from the defender.

The defender is the Chief Constable of Strathclyde Police. The public road on either side of and passing across the Gavell Bridge lay within the Strathclyde Police area. The defender is sued personally (in respect of an alleged failure to take reasonable care to devise, institute and maintain a system to deal with emergencies) and vicariously (in respect of various alleged failures by a number of police officers under his general direction and for whose wrongful acts or omissions he is liable - Police (Scotland) Act 1967, Section 39(1)). It is unnecessary to rehearse all of those various grounds of alleged fault, since Mr Sutherland, senior counsel for the defender, made it plain at the discussion that the defender's challenge to the relevancy of the pursuer's action was based solely on the fundamental submission that police officers owed no duty of care to a person placed as was the pursuer. Mr Sutherland stated that, if contrary to that submission, any one or more of the officers blamed did owe such a duty, the appropriate course was to sustain the pursuer's and repel the defender's respective pleas to the merits of the action and to allow a proof restricted to *quantum*. That was because, he explained, the defender did not in any circumstances seek a proof or a proof before answer on the merits of the action, accepting that, if his fundamental submission was ill-founded, there had been a breach of duty which had been a material cause of the accident.

In these circumstances it is sufficient to narrate matters pertinent to one, possibly the strongest, of the cases of fault pled by the pursuer. It is averred that at about 2.57pm on 11 December Fire Service Control informed Strathclyde Police Force Control that the Gavell Bridge had collapsed. At about 3.00pm two constables of

Strathclyde Police Force attended at the north side of the bridge, having been directed there by (the occupants of) a fire appliance. They informed their Divisional Control (N Division) of what they had found and suggested that liaison take place with D Division which served the area to the south of the bridge. These constables then proceeded to cone off the north side of the bridge and to position their Land Rover vehicle on that side with its blue light flashing and its headlights illuminated so as to be visible and to give warning to any persons approaching from the south side of the bridge. Those constables remained with their vehicle so positioned until some time between 4.10pm and 4.20pm that afternoon when they withdrew with their vehicle. At the time they did so they had received no information to confirm that any barrier or warning was in place on the south side of the bridge. Within a few minutes of their departure the car in which the pursuer was travelling made its approach from the south side and fell into the river, as earlier narrated. It is also averred that the pursuer, who lived locally and had spent the earlier part of the afternoon driving around the general area assisting drivers who had encountered difficulty as a result of the flooding, had at about 3.00pm seen a police Land Rover in attendance at the Gavell Bridge with its blue light flashing.

Against that narrative of fact (which, in respect of the actings of the police constables, is admitted by the defender) the pursuer makes the following averments of fault:

"It was their duty to take reasonable care for the safety of road users such as the pursuer. Further and in any event, it was their duty to take reasonable care for the safety of road users who had the opportunity to witness police attendance at the bridge and who might proceed in reliance on police officers having exercised reasonable care for the safety of road users. In the exercise of said reasonable care it was their duty to remain at the Gavell Bridge until it had been confirmed to them that cones or other warning markers had been put in place at the south side of the Gavell Bridge. In the exercise of reasonable care it was their duty to stay in position with blue light and headlamps at the north side of (the) river in order to warn drivers coming from (the) south until such time as it was confirmed to them that the coning off of the south side had been completed or that other suitable warning markers were in place. They knew or ought to have known that road users such as the pursuer would be exposed to risk of severe or fatal injury in the event that the south side of the bridge was not closed off and that no warning of the collapsed bridge was visible to drivers approaching from the south side of the bridge. In each and all of the said duties [those constables] failed and so caused the accident. Had they fulfilled the said duties, the accident would not have occurred."

In response the defender avers:

"Explained and averred that the said duties were not owed by [the named constables] to individuals such as the pursuer."

The pursuer avers that he was initially trapped in the car but ultimately succeeded in getting out when it was underwater. He avers that he sustained certain physical injuries, which were relatively minor and have resolved. He also avers that he has developed severe post-traumatic stress disorder with serious psychological consequences. No argument was presented to me that any speciality arose from the circumstance that the consequences of the accident to the pursuer were largely psychological in character. The argument proceeded on the basis that the same legal result would have followed if the pursuer had sustained grave physical injuries.

Mr Bowie, junior counsel for the defender, moved me to sustain the defender's plea to the relevancy of the pursuer's averments, to repel the pursuer's pleas and to dismiss the action. His fundamental submission was that no duty of care was owed to the pursuer by the defender or by any of the individual police officers referred to, including those mentioned above. He advanced three general propositions - (1) where a party has not created a danger which has resulted in harm to a person, that party will generally not be liable for failing to protect that person from that harm (that proposition being derived from the principle that no duty of care is owed in respect of pure omissions), (2) where the original danger has not been created by the party but he has negligently made matters worse by increasing the resultant harm, the person suffering that harm may be able to recover from that party and (3) where a party negligently creates the danger in the first place, the person

suffering the harm as a result of that negligence may be able to recover. The law, he argued, was less ready to impose liability for omissions than for commissions. The present case fell within proposition (1). In any case in which a duty of care was asserted, three tests required to be satisfied, namely, (i) that harm was reasonably foreseeable, (ii) that there was a relationship of proximity between the pursuer and the defender and (iii) that in all the circumstances it was just, fair and reasonable that such a duty be imposed (*Forbes* v *City of Dundee District Council* 1997 S.L.T. 1330; *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd* 1997 S.C. 59). For the purposes of the present proceedings, the defender accepted that test (i) was satisfied. He maintained, however, that neither of tests (ii) or (iii) was satisfied.

