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Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink

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**POLICE LIABILITY IN NEGLIGENCE FOR FAILURE TO PREVENT
CRIME: TIME TO RETHINK**
S. Tofaris* and S. Steel**

Should the police be liable where they fail to act with reasonable care in the investigation or suppression of crime when it is reasonably foreseeable that if this happens a third party will cause personal injury to a particular victim? Put differently, should the police ever come under an affirmative duty of care to protect a victim from the criminal act of a third party?

The answer currently is no, save in very exceptional circumstances. In *Hill v Chief Constable of West Yorkshire*,¹ the House of Lords held that the police are not liable in negligence for acts done in the course of investigating or suppressing crime. In *Brooks v Metropolitan Police Commissioner*,² Lord Steyn reformulated this as the “core *Hill* principle,” in accordance with which the police do not, in the interests of the whole community, owe individual members of the public, be they victims or witnesses, a duty of care when investigating and suppressing crime. This was approved by a majority of the House of Lords in *Smith v Chief Constable of Sussex Police*.³ Exceptions to the principle exist and are apt to be developed on a case-by-case basis.⁴ At present the police may owe a duty of care to a claimant when investigating or suppressing crime where:⁵ (i) they have directly caused physical injury to her,⁶ or (ii) where they have assumed responsibility to her.⁷

Why then should the question be asked at all? This is because the current position is deeply unsatisfactory, both as a matter of policy and principle, and the Supreme Court has a perfect opportunity to address this when it hears the appeal in *Michael v Chief Constable of South Wales*.⁸

The article is divided into three sections. Section I considers the rationale against the imposition of a duty of care on the police for failure to prevent crime as a result of which a victim suffers personal injury. It finds that *most*, but *not all*, of the arguments found in the case law and in academic literature are unconvincing. Section II sets out the rationale for imposing a duty of care on the police. Section III proposes an analytical framework for determining whether a duty of care should be recognised

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¹ [1989] AC 53.

² [2005] UKHL 34.

³ [2008] UKHL 50. The case was heard together with *Van Colle v Chief Constable of the Hertfordshire Police*.

⁴ *An Informer v A Chief Constable* [2012] EWCA Civ 197 at [93] (*per* Arden LJ); *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [109] (*per* Lord Carswell)

⁵ The police may have a duty of care where the act complained of is not done in the course of investigating or suppressing crime, e.g. where they perform operational tasks concerned with human safety on public roads (*Gibson v Orr* 1999 SC 420, discussed by Lord Hope in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [79]). The policy rationale behind the *Hill* principle does not apply in these cases because the imposition of a duty does not compromise the public interest in the investigation and suppression of crime.

⁶ *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 59. Examples include careless driving (e.g. *Scutts v Keyse* [2001] EWCA Civ 715) and the use of CS gas without fire fighting equipment (*Rigby v Chief Constable of Northampton* [1985] 1 WLR 1242). This exception does not apply to the issue discussed here, which concerns a pure omission by the police.

⁷ Section III below.

⁸ [2012] EWCA Civ 981.

in such cases. This achieves a better balance than the existing law between the competing considerations at work.

I. THE RATIONALE FOR NO DUTY

(a) Justifications for the *Hill* principle

In *Hill*, Lord Keith identified four public policy grounds in support of the non-liability of the police in negligence when investigating or suppressing crime.⁹ In truth, only the final two continue to carry weight with the courts, underpinning the reformulated *Hill* principle. In any case, a closer study reveals that none of them is persuasive.

(i) *No improvement in police standards*

Lord Keith's first policy reason was that the recognition of a duty of care is unlikely to improve the performance of police functions because they apply their best endeavours motivated by the general sense of public duty. This has fallen out of favour with the courts.¹⁰ Recent examples of police institutional misconduct¹¹ vindicate Lord Steyn's remark in *Brooks* that "nowadays, a more sceptical approach to the carrying out of all public functions is necessary."¹²

(ii) *Judicial examination of police strategy*

The second policy ground was that negligence claims against the police are likely to raise issues touching deeply on the conduct of a police investigation, including "matters of policy and discretion," which are unsuitable for determination by the courts. Setting limits on the type of police decisions that are open to judicial examination is legitimate. However, from an analytical perspective this is better done under "justiciability," rather than as an element of public policy determining the existence of a duty of care. Moreover, Lord Keith's use of the fact that policy or discretionary issues *may* arise to conclude that it is *never* appropriate to impose a duty of care on the police when investigating or suppressing crime is questionable. There may be instances in which no policy or discretionary issues arise, so that it would be wrong to deny a duty of care on that ground.

(iii) *Defensive policing*

The third policy factor is that the imposition of negligence liability on the police may lead them to exercise their primary function of investigating and suppressing crime defensively, inhibiting them from taking difficult operational decisions and restricting their freedom to act in the interests of the community.¹³ The argument is not without

⁹ [1989] AC 53, 63.

¹⁰ *Brooks v Metropolitan Police Commissioner* [2005] UKHL 34 at [28] (*per* Lord Steyn); *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [73] (*per* Lord Hope).

¹¹ E.g., the findings of institutional racism in the Metropolitan Police by *The Stephen Lawrence Inquiry* (London: HMSO, 1999) and the extensive efforts by the South Yorkshire police force to divert attention from its own liability for the Hillsborough disaster detailed in *The Report of the Hillsborough Independent Panel* (London: HMSO, 2012).

¹² [2005] UKHL 34 at [28].