As regards proximity, the decided cases could for present purposes be divided into three categories (a) cases concerning police officers in which it had been held that there was no sufficient proximity, (b) cases concerning police officers in which it had been held that there was sufficient proximity and (c) cases not concerning police officers but concerning analogous persons. In category (a) were *Hill* v *Chief Constable of West Yorkshire* [1989] A.C. 53, *Clough* v *Bussan* [1990] 1 All E.R. 431, *Ancell* v *McDermott* [1993] 4 All E.R. 355 and *Alexandrou* v *Oxford* [1993] 4 All E.R. 328. Those cases were indistinguishable from the present case. In England the common law duty which the police owed to the general public was to protect life and property (*Halsbury's Laws of England* (4th Ed., Vol. 36, para. 320; *Haynes* v *Harwood* [1935] 1 K.B. 146). A like duty in Scotland was to be found in statutory form in Section 17(1)(a)(iii) of the Police (Scotland) Act 1967. Reference was also made to *Stair Encyclopaedia*, Vol. 16, para. 1784. In *Hill* v *Chief Constable of West Yorkshire* Lord Keith (at p. 62) had emphasised that *Dorset Yacht Co.* v *Home Office* [1970] A.C. 1004 was concerned with the special characteristics or ingredients beyond reasonable foreseeability of likely harm which might result in civil liability for failure to control another man to prevent his doing harm to a third. At p. 59 his Lordship had observed that the absence of specific requirements under the common law as to the manner in which the obligation of chief officers of police to enforce the law was to be discharged was not a situation where there could readily be inferred an intention of the common law to create a duty towards individual members of the public. For the requisite proximity of relationship to exist in a case of the present kind, Mr Bowie argued, the pursuer must be part of a determinate class which was smaller than the public at large and in relation to which there was a particular risk of injury resulting from the acts or omissions complained of. That was not satisfied here. *Clough* v *Bussan*, *Ancell* v *McDermott* and *Alexandrou* v *Oxford* were all illustrative of that principle and applicable to the present case. Cases in category (b) could be sub-divided into (1) cases where the police created the danger (*Rigby* v *Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242, *Alcock* v *Chief Constable of South Yorkshire* [1992] 1 A.C. 310, *Marshall* v *Osmond* [1983] 1 Q.B. 1034 and *Knightley* v *Johns* [1982] 1 W.L.R. 349) and (2) cases where the police had assumed responsibility for the plaintiff or pursuer (*Kirkham* v *Chief Constable of Greater Manchester Police* [1990] 2 Q.B. 283, *Osman* v *Ferguson* [1993] 4 All E.R. 344, *Wilson* v *Chief Constable, Lothian and Borders* 1989 S.L.T. 97, *Simpson* v *Dundee Corporation* 1928 S.N. 30). All those cases were distinguishable from the present case. Of cases in category (c), *Capital & Counties plc* v *Hampshire County Council* [1997] Q.B. 1004 was instructive, especially per Stuart-Smith L.J. at pp. 1034-8.

Moreover, it would not be fair, just and reasonable to impose a duty of care in the present circumstances. Reference was made to *Hill* v *Chief Constable of West Yorkshire* in the House of Lords per Lord Keith at p. 63 and per Glidewell L.J. in the Court of Appeal (reported in [1988] 1 Q.B. 60 at pp. 75-6). Four policy elements could be discerned in Lord Keith's observations at p. 63 as to why an action of damages should not lie against the police - (1) their general sense of duty would be unlikely to be appreciably reinforced, (2) it might lead to their function being carried out in a detrimentally defensive frame of mind, (3) the diversion of manpower in defending such actions and (4) the difficulty in a court adjudicating on operational decisions. Those observations were equally applicable to circumstances where the police were exercising a function of protecting life and property. Reference was also made to the speech of Lord Templeman at p. 65C-D. Those principles had been applied in *Clough* v *Bussan, Ancell* v *McDermott, Alexandrou* v *Oxford* and *Osman* v *Ferguson*.

The decision of the Court of Appeal in *Osman* v *Ferguson* had been considered in the Court of Human Rights in *Osman* v *United Kingdom* (case 87/1997/871/1083, judgment issued on 28 October 1998) but decisions of

that Court were, as the law presently stood, relevant only to the construction of domestic legislation. Reference was made to *T, Petitioner*, 1997 S.L.T. 724, per Lord President Hope at pp. 733-4.

Miss Carmichael, junior counsel for the pursuer, presented her submissions under four broad heads - (1) the current state of the law of Scotland as to the test for the existence of a duty of care, (2) the proper approach if (contrary to the pursuer's primary submission) the tripartite case referred to in *Caparo plc* v *Dickman* [1990] 2 A.C. 605 were to be applied to cases such as the present, (3) the English authorities relied on by the defender and (4) the different approach to be urged on this court in the light of certain Canadian decisions.

As to (1), this chapter would be expanded on in the speech of senior counsel for the pursuer. However, it was important to recognise that the tripartite approach adopted in *Caparo plc* v *Dickman* did not involve three discrete boxes, each of which had to be separately ticked. Reference was made to the speeches of Lord Bridge at pp. 616-8, Lord Roskill at p. 628 and Lord Oliver at pp. 633-4. In *Forbes* v *Dundee District Council* the adoption of a tripartite test had proceeded on a concession to that effect. The reasoning was, in any event, open to some criticism and the circumstances were distinguishable from the present. *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd* also proceeded on a concession. The same test had been applied in *Coleridge* v *Miller Construction Ltd* 1997 S.L.T. 485 but that decision was not binding nor were the circumstances analogous. Reference was also made to *Marc Rich & Co AG* v *Bishop Rock Marine Co Ltd* [1996] A.C. 211. In cases of actions of damages for personal injuries, the approach adopted in *Donoghue* v *Stevenson* 1932 S.C. (H.L.) 31 still represented the law of Scotland. The same approach, foreseeability of harm associated with a relationship of neighbourhood, was to be found in *Dorset Yacht Co* v *Home Office*. Reference was also made to *Wilson* v *Chief Constable, Lothian and Borders*, especially per Lord McCluskey at pp. 103-4 and to *Maloco* v *Littlewoods Organisation* 1987 S.C. (H.L.) 37, especially per Lord Brandon at p. 58 and Lord Mackay of Clashfern at pp. 64-5 and p. 68. The English decisions were not binding on this court.

As regards (2), if it was appropriate to apply a tripartite test, it was necessary to consider only the elements of proximity and of "fair, just and reasonable", it being conceded by the defender that the accident was foreseeable. As to proximity, the class of persons to whom a duty of care was held to be owed in *Dorset Yacht Co* v *Home Office* comprised those unfortunate enough to have their yachts moored in proximity to where the Borstal boys were housed on Brownsea Island. There was no pre-arranged relationship between the plaintiffs and the officers having charge of the Borstal boys but, being so charged, they were held to owe a duty of care to the yacht owners. Here, likewise, there was a particular hazard, namely, a collapsed bridge carrying a public road, of which the police officers had taken charge. By doing so, the hazard being at a particular place and at a particular time, the officers brought themselves within a sufficiently proximate relationship to persons using that public road and approaching the bridge. Police officers were not mere by-standers. An obligation was imposed on them by Section 17(1)(a) of the Police (Scotland) Act 1967 to guard, control and watch so as, among other things, to protect life. The carrying out in relation to road safety of operational duties in furtherance of that obligation brought those police officers into a close degree of relationship with affected road users. The pursuer, moreover, was averred to be a person who had become aware of a police presence at the bridge and who was accordingly within a narrower class of persons who might be expected to put reliance on such presence - though it was not suggested that the pursuer had in fact relied upon such presence.

As to "fair, just and reasonable", it was important to distinguish between operational and policy areas (*Anns* v *Merton London Borough Council* [1978] A.C. 728, per Lord Wilberforce at pp. 751-4). Reference was also made to the Police (Scotland) Regulations 1976 (S.I. 1073) Regulation 18(1). It was also arguably relevant in this context to consider where the loss would fall. The pursuer in the present circumstances, in contrast to a person harmed by a police failure in respect of criminal matters, had no possibility of redress under the Criminal Injuries Compensation Scheme. *Hill* v *Chief Constable of West Yorkshire* was concerned with public policy considerations in relation to the investigation and suppression of crime and should be understood in that context. The factors referred to there had no application to the present circumstances. There was here no material dispute about the facts, which had been established at a Fatal Accident Inquiry.

The Court of Appeal in *Capital & Counties plc* v *Hampshire County Council* at p. 1044 had acknowledged that there was considerable force in the eight listed criticisms of reasons given in earlier cases for refusing, on public policy grounds, to impose a duty of care on fire brigades and would not have decided that claim against the plaintiffs on such grounds. It was inappropriate even under the existing law to restrict the use of judgments of the Court of Human Rights to the matter of the interpretation of statutes. Reference was made to *Derbyshire County Council* v *Times Newspapers* [1992] Q.B. 770, per Balcombe L.J. at pp. 812-3; those observations had not been disapproved in the House of Lords ([1993] A.C. 534). The observations of the Court of Human Rights in *Osman* v *United Kingdom* on the appropriate limits of any public policy immunity of police officers were instructive. To sustain a public policy defence in the present case would be to risk violating the approach adopted by the European Court; this court should be slow to do that.

As regards (3), *Alexandrou* v *Oxford* was on its facts distinguishable; in any event, it should not be followed on either ground of decision. *Osman* v *Ferguson* had been decided on public policy grounds; that decision, in light of *Osman* v *United Kingdom*, must be taken to have been wrong; McCowan L.J. would have held the relationship arguably to have been sufficiently proximate. *Ancell* v *McDermott* was, as regards proximity, distinguishable on the facts and, if not so distinguishable, was wrongly decided; in relation to public policy, the extension of *Hill* v *The Chief Constable of West Yorkshire* to the civil road traffic operations of police officers was not justified. *Clough* v *Bussan* was likewise wrong or, alternatively, distinguishable. As regards the English cases in which it had been held that there was (or could be) a duty of care on the police, *Rigby* v *Chief Constable of Northamptonshire* (where the police had been held liable to the proprietor in respect of firing the C.S. canister when firefighting equipment was not present) illustrated the distinction between the policy and the operational areas. Were the policy immunity for the police as extensive as the defender contended, it would have been an effective answer in each of *Rigby* v *Chief Constable of Northamptonshire*, *Knightley* v *Johns*, *Marshall* v *Osmond* and *Kirkham* v *Chief Constable of Greater Manchester*. Both *Knightley* v *Johns* and *Rigby* v *Chief Constable of Northamptonshire* had been referred to by Lord Keith in *Hill* v *Chief Constable of West Yorkshire* without disapproval. In the present case the police officers could properly be said to have assumed responsibility for safeguarding road users from the hazard. Reference was also made to *Leach* v *Chief Constable of Gloucestershire Constabulary* (now reported at [1999] 1 All E.R. 215) and *Swinney* v *Chief Constable of Northumbria Police* [1997] Q.B. 464, especially per Hirst L.J. at pp. 463-5 and Peter Gibson L.J. at p. 466. Scottish decisions supported the view that claims to immunity by public service professionals were not readily to be accepted (*Duff* v *Highland and Islands Fire Board* 1995 S.L.T. 1362; *McCafferty* v *Secretary of State for Scotland* 1998 S.C.L.R. 379).

As regards (4), two cases from Canada were instructive. In *Doe* v *Metropolitan Toronto Commissioners of Police* (1989) 58 D.L.R. (4th) 396, Henry J. in the Ontario High Court of Justice had held that in the particular circumstances there was a triable issue against the police who had failed to warn a likely victim of a serial rapist (a decision subsequently affirmed by the Divisional Court (1990) 72 D.L.R. (4th) 580). In *O'Rourke* v *Schacht* (1974) 55 D.L.R. (3rd) 96 (where the factual circumstances were very similar to those in the present case) the Supreme Court of Canada had, by a majority, affirmed the decision of the Ontario Court of Appeal holding the police liable in negligence. Miss Carmichael also drew my attention to an article by Dr Douglas Brodie in 1977 Juridical Review 65.