¹³ *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [78], [81] (*per* Lord Hope), at [97] (*per* Lord Phillips), at [108] (*per* Lord Carswell), at [132] (*per* Lord Brown); *Brooks v Metropolitan*

problems.¹⁴ Its status in the case law is weakened by the fact that, although accepted in some cases involving public authorities,¹⁵ it has been rejected in others.¹⁶ In some of these, it has been suggested that liability would actually enhance the overall standard among public authority employees.¹⁷ Such an uneven application of the defensiveness argument is not justified on logical grounds. This leaves open the existence of special reasons why the police may be more susceptible to defensive practices than other public services, yet none has been provided on empirical grounds. This is the major shortcoming of the defensive policing argument. Questions about how the behaviour of the police or other public authorities will be affected by the threat of litigation cannot be answered without empirical evidence. In the absence of this, all the courts are doing is to make intuitive judgments,¹⁸ which at best trivialise the complexity of collecting and utilising such evidence¹⁹ and at worst gravely misrepresent the true position.

Two glaring examples suffice here. First, judicial statements about defensive policing are inconsistent with the evidence provided recently by police officers in the course of the Independent Review of the Riot (Damages) Act 1886, where they adamantly rejected the argument on deterrence in connection with the prospect of paying compensation under the Act.²⁰ Secondly, in *Smith*, Lord Carswell remarked that “police officers may quite properly be slow to engage themselves too closely in... domestic type matters, where they may suspect from experience the existence of a

Police Commissioner [2005] UKHL 34 at [30] (*per* Lord Steyn); *Desmond v The Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3 at [31].

¹⁴ C. McIvor, “Getting Defensive About Police Negligence: The *Hill* Principle, The Human Rights Act 1998 and the House of Lords” (2010) 69 CLJ 133.

¹⁵ *Mitchell v Glasgow City Council* [2009] 1 AC 874 at [28] (*per* Lord Hope) (social landlords); *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [103] (*per* Lord Brown) (road authorities); *Stovin v Wise* [1996] AC 923, 958 (*per* Lord Hoffmann) (road authorities); *X v Bedfordshire County Council* [1995] 2 AC 633, 750 (*per* Lord Browne-Wilkinson) (social services); *Elgouzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, 349 (Crown Prosecution); *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897, 902-903 (coast-guard).

¹⁶ *Dorset Yacht Co v Home Office* [1970] AC 1004, 1033 (*per* Lord Reid) (prison services); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 568 (*per* Lord Slynn) (social services); *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672 (*per* Lord Clyde) (educational services); *Capital & Counties v Hampshire County Council* [1997] QB 1004, 1043 (fire fighters). Some have questioned why the same argument has not been applied to doctors: D.S. Cowan & J. Steele, “The negligent pursuit of public duty – a police immunity?” (1994) PL 4, 9; P. Giliker, “*Osman* and police immunity in the English law of torts” (2000) 20 LS 372, 381.

¹⁷ *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 568; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672.

¹⁸ Lord Dyson, “The duty of care of public authorities: Too much, too little or about right?” (PIBA Richard Davies Lecture, 27 November 2012) at 4, referring to “little more than speculation” (available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-piba-lecture-27112012.pdf>)

¹⁹ J. Hartshorne, N. Smith & R. Everton, ““*Caparo* under fire”: A study into the effects upon the fire service of liability in negligence” (2000) 63 MLR 502, 518-520 point to the need to consider many variables before properly deciding what the impact of negligence liability would be. In the case of the police, this would include, among others, finding out what, if any, the additional effect of negligence liability would be over that already created by the potential liability under the Human Rights Act, by other legislation, such as health and safety laws, and by internal and external inquiries about possible misconduct. On the different factors which may contribute to defensive police practices, see R. Heaton, “We Could be Criticized! Policing and Risk Aversion” *Policing* (2011) 5:1, 75-86.

²⁰ Home Office, *Independent Review of the Riot (Damages) Act 1886: Report of the Review* (September 2013), para. 2.16. On the inconsistency, see J. Morgan, “Strict Liability for Police Nonfeasance? The Kinghan Report on the Riot (Damages) Act 1886” (2014) 77 MLR 434, 455-456.

degree of hysteria or exaggeration on the part of either or both persons involved,²¹ whilst Lord Hope said that not every complaint of domestic violence is genuine and that the judgment as to how to respond must be left to the police, adding that “police work elsewhere may be impeded” if the police had a duty of care to prevent the execution of every reported threat.²² These statements seem to be at odds with existing evidence, which suggests that there is under-reporting rather than over-reporting of domestic violence,²³ and that the police response remains, in the words of HM Inspectorate of Constabulary, “not good enough” with the result “that victims are put at unnecessary risk.”²⁴

(iv) *Diversion of police resources*

The last policy consideration is that having to defend negligence claims would divert human and other resources of the police from their primary function of investigating and suppressing crime.²⁵ This is, to some extent, undermined by the fact that it has been found unpersuasive in other cases involving public authorities.²⁶ There also seems to be no reason why it should not in principle apply to claims against the National Health Service, yet the courts do not place any weight on it in that context.²⁷ At the same time, it should not be readily assumed that the overall impact on public or police resources is negative.²⁸ If the imposition of a duty of care encourages the police to act more carefully, as some commentators have argued,²⁹ then it may end up saving public resources. Victims of serious crime often rely on medical help from the National Health Service and on welfare support from the state; if, by acting more carefully, the police prevent the crime, those costs will be averted. Therefore, even if police resources are detrimentally affected, public resources may benefit overall. Moreover, it may be that imposition of a duty of care can save police resources. For example, litigation may uncover organisational failings missed by internal inquiries³⁰ and in this way enable the police to adopt a more efficient system in the future. The

²¹ [2008] UKHL 50 at [107].