Mr Sutherland renewed his junior's motion. There was, he argued, no general duty of care owed by the police towards private individuals (as distinct from a duty towards the general public). The pursuer's case could not stand with *Hill* v *Chief Constable of West Yorkshire*. The pursuer was in effect asking the court not to follow *Hill* v *Chief Constable of West Yorkshire* but instead to follow the Canadian cases of *O'Rourke* v *Schacht* (a majority decision of some age which did not reflect the current law in the United Kingdom) and *Doe* v *Metropolitan Toronto Commissioners of Police* (in which, albeit more recently, a judge at first instance had chosen to disagree with the public policy principle adopted unanimously in the House of Lords; the public policy issued had not been raised in the Divisional Court). It had been held repeatedly and by the highest authority that in this area the law of Scotland and the law of England were the same. This court should follow and apply the reasoning in *Hill* v *Chief Constable of West Yorkshire*. The general function of the police was to

keep the Queen's peace. That was, for Scotland, reflected in Section 17 of the Police (Scotland) Act 1967 where the protection of life and property was a subspecies of the obligation to guard, patrol and watch; the other subspecies were the prevention of the commission of crime and the preservation of order. These were all aspects of the protection of public welfare. Constables were subject to the direction of the appropriate chief constable (Section 17(2)) and a chief constable was subject to lawful instructions received from the sheriff principal and the appropriate prosecutor (Section 17(3)(as amended)). There had been a clear development of the law since *Dorset Yacht Co* v *Home Office* and *Anns* v *Merton London Borough Council*. The tripartite classification expressed in *Caparo plc* v *Dickman* had subsequently been followed in Scotland as well as in England (*Forbes* v *Dundee District Council*; *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd*; *Coleridge* v *Miller Construction Ltd*). Reference was also made to the speech of Lord Goff in *Maloco* v *Littlewoods Organisation* at pp. 83-4. An incremental approach was to be adopted. Where the courts, whether in Scotland or in England, had already held a particular type of situation to be inappropriate for the imposition of a duty of care, their decisions should be followed.

It was accepted by the defender that it was reasonably foreseeable that, if the collapsed bridge were not closed off, a fatal accident might occur. It was also accepted that it could have been closed off by the police in time to avoid this accident. However, there was no sufficient proximity of relationship. Where (a) the police had negligently created a danger or (b) where in limited circumstances the police had assumed responsibility for a particular person and were effectively in control of him, sufficient proximity might exist. It was not being asserted that in such cases there was any immunity. But it was important to bear in mind the distinction between acts and omissions. *Alcock* v *Chief Constable of South Yorkshire* was a case where the actings of the police were negligent by reason of the opening of the pens, thereby creating danger to the spectators who then entered them in excessive numbers. In *Knightley* v *Johns* the superior officer had created the danger, as had the officer in *Rigby* v *Chief Constable of Northamptonshire* by the positive act of firing the canister without a fire engine being present. In *Dorset Yacht Co Ltd* v *Home Office* the officers had brought the Borstal boys into the locality where the yachts were moored. Where what was complained of was an omission, it was necessary, in order to establish sufficient proximity, that there be some additional factor such as a pre-existing relationship. A classic example of a person in such a pre-existing relationship was an individual who was held in custody by the police (*Simpson* v *Dundee Corporation*; *Wilson* v *Chief Constable, Lothian and Borders*; *Kirkham* v *Chief Constable of Greater Manchester Police*). It was a logical extension that the duty of care to such a person apply to the manner or circumstances in which he left their custody. In *Leach* v *Chief Constable of Gloucestershire Constabulary* the majority decision had been to strike out most of the claim. Even the judge in the minority on this issue (Pill, L.J.) would have allowed the whole action to proceed to trial only because he held that on the facts alleged the police had assumed responsibility for the plaintiff. *Swinney* v *Chief Constable of Northumbria Police* might be analysed in Scots law as a proximate relationship created by a promise of confidence. In *Osman* v *Ferguson* and *Doe* v *Metropolitan Toronto Commissioners of Police* the relationship between the police and the victim could be said to be special. The legal climate when *O'Rourke* v *Schacht* was decided in 1974 was very different from that which now existed in the United Kingdom; even in 1974 it had been decided simply by a majority. The current law of Scotland and of England was to be found reflected in the dissenting judgment of Martland J.. The decision on the existence of a special relationship in *Doe* v *Metropolitan Commissioners of Police* followed as a matter of Ontarian law from *O'Rourke* v *Schacht*. *Alexandrou* v *Oxford*, *Clough* v *Bussan* and *Ancell* v *McDermott* were practical illustrations of the current law in the United Kingdom. The statutory obligation on a constable to act under the direction of his chief constable was inconsistent with the existence of a private law obligation owed to individual members of the public.

As to the requirement that the imposition of a duty of care be fair, just and reasonable, Mr Sutherland disclaimed any suggestion that the police were entitled to a blanket immunity covering the whole field of negligence. Their situation had, however, been definitively laid down by the House of Lords in *Hill* v *Chief Constable of West Yorkshire* . If the balance there laid down was wrong, it was a matter for Parliament, or possibly for the House of Lords in light of European judgments such as *Osman* v *United Kingdom,* to reconsider; it was not for this court. In any event, the ratio of *Osman* v *United Kingdom* was difficult to understand and to apply to domestic law. The European Court had not said that *Hill* v *Chief Constable of*

West Yorkshire was wrongly decided and its judgment did not have direct effect in a Scottish court. The factors relied on by Lord Keith at p. 63 were equally applicable to a road traffic situation as in the present case. Of the Scottish cases the approach of Lord Nimmo Smith in *Forbes* v *City of Dundee District Council* as to the imposition of civil liability on public authorities was to be preferred to that of Lord Macfadyen in *Duff* v *Highland and Islands Fire Board*. In England *Capital & Counties plc* v *Hampshire County Council* was the most recent application of the correct principle, arriving in respect of the fire service at a similar result to that appropriate in respect of the police.

Mr McEachran, senior counsel for the pursuer, emphasised at the outset that the present case was one concerned with personal injury, not with economic loss, damage to property or other consequences. The traditional approach to such a case was and remained that laid down in *Donoghue* v *Stevenson*. Moreover, this was not a case of "pure omission". It was a case concerned with the negligent carrying out of an operational exercise (to cordon off a known hazard). The circumstances were parallel to those in *Alcock* v *Chief Constable of South Yorkshire* where the police had negligently performed the operational exercise of crowd control at the Hillsborough ground. In such operational situations the police could be liable for omissions as well as for acts (*Hill* v *Chief Constable of West Yorkshire*, per Lord Keith at p. 59B-C). The neighbourhood principle laid down in *Donoghue* v *Stevenson* rather than any tripartite test continued to regulate the law of Scotland in cases of personal injury. Reference was made to *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd*, per Lord Justice-Clerk Ross at p. 62. Scots law was a system based on principle. It was inappropriate to adopt, as the lower courts had done in England since *Caparo plc* v *Dickman*, a category-based and compartmentalised approach. The proper approach, as illustrated in *Duff* v *Highland and Islands Fire Board* and *McCafferty* v *Secretary of State for Scotland*, was to acknowledge the neighbourhood principle (based on foreseeability of harm) and then to ask whether in the particular circumstances there had been a breach of duty. The addition of a "fair, just and reasonable" requirement to foreseeability and proximity (in the Atkin sense) was not justified. It placed an unwarranted hurdle in the way of a pursuer seeking damages for personal injuries. The factors relied on by Lord Keith in *Hill* v *Chief Constable of West Yorkshire* in respect of the third requirement would, if adopted, equally apply to claims against doctors and other professionals. An approach founded on *Donoghue* v *Stevenson* was to be preferred. The Canadian cases were persuasive. The article by Dr Brodie was commended.

If a tripartite approach was appropriate, the three elements were here satisfied. Foreseeability was not disputed. Proximity was to be found in (1) the geography (a local person using the bridge), (2) the setting up of a police operation to protect road users from a recognised hazard, (3) the fact that the pursuer was already affected by the police operation (having seen the flashing light of a police vehicle at about 3.00pm) and (4) the public law duty imposed on the police by statute. As to "fair, just and reasonable", *Osman* v *United Kingdom* suggested that proportionality was to be taken into account. Of the four factors relied on by Lord Keith in *Hill* v *Chief Constable of West Yorkshire*, the third and fourth had no application to the present case. Policy considerations, such as police accountability and the right of the citizen to have heard his complaint of administrative error, tended to negative the proposition that this claim be excluded on any fair, just and reasonable criterion. Reference was made to *X* v *Bedfordshire County Council* [1995] 2 A.C. 633, per Lord Browne-Wilkinson at p. 749G. The trend even in the English courts was now away from conferring a wide immunity on the police. Reference was made to *Swinney* v *Chief Constable of Northumbria Police*, per Hirst L.J. at p. 484. In *Osman* v *United Kingdom* the U.K. Government had emphasised (para. 144) that the exclusion referred to in *Hill* v *Chief Constable of West Yorkshire* was not a blanket exclusion of liability and did not apply beyond the investigation and suppression of crime. That view was correct. The pursuer's action was relevant to instruct the requisite duty of care.

The first issue for decision is the test to be applied under the law of Scotland as it now stands in determining whether in particular circumstances a duty of care is owed to a pursuer by a defender (or by a person for whom a defender is vicariously responsible). In *Caparo plc* v *Dickman* the House of Lords, sitting in an English appeal concerned with economic loss, followed the approach adopted in a series of decisions of the Privy Council and the House of Lords and applied a test involving three elements. Lord Bridge at pp. 617H-618B said:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

The other judges agreed. Those judges included Lord Jauncey, who at pp. 654-5 referred with approval to a passage from the speech of Lord Keith in *Peabody Donation Fund* v *Sir Lindsay Parkinson & Co Ltd* [1985] A.C. 210 at pp. 240-1 where his Lordship held that, in addition to other elements, it was material to take into consideration whether it was just and reasonable that a duty of care of particular scope be incumbent upon a defendant. Of the four prior decisions referred to by Lord Bridge, three were concerned with economic loss and one (*Hill v Chief Constable of West Yorkshire*) with damages for the death of a relative.

The three-element test referred to in *Caparo plc* v *Dickman* has on a number of occasions been adopted and applied without challenge in Scotland. Examples are *Coleridge* v *Miller Construction Ltd* (a claim for economic loss) and *Forbes* v *City of Dundee District Council* (a claim in respect of personal injury). In *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd* (a claim for physical damage to property) it was conceded both in the Outer and in the Inner House that that test was applicable. Lord Justice-Clerk Ross, with whom Lord Cowie agreed, saw no reason to question the soundness of that concession, though Lord Morison appears to have entertained doubts on the matter. Since the present case was before me the judgment of the House of Lords in that case has been issued (now reported at 1999 S.L.T. 224). The decision of the Second Division was reversed but it appears that the case was again argued on the same concession, the soundness of which was not, so far at least as the speeches reveal, questioned by their Lordships. Lord Mackay of Clashfern, giving the leading judgment, said at p. 226:

"The foundation on which [the respondents'] argument rests is the consideration that for a duty of care to be imposed, while the elements of foreseeability and proximity require to be taken into account, so also must be considerations of fairness, justice and reasonableness. In the most recent authority on this topic in this House, Lord Steyn, speaking for the majority of those who took part in the decision of *Marc Rich & Co AG* v *Bishop Rock Marine Co Ltd* [1996] A.C. at p. 235, said: 'But since the decision in *Dorset Yacht Co Ltd* v *Home Office* [1970] A.C. 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff. Saville L.J. explained, at page 1077: 'whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course ... these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed ... Again in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question whether a duty should be imposed in any given case. In the end whether the law does impose a duty in any particular circumstances depends upon those circumstances' ... That seems to me a correct summary of the law as it now stands.' ".

Lord Mackay went on to hold that in the particular circumstances (including the contractual background) it was fair, just and reasonable to impose such a duty.

Although there is no authority directly binding on me, the three-element test now falls, in my view, to be applied in Scotland in personal injury actions based on a duty of care as well as in other actions of damages so based. The more traditional approach in Scotland has been to apply the test laid down by Lord Atkin in *Donoghue* v *Stevenson*. In *Dorset Yacht Co* v *Home Office* Lord Reid at p. 1027A said that *Donoghue* v

Stevenson might "be regarded as a milestone". A milestone is an object encountered in the course of a journey. The relevant journey did not end in 1932 but went on, albeit not perhaps in a straight line, through *Dorset Yacht Co* v *Home Office*, *Anns* v *Merton London Borough Council* and *Caparo plc* v *Dickman* to the present day. Progress on that journey does not mean that milestones passed are no longer relevant; they remain important stages in the development of the law. However, I see no logical justification in modern circumstances and as the law has developed for applying a different test for the existence of a duty of care in respect of personal injury from that applicable relative to physical damage to property or to economic loss. At one stage in the development of the law it may have been arguable that a distinction fell to be drawn between "pure economic" loss on the one hand and physical damage to property or to the person on the other. However, the quietus to any such distinction was given, if not earlier, by, in England, *Marc Rich & Co AG* v *Bishop Rock Marine Co Ltd* and, in Scotland, *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd*. I would have come to the same view even without the benefit of seeing the judgment of the House of Lords in the latter case.