²² *Ibid.*, at [76].

²³ K. Paradine & J. Wilkinson, *Protection and Accountability: The Reporting, Investigation and Prosecution of Domestic Violence* (London: HMIC, 2004).

²⁴ HM Inspectorate of Constabulary, *Everyone’s business: Improving the police response to domestic abuse* (March 2014), 6. See also “Domestic Violence”, House of Commons Standard Note, Home Affairs Section, SN/HA/6337, 23 May 2014; M. Burton, *Legal Responses to Domestic Violence* (London: Routledge, 2008), Ch. 6.

²⁵ *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [97] (*per* Lord Phillips), at [133] (*per* Lord Brown); *Desmond v The Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3 at [31]

²⁶ *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 667; *Capital & Counties v Hampshire County Council* [1997] QB 1004, 1044.

²⁷ *Capital & Counties v Hampshire County Council* [1997] QB 1004, 1043; T. Bingham, “A Duty of Care: The Uses of Tort” in T. Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford: OUP, 2011), 269-282 at 276.

²⁸ J. Hartshorne, N. Smith & R. Everton, ““Caparo under fire”: A study into the effects upon the fire service of liability in negligence” (2000) 63 MLR 502 suggest on the basis of empirical data that there has been no important resource implication from the imposition of a duty of care on fire services. For a similar conclusion, see S. Halliday, J. Ilan and C. Scott, ‘The Public Management of Liability Risks’ (2011) 31 OJLS 527.

²⁹ This is widely accepted in “law and economics” literature. See, e.g., G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970); R. Posner, “A theory of negligence” (1972) 1 *Journal of Legal Studies* 29.

³⁰ This was true in the fire service case *Capital & Counties v Hampshire County Council* [1997] QB 1004, 1043.

likelihood of these cannot be ascertained without evidence. This is ultimately the problem: it is impossible to make an informed decision about the effect of negligence liability on police resources without empirical evidence.

The above analysis demonstrates that the policy reasons underlying the *Hill* principle are, in their current form, unconvincing. Empirical evidence may alter that, but until that happens they should not be used to deny a duty of care on the police when investigating or suppressing crime. The opposite, of course, is also true; one cannot assume that the threat of litigation would improve the standards of police officers making it appropriate to impose a duty of care. The most sensible solution is surely to require whoever tries to rely on such arguments to prove them using the ordinary rules of evidence. Buxton LJ's remarks in *Perrett v Collins* ring true here: "the court should be very cautious before reaching or acting on any conclusions that are not argued before it in a way in which technical issues are usually approached, with the assistance of expert evidence."³¹

Two final points are worth making. First, there is no evidence that policing has been negatively affected in other jurisdictions in the Commonwealth³² and Europe³³ where the police have been held liable in the scenario discussed here. Secondly, even without the *Hill* policy reasoning, the applicable framework of negligence liability includes adequate control mechanisms to safeguard the public interest in allowing the police to perform their law enforcement functions effectively and without the fear of speculative litigation.

(b) Justifications for the *omissions* principle

Under the current law, it is not only the *Hill* principle which prevents the imposition of a duty of care upon the police in relation to the failure to prevent crime. Such a duty is also precluded by the principle that A is not under a duty to take care to prevent harm occurring to B through a source of danger not created by A unless either (i) A has assumed a responsibility to protect B from that danger, (ii) A has a special level of control over that source of the danger, or (iii) A's status creates an obligation to protect B from that danger. We refer to this as the *omissions principle* since all and only failures to prevent harm occurring through risk sources one did not create are *omissions*.

The omissions principle has been stated to apply to private individuals and public authorities.³⁴ In this section, we consider various arguments for the omissions principle. We argue that whatever the success of these arguments in relation to private

³¹ [1998] 2 Lloyd's Rep 255, 277.

³² Canada: *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 (Ontario Court of Justice); *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCC 41 (Supreme Court of Canada). South Africa: *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 and 2004 (3) SA 305 (Supreme Court of Appeal).

³³ On Germany, see R. Surma, "A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence" in D. Fairgrieve, M. Andenas & J. Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002), 355-402 at 381-382; B.S. Markesinis et al, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart, 1999), 66. On France, see B.S. Markesinis et al, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart, 1999), 55-56; D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford: OUP, 2003), 110-113.

³⁴ *Stovin v Wise* [1996] AC 923, 946. This is also the intended implication of Lord Hoffmann's analysis in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [23]-[44].

individuals, they are not convincing as arguments for applying the principle in relation to public authorities.

(i) *Freedom*

In *Stovin v Wise*, Lord Hoffmann said: “it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect.”³⁵

As a justification for the absence of any affirmative duty of care being owed by public authorities, this statement is problematic. First, whilst it may be that a *general* duty to take care to protect people from injuries caused by other risk sources is more invasive of freedom than a general duty to take care not to cause injury by one’s own action,³⁶ it is not obvious that this is true of a *limited* positive duty, arising only in clearly defined circumstances. Honoré gives the example of dropped litter: “the trouble involved in disposing of a wrapper neatly in a bin is much the same as the trouble involved in picking a wrapper up.”³⁷ His point is that it is not always the case that requiring a positive act is more onerous (and hence invasive of freedom) than the corresponding abstention.

Second, it must be questioned how valuable the freedom of a *public authority* negligently to fail to take steps to assist an identified individual who is at serious risk of physical injury is. Why would there be a relevant difference here between the freedom-based interests of a private individual compared to a public authority? First, a private individual’s freedom arguably has *intrinsic* value in so far as her having freedom to do various things contributes to her having an autonomous life. By contrast, the value of the state’s freedom is purely instrumental: the state’s freedom is valuable only in so far as it contributes to the fulfilment of its proper functions. Second, it has been argued that the moral significance of virtuous acts would be diminished if individuals are not legally free to undertake those acts.³⁸ Forced virtue is no virtue at all. Yet it is preposterous to claim that the police’s responding non-negligently to the serious endangerment of a private individual is a matter of moral *virtue*. Had the police officers in *Michael* behaved non-negligently, they would not, *ipso facto*, have been “virtuous.”

(ii) *Lesser culpability*

Honoré argues that omissions which lead to some effect are generally less *culpable* than acts which lead to the same effect. The basis of his claim is that acts which lead to harm amount to *interventions* in the world, whilst omissions are *failures to intervene* in the world. The significance of this, in turn, is that an intervention which leads to harm makes things go worse as opposed to simply failing to make them go

³⁵ [1996] AC 923, 943.

³⁶ P.J. Fitzgerald, “Acting and refraining” (1967) 27 *Analysis* 133, 139: “to prohibit an act (by making its commission a crime or a civil wrong) leaves the subject free to do many alternative acts; to prohibit an omission (by requiring the act to be performed) leaves him free to do only *one* act, the act which he is forbidden to omit.” See also, J. Bennett, “Whatever the consequences” (1966) 26 *Analysis* 83, 94-97; A.P. Simester, “Why omissions are special” (1995) 3 *Legal Theory* 311, 318-319.

³⁷ T. Honoré, “Are omissions less culpable?” in P. Cane and J. Stapleton (eds.), *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991), 31, 50.

³⁸ See, e.g., N.J. McBride and R Bagshaw, *Tort Law*, (4th ed.) (London: Pearson, 2011), 214.

better. The former thus “threatens not security so much as the expectation of improvement, which is a different but secondary value.”³⁹

This argument, even if correct, does not itself justify the omissions principle. First, even if acts leading to harm are more culpable because they violate *security* as opposed merely to the expectation of improvement, it hardly follows that omissions cannot be seriously culpable. In other words, even if the security/expectation of improvement distinction helps to explain why there is a moral difference between acts and omissions, it tells us little as to the *strength* of that distinction. As Kortmann argues, even if omissions are not, in general, as culpable as acts, omissive conduct may in particular cases reach a significant enough level of culpability as to attract liability.⁴⁰ Second, most people would accept, as Honoré himself does, that in some situations there is *no moral difference* whatsoever in the culpability of acts and omissions. The mother who deliberately starves her child to death has behaved just as culpably as the mother who deliberately poisons her child. Honoré explains such situations where acts and omissions involve equal culpability as involving ‘distinct duties.’⁴¹ An omission leading to some harm is equally culpable as an omission leading to the same harm where the ommitter was under a special or ‘distinct’ duty to prevent the occurrence of the harm. Thus the validity of the ‘culpability’ argument in favour of the omissions principle as it applies to the police can be challenged on two grounds: first, there may be circumstances where an omission of the police, though less culpable than a corresponding act, is still culpable enough to merit the imposition of liability and second, there may be circumstances where the police can be said to owe a ‘distinct duty’ to prevent some harm even absent an assumption of responsibility to do so. We present the positive case for such a duty below.

(iii) *Erosion of individual responsibility*

Another argument for the omissions principle is that we are primarily responsible for what we do and not for what others do, but if we are held legally responsible for failing to prevent the actions of others, then we blur and potentially erode this moral distinction.

The premise of this argument is correct: intuitively, we are primarily responsible for what *we* do rather than what *others* do; our responsibility for our own actions is a special one.⁴² This, however, does not generate the omissions principle. It would indeed erode our sense of special responsibility and authorship over our own lives if there were *unlimited* moral responsibility for outcomes with which we are *prima facie* unconnected.⁴³ But rethinking the omissions principle in its application to the police hardly implies that the distinction between acts and omissions will be left without *any* important moral significance. First, a limited inroad into the omissions principle does not involve wholesale rejection of the act/omissions distinction. Second, acceptance of a limited *legal* duty in respect of omissions beyond the existing law need not entail that the person held liable is *equally* as *morally* responsible as the primary wrongdoer. If this objection were taken to its logical conclusion, it would rule

³⁹ T Honoré, “Are omissions less culpable?”, above n. 37, 51.

⁴⁰ J. Kortmann, *Altruism in Private Law* (Oxford: OUP, 2005), 28.

⁴¹ T Honoré, “Are omissions less culpable?”, above n. 37, 33.

⁴² *Customs & Excise Commissioners v Barclays Bank* [2007] 1 AC 181, at [18] (*per* Lord Bingham): “It would be a strange and anomalous outcome if an action in negligence lay against a notified party who allowed the horse to escape from the stable but not against the owner who rode it out.”

⁴³ A.P. Simester, “Why omissions are special”, above n. 36, 327-335.

out any form of accessory liability in tort law, a liability which is always in respect of the wrong of another, *primarily*, responsible person.