Two further observations are appropriate in this context. First, as Lord Bridge said in *Caparo plc* v *Dickman,* at p. 618:

"... it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope".

In the same case Lord Oliver at p. 633C-D observed:

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

Lord Roskill made similar observations at p. 628. Secondly, the circumstance that the same test falls to be applied across the board by no means has the consequence that the same result will follow in different types of claim. As Saville L.J. explained in *Marc Rich & Co AG* v *Bishop Rock Marine Co Ltd* in a passage repeated by Lord Mackay of Clashfern in *British Telecommunications plc* v *James Thomson & Sons (Engineers) Ltd* at p. 226:

"... in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem".

The second issue for decision is whether there existed between the constables and the pursuer a relationship of sufficient proximity to found a duty of care. It is important, in my view, to determine that issue with reference to the relevant point of time. The question is not whether such a relationship existed when those officers were on patrol prior to 3.00pm on 11 December or when they were first informed at about that time that the bridge had collapsed. The relevant time is, more than an hour later, immediately prior to their withdrawing their vehicle from its position on the north side of the bridge.

The general functions of constables in Scotland were, as at 1994, regulated by Section 17 of the Police (Scotland) Act 1967 (as amended). That statute consolidated earlier statutory provisions applicable to Scotland, including Section 4 of the Police (Scotland) Act 1956. Section 17 of the 1967 Act (as amended) provided:

"(1) Subject to the provisions of this Act, it shall be the duty of the constables of a police force -

(a) to guard, patrol and watch so as -

(i) to prevent the commission of offences,

(ii) to preserve order; and

(iii) to protect life and property;

(b) where an offence has been committed (whether within or outwith the police area for which the police force is maintained) to take all such lawful measures, and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice;

(c) to serve and execute when required any warrant, citation or deliverance issued, or process duly endorsed, by a Lord Commissioner of Justiciary, sheriff, or justice of the peace, being a warrant, citation, deliverance or process relating to any criminal proceeding;

(d) to attend any court of law for the purpose of giving evidence ...

(2) The performance by a constable of his functions under this or any other enactment or under any rule of law shall be subject to the direction of the appropriate chief constable.

(3) In directing the constables of a police force in the performance of their functions the appropriate chief constable shall comply with all lawful instructions (whether general or special) which he may receive -

(a) ...

(b) ... from the sheriff principal having jurisdiction in the place:

Provided that in relation to the investigation of offences the chief constable shall comply with such lawful instructions as he may receive from the appropriate prosecutor ..."

As is evident from that section, the general functions of constables are to a large extent concerned with the prevention of crime and with the operation of the criminal justice system. That is not, however, their exclusive function, which in terms extends to guarding, patrolling and watching so as to protect life and property. Such protection is not restricted to protection against dangers presented by criminal activity. For example, constables have, possibly derived from Section 17(1)(a)(iii), a general function of controlling traffic. (For a view on the source of this last function at common law in England, see *Halsbury's Laws of England* (4th Ed.) paras. 320 and 328).

It is within common experience, at least in Scotland, that police officers, in emergencies and otherwise, take control of traffic or other road safety situations with a view better to safeguarding life and property. Such action is in no sense dependent on any crime having been committed or on any crime being apprehended. It is a civil function in respect of which constables have authority, with attendant responsibility.

Once a constable has, in exercise of such a function, taken charge of a particular road traffic situation which, without control by him, presents a grave and immediate risk of death or serious injury to road users likely to be affected by the particular hazard, it would seem, at least on first impression, consistent with the underlying principle of neighbourhood for the law to regard him as being in such a relationship with such road users as to satisfy the requisite element of proximity. The logic of the defender's argument on proximity leads to the proposition that, if constables coming during the hours of darkness upon an unlighted major obstruction on a public road take appropriate measures to warn oncoming traffic of the hazard (by positioning their vehicle with flashing warning light or otherwise), they may thereafter, without being in breach of any duty of care to any road user, carelessly (without instruction or any other reason for doing so) choose to withdraw all such warnings with the result that road users are once again exposed to grave and immediate risk.

I find that proposition *prima facie* unattractive. There is no Scottish authority which requires me to accept it. Nor is there, so far as drawn to my attention, any support for it in any Scottish case. In *Simpson v Dundee Corporation* an individual was found by a police constable in a collapsed state in a public street. His condition being attributed by the constable to drink, the individual was then taken in charge and conveyed to a police office where he was detained by other officers in a cell without medical assistance. It was subsequently discovered that he had been suffering from cerebral haemorrhage from the effects of which he later died. The court held, in effect, that a duty of care was owed to such a person by the police officers. In *Wilson* v *Chief Constable, Lothian and Borders* it was not disputed that a like duty was owed to a person who, although not arrested or formally detained, had prior to his release in wintry conditions while in a seriously intoxicated condition been held by police officers. He subsequently died from hypothermia. At p. 103K Lord McCluskey is reported as having said:

"They had a choice: to free him or to hold him. They could not have been unaware that they had that choice. They chose to release him. In deciding how to exercise that choice they had a duty to exercise a reasonable care to have regard to the reasonably foreseeable consequences of his being released."