(iv) *Absence of a right to the conferral of a benefit*

According to Stevens, “the failure to confer a benefit upon someone else does not, alone, constitute the infringement of a right”.⁴⁴ On this analysis, if A (regardless of A’s identity or ability to prevent the loss) fails to protect B from some injury threatened by C, then A will have failed to confer a benefit upon B.⁴⁵ Stevens intends this as both a descriptive and normative claim. In his view, its normative basis lies in the “premium placed upon our freedom to choose how we live our lives”.⁴⁶ Stevens’ argument is thus vulnerable to the same objections mentioned in relation to freedom above.

Nolan also seeks to justify the omissions principle by reference to the view that “we do not have a right good against the whole world that others confer benefits on us”.⁴⁷ Without more, however, this is no justification.⁴⁸ The fact that we do not and ought not to have such a right good against the whole world need not imply that we ought not to have such a right good against some limited class of well-positioned potential duty-bearers in limited circumstances. More fundamentally, it is, of course, a fallacy to argue from the fact that as a matter of positive law there is no such right to the normative conclusion that there ought to be no such right. That conclusion requires substantive normative argument.

But is it not self-evident that an individual can never have a moral right, enforceable in law, that another confer a benefit upon her? Perhaps this would explain why Stevens and Nolan offer scant argument in justification of this claim. Yet given that prominent theorists of rights argue for the view that there can indeed be rights that others deliver some positive assistance (at least in limited situations), this is a difficult claim to accept without further argument.⁴⁹

(v) “*Why pick on me?*”

In *Stovin v Wise*, Lord Hoffmann also referred to the ‘why pick on me?’ argument for the omissions principle.⁵⁰ This argument states that it is unfair to single out one person for failing to take positive steps to protect someone when there are other people who similarly failed to do so. If A, B, and C each walk past the dropped litter, why single out A?

The deficiencies in this argument have often been pointed out.⁵¹ First, it does not apply where there is only *one* person who has negligently failed to provide

⁴⁴ R. Stevens, *Torts and Rights* (Oxford: OUP, 2007), 9.

⁴⁵ This claim could itself be challenged. Whether some event constitutes a *harming* as opposed to a mere *failure to confer a benefit* depends upon what baseline is assumed.

⁴⁶ R. Stevens, *Torts and Rights*, above n. 44, 9.

⁴⁷ D. Nolan, “The liability of public authorities for failing to confer benefits” (2011) 127 LQR 260.

⁴⁸ Nolan also refers (*ibid*, 284-285) by way of separate justification of the omissions principle to the Honoré distinction between interferences with security and disruption of expected improvements, but fails to address the possibility that a public authority might owe a ‘distinct duty.’

⁴⁹ See, e.g., C Fabre, “Good Samaritanism: A Matter of Justice” (2002) *Critical Review of International Social and Political Philosophy* 128, 132-138.

⁵⁰ [1996] AC 923, 944.

⁵¹ Indeed, the deficiency of the argument in relation to public authorities was pointed out by Lord Hoffmann in *Stovin* itself: *ibid*, 946.

assistance. Secondly, in cases where multiple people each breach a duty to give positive assistance, it should not be the case that the more the claimant is the victim of a wrong, the worse off she becomes. To put the point slightly differently, the number of wrongdoers should not dilute the responsibility of any particular wrongdoer. Third, there is special reason to single out a public authority in relation to some injury where the public authority has been tasked by statute with taking steps to prevent that injury.

(c) Other justifications for no duty

(i) Rule of law

As we have seen, private individuals enjoy the benefit of the omissions principle. It has been argued that, in light of this, *the rule of law* demands that public authorities also be entitled to the benefit of this principle. Such arguments typically rely upon a Diceyan conception of the rule of law which requires that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”⁵²

There are difficulties with this view. First, it is worth pointing out, as Priel has, that this view is often presented by private lawyers as if it were a neutral view defending an uncontroversial principle of equality before the law, yet in truth it implies a controversial, strongly libertarian view of the responsibilities of the state.⁵³ This is so because, on this view, the state ought to have no more legal obligations than private individuals. If this principle were correct, then many of the modern welfare state’s legal obligations to its citizens could not be justified.⁵⁴ Second, more fundamentally, it is doubtful that the rule of law, even on Dicey’s conception, is truly engaged here. The rule of law does not prohibit differential treatment of the state and private individuals if there are normatively important differences between private individuals and the state which justify this.⁵⁵ In other words it would be permissible under the rule of law for the “ordinary law of the realm” to differentiate between the state and private individuals if there were normatively important differences between them. It is hard to believe that there are no normatively important differences between police officers and private individuals so far as, say, the suppression of crime goes.⁵⁶

(ii) Unsuitability of a private law analysis

DuBois and others have argued that because the normative foundations of tort law lie in *corrective* justice, tort law provides an inapposite normative framework for

⁵² A.V. Dicey, *Lectures introductory to the study of the constitution* (London: Macmillan & Co, 1885) 177-178.

⁵³ D. Priel, ‘The political origins of English private law’ (2013) 40 *Journal of Law and Society* 481, 503-504.

⁵⁴ Or, at least, there is something morally regrettable about those obligations, even if they are all things considered justified.

⁵⁵ See, similarly, F. DuBois, “Human Rights and the Tort Liability of Public Authorities” (2011) 127 *LQR* 589, 604: “The Diceyan equality principle...has no purchase here.”

⁵⁶ For a clear elucidation of some of these differences, see J. Gardner, ‘Criminals in uniform’ in A. Duff, L. Farmer, S. Marshall, M. Renzo, V. Tadros (eds.), *The Constitution of the Criminal Law* (Oxford: OUP, 2012).

analysing the liability of public authorities, since the existence and extent of such liability is principally a question of *distributive* justice.⁵⁷

What is corrective justice? In essence, it is the view that if A wrongfully harms B, A thereby comes under a moral duty to repair that harm.⁵⁸ How could it be that harms inflicted by public authorities could not come within the scope of corrective justice? It must be either that (a) public authorities cannot (whilst exercising public functions) morally wrong private individuals in the relevant sense, or (b) public authorities cannot harm private individuals.

Proposition (b) is absurd. Proposition (a) is also untenable. There is no moral magic about going on duty as a police officer.⁵⁹ For instance, if a police officer strikes a suspect to encourage a confession, this is clearly a wrong relevant to corrective justice. A more plausible version of (a) is that public authorities cannot morally wrong private individuals in the relevant sense *in so far as they merely omit to prevent harm occurring to those individuals*. This depends upon whether one thinks that a person can ever *wrong* another by omission. If one accepts the commonsensical view⁶⁰ that one can morally wrong another person by negligently failing to assist them in certain circumstances, then there is no conflict with corrective justice.⁶¹

Yet it seems that DuBois is ultimately committed to the original proposition (a). This is because his view is that the wrongs to which corrective justice responds are wrongs between what he calls “normative equals”.⁶² Persons are normatively equal, in his view, if and only if they each have a moral entitlement to set their own ends.⁶³ Public authorities and private individuals are not normative equals, on his analysis, since the former are not morally entitled to set their own ends, but must serve the public.⁶⁴ It follows from the argument that a public authority, at least when pursuing a public function, can never commit a wrong relevant to corrective justice – not even a wrong involving *positive acts*.⁶⁵ But this is implausible. It is peculiar that when people go ‘on duty’ they lose the capacity to commit ordinary moral wrongs.

Furthermore, it seems to us that public officials *are* in any event ‘normative equals’ in DuBois’ sense. Public officials, as people, *are* morally entitled to set their own ends. But the *role* which they have assumed imposes certain special moral obligations on them. Just as a fiduciary’s role imposes stringent obligations to act

⁵⁷ F. DuBois, “Human Rights and the Tort Liability of Public Authorities”, above n. 55, 600-607. See also Lord Hoffmann, ‘Reforming the Law of Public Authority Negligence’ (Bar Council Law Reform Lecture, 17 November 2009), at [18] (available at: http://www.barcouncil.org.uk/media/100362/lord_hoffmann_s_transcript_171109.pdf). For a different version of similar arguments, see D. Nolan, “Negligence and Human Rights Law: The Case for Separate Development” (2013) 76 MLR 286. We deal with Nolan’s arguments below, pp.13-14.

⁵⁸ See J.L. Coleman and G. Mendlow, “Theories of Tort Law”, in E. Zalta (ed.), *Stanford Encyclopaedia of Philosophy*, section 3.1: “...the *principle of corrective justice*...says that an individual has a duty to repair the wrongful losses that his conduct causes.”

⁵⁹ See again the helpful discussion in J. Gardner, “Criminals in uniform”, above n. 56, 103-116.

⁶⁰ E.J. Weinrib, “The Case for a Duty to Rescue” (1980) 90 *Yale Law Journal* 247, 260

⁶¹ See further, section II (a) below.

⁶² See F. DuBois, “Human Rights and the Tort Liability of Public Authorities”, above n. 55, 599. For discussion and criticism, see P. Cane, “Tort Law and Public Functions” in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2014), 148-168.

⁶³ *Ibid*, 600.

⁶⁴ *Ibid*, 600-601.

⁶⁵ DuBois denies this (*ibid*, 603) but we do not see that his position has the resources to prevent this inference. He states, *ibid*, that: “public authorities’ liability for infringements of “negative” rights has the same bilateral structure as the tort liability of private persons and is therefore entirely suitable for the tort route”. But why are public authorities and private individuals ‘normative equals’ in relation to negative rights but not positive rights?

only in the best interests of the principal does not preclude the tort liability of a fiduciary when the latter is pursuing the fiduciary obligations, so the moral duty to serve the public attached to the office of being a police officer does not. In general, the fact that A is morally obligated to serve the interests of another does not entail that A has no moral entitlement to set her own ends in the relevant sense.

The better view is that the liability of public authorities raises issues of both corrective *and* distributive justice. It raises issues of corrective justice in so far as it is concerned with the enforcement of moral obligations of repair arising out of interpersonal moral wrongs. It raises issues of distributive justice in so far as the (judicial) decision to grant a *legal* right of corrective justice is always a question of distributive justice.⁶⁶ It is a question about the distribution of the legal rights to the enforcement of the moral obligation of corrective justice. Such questions inevitably raise distributive issues concerning whether scarce and valuable public resources should be distributed to individuals in order to provide them with the legal means to enforce their moral obligations. But in both these respects – the corrective and distributive – the liability of public authorities is akin to the liability of private individuals. The decision to grant any new legal right to enforce an obligation of corrective justice is always a distributive one.