In both cases the relationship of the police constables was with a particular known individual. But that, in my view, is not a prerequisite for the existence of the necessary proximity. Persons of a limited class, defined by their obvious exposure to an immediate and direct hazard, may equally be owed such a duty. Persons whom a Borstal officer could reasonably foresee had property situated in the vicinity of the place where Borstal trainees were staying were held to fall within such a limited class (*Dorset Yacht Co* v *Home Office*, especially per Lord Diplock at pp. 1070-1). Certain similarities of that case with the case before him were noticed by Lord McCluskey in *Wilson* v *Chief Constable, Lothian and Borders* at pp.103-4. Persons travelling by vehicle on the public road towards the collapsed bridge in a late afternoon in midwinter in central Scotland were, in my view, likewise, as regards the constables who had taken control of that hazard, within such a class. It is not, in my view, a relevant distinction that, in the cases referred to, the control had by the officers was of human beings, likely themselves to suffer damage or to inflict it on others, while in the present case it was of an inanimate hazard to human beings. I should add that I do not regard the circumstance, averred by the pursuer, that he was at an earlier stage aware of a police presence in the vicinity of the bridge as being material for present purposes. Nor, in my view, is the fact that he happened to live locally a material consideration.

As regards cases involving officers of other public bodies, it was not argued at debate in *Forbes* v *City of Dundee District Council* (local authority officials exercising building control functions) that the pursuer's averments were plainly irrelevant to instruct the necessary proximity (per Lord Nimmo Smith at page 1340C); nor was any such argument on proximity apparently advanced in *Duff* v *Highland and Islands Fire Board* (fire officers).

The English cases, although not binding on me, are, of course, to be treated with respect. None of these was, however, concerned with a situation such as the present. In *Hill* v *Chief Constable of West Yorkshire* the victim was not one of a limited class at particular risk. In distinguishing, in relation to proximity, the circumstances in that case from those in *Dorset Yacht Co Ltd* v *Home Office*, Lord Keith at p. 62C-D said:

"Miss Hill was one of a vast number of the female general public who might be at risk from [Sutcliffe's] activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys."

In *Alexandrou* v *Oxford* the issue of proximity appears to have been determined on the basis that no special relationship existed between the police and any member of the public who by any means gave information of any suspected crime against them or their property (per Glidewell L.J. at p. 338j); a similar ground of judgment was given by Slade L.J. at p. 344a-b. In *Clough* v *Bussan* and in *Ancell* v *McDermott* the police, although receiving certain information or making certain observations, had not in any sense taken control of the relevant hazard. Accordingly the circumstances are distinguishable, though I reserve my opinion as to

whether under Scots law the same decisions on proximity would have been reached as were reached in these last three cases.

The concept of assumption of responsibility (combined with reliance by the other party on such assumption) has been used in some cases in England concerning personal injury as a touchstone for determining whether or not sufficient proximity existed (*Kirkham* v *Chief Constable of Greater Manchester Police*, per Lloyd L.J. at p. 289; *Capital & Counties plc* v *Hampshire County Council*, per Stuart-Smith L.J. at pp. 1034-8). That concept may be traced back to *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] A.C. 465, where the concept is of voluntary assumption of responsibility with associated reliance. The utility of the concept is obvious in cases involving financial and similar dealings between parties who would not otherwise have a sufficiently proximate relationship. Its usefulness as a touchstone in cases involving a risk of bodily injury or death is not so obvious. It seems somewhat artificial to speak of police officers having (voluntarily) assumed responsibility for persons lawfully in their charge (that is, beyond the responsibility which these officers would otherwise have) and even more artificial to speak of such persons, perhaps unconscious or seriously intoxicated, relying on such an assumption. No such concept was referred to in *Simpson* v *Dundee Corporation* or in *Wilson* v *Chief Constable, Lothian and Borders*. The necessary proximity was brought into existence, in my view, by the control in fact had by the respective constables over the person in their charge, seen, it may reasonably be supposed, against the background of the general functions entrusted to the police. However, if assumption of responsibility with associated (possibly inferred) reliance is a helpful concept in relation to personal injury cases, I would be prepared to treat it as satisfied in the circumstances of the present case.

The submissions made on behalf of the defender tended to treat the duties of police officers, fire officers and others to "the public at large" as if they were wholly discrete from and irrelevant to any duty of care owed by such persons to particular individuals or to a particular class of individuals. This approach does not readily square with the principles and practice of Scots law. The functions, for example, of roads authorities in respect of the management and maintenance of public roads are laid down, commonly by statute, in similar "public" terms. However, it has never, so far as I am aware, been doubted in Scotland that as regards operational matters a duty of care is owed by such authorities and their servants to road users - a duty not directly under the statute but a duty arising out of the relationship between those authorities and road users created by the control vested by statute in the former over the public roads in their charge. Similarly, the circumstance that under Section 17 of the Police (Scotland) Act 1967 there is included among the functions of constables the protection in a civil context of life and property is, in my view, a relevant and important consideration in relation to the existence of a duty of care. If police constables, having such a function, in furtherance of it take control of a hazard on a public road they are, in my view, in a sufficiently proximate relationship with road users likely to be immediately and directly affected by that hazard as is sufficient for the purposes of the existence of a duty of care to such road users. That duty may extend not only to the manner of the exercise of that control but, as *Wilson* v *Chief Constable, Lothian and Borders* illustrates in a different context, to the relinquishment of it. The situation of the Good Samaritan or of the doctor in the audience who volunteers his assistance to a theatre-goer suddenly taken ill is, in my view, distinguishable. The relevance of the statutory background (if any) to any duty of care is made clear by Lord Browne-Wilkinson in *X (Minors)* v *Bedfordshire County Council* where at p. 739C he said:

"... the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done".

Reliance was placed by counsel for the defender on the proposition that the common law does not impose liability for what are called "pure omissions" (*Maloco* v *Littlewoods Organisation*, per Lord Goff at p. 76). Of course, where no pre-existing relationship exists, a failure to act may not, whatever the moral obloquy, amount in law to a breach of any duty of care (as in failure to stop a blind stranger stepping out in front of busy traffic), while a positive act (as in carelessly walking into such a stranger and propelling him in front of such traffic) may well do so. However, where a relationship does pre-exist, whether with an individual or with a limited group of persons, the distinction between acts and omissions becomes less important.