(iii) *Availability of alternative remedies*

The courts have in the past refused to impose a duty of care on a public authority where the claimant has an alternative remedy.⁶⁷ Although the argument was disapproved in *Barrett*⁶⁸ and *Phelps*,⁶⁹ it has occasionally resurfaced and merits further discussion.

One possibility for a claimant who suffers personal injury as a result of a crime that the police failed to prevent is to pursue a remedy under public law. None, however, is an effective alternative to a tort claim. Judicial review does not provide compensation for past wrongs. Victims of violent crimes can seek compensation from the Criminal Injuries Compensation Scheme, but the relevant awards are modest in comparison to tort damages, have a shorter limitation period of two years and do not lead to an acknowledgment of the police's failings.⁷⁰

Another possibility is to pursue an express statutory remedy. The Police Reform Act 2002 (amended in part by the Police Reform and Social Responsibility Act 2011) gives individuals the right to complain about the conduct of police officers.⁷¹ The main shortcoming of this as an alternative remedy to a tort claim is that no compensation is payable to individuals under it.

A third possibility is to bring proceedings under another tort. The only other tort that can potentially apply here is misfeasance in public office. This is a general tort covering failures of all public authorities rather than a specialised regime for

⁶⁶ See especially, J. Gardner, "What is tort law for? Part 2: the place of distributive justice" in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: OUP, 2014), 335-353.

⁶⁷ For examples, see *Rowling v Takaro Properties* [1988] AC 473, 502 (judicial review); *X v Bedfordshire County Council* [1995] 2 AC 633, 761 (statutory complaint); *Hill v Chief Constable of West Yorkshire* [1988] QB 60, 73 (Court of Appeal) (Criminal Injuries Compensation Scheme).

⁶⁸ [2001] 2 AC 550, 568, 589.

⁶⁹ [2001] 2 AC 619, 653, 672.

⁷⁰ P. Cane, *Atiyah's Accidents, Compensation and the Law* (8th ed.) (Cambridge: CUP, 2013), 299-325

⁷¹ R. Clayton & H. Tomlinson (eds.), *Civil Actions Against the Police* (3rd ed.) (London: Sweet & Maxwell, 2004), Ch. 2; J. Beggs & H. Davies, *Police Misconduct, Complaints and Public Regulation* (Oxford: OUP, 2009), Ch. 3.

dealing with similar situations to the one discussed. As such, it is not more appropriate to apply than negligence. It follows that the imposition of a duty of a care would not bypass the doctrinal restrictions of another more suitable tort.⁷²

(v) *Relationship with claims under the Human Rights Act 1998*

The existence of the Human Rights Act can potentially affect the negligence claim against the police for failure to prevent crime in two ways. First, it has been argued that the claim under the HRA operates as an alternative remedy, obfuscating the need to impose a duty of care at common law. Secondly, it has been suggested that the liability for pure omissions by public authorities is better dealt with under human rights law than the tort of negligence. We consider each in turn.

(1) The HRA claim as an alternative remedy

Section 6(1) of the HRA provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right,” whilst section 7(1) provides that victims of the unlawful act can bring proceedings against the relevant authority. In *Osman v United Kingdom*,⁷³ the European Court of Human Rights established that under the right to life in Article 2 of the European Convention on Human Rights, the police have a positive obligation to take preventive measures to protect individuals whose life are at risk from the criminal acts of third parties. This means that *in principle* a victim of crime who has suffered personal injury can bring an action under the HRA against the police for failure to prevent the crime. For this to succeed, the claimant needs to prove: (i) that the police knew or ought to have known at the time, (ii) that there was a real and immediate risk to the life of the victim of violence,⁷⁴ (iii) that the police failed to take reasonable measures to avoid the risk. It could therefore be argued that the existence of a potential claim under the HRA has removed the need to impose a common law duty of care in the limited class of cases considered here.⁷⁵

In our view this is unconvincing. First, although a claim under the HRA may result in damages, it has several disadvantages when compared to a claim under the tort of negligence. Damages are not as of right but discretionary, they tend to be lower than those in tort and their assessment is lacking clear guidance from the Strasbourg court.⁷⁶ Moreover, the limitation period for a HRA claim is only one year as compared with six years for tort. Secondly, as Nolan argues, “the alternative remedy argument collapses if the protection offered by the Convention is not co-extensive with the law of negligence at a substantive level.”⁷⁷ The *Osman* test sets a high

⁷² C. Booth & D. Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006), 205.

⁷³ (2000) 29 EHRR 245.

⁷⁴ This follows the reformulation of the test by the Court of Appeal in *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252 at [25]. In *Osman v United Kingdom* (2000) 29 EHRR 245, para. 116, the European Court of Human Rights referred to an “identified individual.”

⁷⁵ Lord Brown came close to this in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [136], when he said that “to the extent that articles 2 and 3 of the Convention and sections 7 and 8 of the Human Rights Act already provide for claims to be brought in these cases, it is quite simply unnecessary now to develop the common law to provide a parallel cause of action.”

⁷⁶ On damages under the HRA, see J. Steele, ‘Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?’ [2008] 67 CLJ 606.