The third issue to be decided is whether no duty of care existed because it would not be fair, just and reasonable to "impose" one in circumstances such as the present. In *Hill* v *Chief Constable of West Yorkshire*, Lord Keith at p. 63 expressed the opinion that another reason (that is, other than lack of proximity) why an action for damages in negligence should not lie against the police in the circumstances of that case was public policy. His Lordship identified a number of factors which bore on that matter. Some of those factors taken individually might apply in the present case. It is, however, important in my view to bear in mind the circumstances of the case in which those observations were made - in particular, the context of criminal investigation. His Lordship expressly approved the judgment of Glidewell L.J. in the Court of Appeal where at [1988] Q.B. pp. 75-6 reference was made to the implications for the criminal justice system of allowing civil actions of negligence to lie against the police arising out of the same subject matter. Reference was made by both Glidewell L.J. and Lord Keith to the basis for immunity held to exist in *Rondel* v *Worsley* [1969] 1 A.C. 191 (where the implications for the administration of criminal justice are obvious). The observations made by Lord Templeman in *Hill* v *Chief Constable of West Yorkshire* are also clearly concerned with the inappropriateness of an action of damages as a vehicle for inquiring into past failures by individual police officers in relation to criminal investigations. There is no justification, in my view, for lifting one or two of the factors referred to by Lord Keith and, if these happen to apply in another situation, to hold for that reason that it would not be fair, just and reasonable to impose (or maintain) a duty of care. As Mr McEachran pointed out, some of the factors relied on by his Lordship would equally apply to actions against medical men or other professionals. So far as I am aware, it has never been suggested that the diversion of precious time and energy from the care of the sick or the absence of any stimulus to perform better were individually or collectively grounds for conferring an immunity from suit on doctors or other health professionals, including those engaged in National Health Service practice. The listed criticisms made of certain earlier judgments by counsel for the plaintiffs in *Capital & Counties plc* v *Hampshire County Council* have, as Stuart-Smith L.J. said at p. 1044, considerable force. His Lordship also at p. 1044E-F observed (in relation to the position of the Fire Brigade) that the analogy with the police exercising their functions of investigating and suppressing crime was not close.

Likewise there is no close analogy, in my view, as regards the policy issue between the exercise by the police of their function of investigating and suppressing crime and the exercise by them of their function of performing civil operational tasks concerned with human safety on the public roads. It was not disputed that the police enjoy no immunity on public policy grounds in respect of the manner in which a constable drives his police vehicle or his motor cycle on the public roads. There would likewise be no immunity, in my view, in respect of the manner in which a constable in charge of directing traffic on such a road performed that function. Likewise, there is no immunity, in my view, in respect of the manner in which other civil road safety operational tasks are carried out by police officers where there is no inherent problem of conflict with instructions issued by superior officers or with duties owed to other persons. To adopt the language of Ward L.J. in *Swinney* v *Chief Constable of Northumbria Police* at p. 486 there is "no overwhelming dictate of public policy" to exclude the prosecution of claims arising out of such circumstances. As Lord Macfadyen said in relation to the Fire Brigade in *Duff* v *Highland and Islands Fire Board* at p. 1363:

"It is no doubt right that in operational matters much must be left to the professional judgement of the firefighters, but that can be achieved by applying a test analogous to the professional negligence test in determining what amounts to negligence. It is going too far in my view to suggest, as counsel for the defenders did, that operational judgement should be immune from challenge."

A similar approach was adopted by Lord Johnston (in relation to prison officers) in *McCafferty* v *Secretary of State for Scotland*.

Although in Scotland the police function in relation to the investigation and suppression of crime and that in relation to the protection of life and property stem from the same statutory provision, it does not follow, in my view, that the same considerations apply to both functions in relation to immunity from suit. In so far as English authority is concerned, I am unable, with respect, to accept the conclusion of Kennedy J in *Clough* v *Bussan* at p. 435 that, for the purposes of public policy, the one is really part and parcel of the other. Nor am

I, with respect, convinced by the reasoning on the public policy issue in *Alexandrou* v *Oxford* or in *Ancell* v *McDermott*. These three last mentioned cases illustrate what might be regarded as a tide in the English courts towards a wide interpretation of Lord Keith's and Lord Templeman's observations in *Hill* v *Chief Constable of West Yorkshire*. That tide may now be running less strongly. *Swinney* v *Chief Constable of Northumbria Police* and *Capital & Counties plc* v *Hampshire County Council* may be indicative of such a change. Moreover, the decision of the Court of Human Rights in *Osman* v *United Kingdom*, together with the position adopted by the U.K. Government before that court that "the exclusion was not a blanket exclusion of liability but a carefully and narrowly focused limitation which applied only in respect of the investigation and suppression of crime, and even then not in every case" (para. 144), may also lead to some reconsideration of the scope of the public policy immunity accorded to the police in some of the English decisions.

In Scotland there has, so far as drawn to my attention, been no judicial discussion of the application of the fair, just and reasonable element to claims made against police officers. I have already referred to the approach adopted by Lord Macfadyen and by Lord Johnston in relation to fire officers and prison officers respectively. In so far as Lord Nimmo Smith's approach in *Forbes* v *City of Dundee District Council* in relation to local authority officials exercising building control functions may be to a contrary effect, I must respectfully disagree with it. In my view in the circumstances of this case it would be fair, just and reasonable to hold that a duty of care was owed by the police constables in questions to persons such as the pursuer travelling in the admitted circumstances on this public road. Although, given the legal climate in which it was decided, *O'Rourke* v *Schacht* must be approached with some caution, the result is in substance, in my view, consistent with Scots law.

I have dealt separately with the elements of proximity and of what is fair, just and reasonable, the element of foreseeability being conceded. In giving such separate treatment, however, I have borne in mind that, as has been repeatedly emphasised, these are not watertight categories but convenient labels. Viewing the matter finally as a composite test involving all three elements and recognising that the infliction of harm was here indirect rather than direct, I am satisfied that a duty of care was owed to the pursuer by the constables referred to. For breach of that duty the defender is in law responsible.

In these circumstances and having regard to the basis on which the debate before me proceeded, I shall repel the defender's third plea-in-law, sustain the pursuer's first plea-in-law and allow to parties a proof before answer restricted to *quantum*.