⁷⁷ D. Nolan, “Negligence and Human Rights Law: The Case for Separate Development” (2013) 76 MLR 286, 317.

threshold for the establishment of liability and is difficult to satisfy.⁷⁸ As such, it would not always be co-extensive with the scope of negligence liability.⁷⁹

To be clear, our position is not that the tort of negligence should *necessarily* develop harmoniously with Convention rights.⁸⁰ We agree with Lord Hope's statement in *Smith v Chief Constable of Sussex Police* that "the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy."⁸¹ But it does not follow from this that the common law should be preserved unchanged because of the HRA claim, contrary to what his Lordship went on to say.⁸² In *Smith v Ministry of Defence*, Lord Carnwath remarked that the domestic judges' "primary responsibility should be for the coherent and principled development of the common law, which is within [their] control. [They] cannot determine the limits of article 2."⁸³ It would be a shame if the Strasbourg-set limits automatically determine the limits of the common law.

(2) HRA as a better route for dealing with police omissions

Nolan has recently argued that the liability of the police for pure omissions is better treated as a matter of human rights law, under the HRA. He offers two main arguments. The first is that "the distinction between acts and omissions is foundational to the law of negligence...and the undermining of that distinction may therefore be expected to produce a degree of incoherence."⁸⁴ The second is that moving away from the current position whereby public authorities obtain the benefit of the omissions principle, as private individuals do, would introduce an "alien public/private distinction" into private law in that it would require the courts to distinguish between public authorities and private individuals in cases where the alleged duty is an affirmative one.⁸⁵ By contrast, the distinction between positive and negative obligations is not as stark in human rights law.⁸⁶

Nolan's first argument in effect relies upon his claim that private law does not (ought not to?) recognise the existence of legal rights that others save one from suffering physical injury (or in his terms, rights that others "confer benefits" upon one). We have already observed that the normative argument for this claim is weak. Indeed, it seems, on the contrary, that the law would be more coherent – if by that we

⁷⁸ This was noted by Lord Carswell in *In re Officer L* [2007] 1 WLR 2135, at [20], and Lord Hope in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50 at [69]. Both the domestic and the Strasbourg courts found that the test was not satisfied on the *Van Colle* facts: *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; *Van Colle v United Kingdom* (2013) 56 EHRR 23.

⁷⁹ *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [99] (*per* Lord Phillips).

⁸⁰ Cf. Lord Bingham's approach in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [58], which was rejected by the majority. Interestingly, in *Smith v Ministry of Defence* [2013] UKSC 41, Lord Hope for the majority approved at [98] Lord Bingham's statement in *Smith v Chief Constable of Sussex Police* that "one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual under the Convention did not find a reflection in a body of law as sensitive to human needs as the common law."

⁸¹ [2008] UKHL 50 at [82].

⁸² Lord Hope said in *ibid*, at [82]: "the case for preserving [the common law] may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the *Osman* can now be dealt with in domestic law under the 1998 Act."

⁸³ [2013] UKSC 41 at [156].

⁸⁴ D. Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 MLR 286, 304.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, 304-305.

mean more consistent with its underlying normative justifications – if the acts/omissions distinction were construed less rigidly in relation to public authorities. As we have seen, the arguments offered for the significance of that distinction do not withstand much scrutiny in relation to public authorities.

The second argument is also problematic. Firstly, if we accept that the reasons offered for the omissions principle *within private law* apply less strongly to public authorities, then the distinction between public authorities and private individuals is one itself mandated or licensed *by private law*. Secondly, it need not follow from our argument that there is a strict distinction between public authorities and private individuals in relation to omissions liability. All we have argued is that *in relation to the police*, the arguments for the omissions principle are weak. It may be that these arguments, such as the argument from dependency, do not apply as strongly to other public authorities. Thirdly, the taxonomic strength of the distinction between ‘public law’ and ‘private law’ is partly a function of whether these rules are underpinned by (fundamentally) distinct normative frameworks. *Prima facie*, and clearly much more needs to be said here, it is difficult to believe that morality cleaves perfectly across the public/private divide, with a distinctive morality governing public functions and an ‘ordinary’ morality governing private individuals. Far more likely that public law and private law have, or ought to have, much, morally, in common. As Gardner explains, “the differences between the duties of police officers and of other people, in other roles, are ordinary moral differences. Although police officers as such are indeed in special moral positions, there is no distinct ‘political’ morality applicable to them that displaces ordinary moral judgement. Morality is just morality, and it applies to people. It applies to public officials (judges, soldiers, parliamentarians, police officers, local authority librarians, etc) because they are people. They do not stop being people and hence do not stop being bound by morality when they put on their uniforms, or otherwise go on duty.”⁸⁷

(vi) *Fear of speculative or excessive litigation*

Like other public authorities, the vast span of activities in which the police engage and the variety of responsibility which they undertake means that an individual will often be able to show that had the police acted in a particular manner, she may not have suffered harm. At the same time, the police are easy to trace and guaranteed to have financial resources out of which a claim may be met. In the scenario discussed here, the criminal inflicting the harm on the victim will often lack assets to be worth suing, and even if he does not, he will almost always have less financial might than the police. In such cases, the rules on joint and several liability, which allow full recovery irrespective of the defendant’s degree of culpability, mean that a claim against the police is far more appealing.⁸⁸ These make the police an attractive target of litigation, often as “defendants of last resort.” Claims may be initiated in the hope that the police may settle to avoid costly, lengthy and distracting litigation. Although difficult to ascertain, this puts the police and other public authorities “at risk of speculative litigation in a way which most individuals and private-sector companies are not.”⁸⁹

⁸⁷ J. Gardner, “Criminals in uniform”, above n. 56, 116.

⁸⁸ T. Weir, “Governmental Liability” (1989) PL 40.

⁸⁹ B.S. Markesinis et al, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart, 1999), 86.

This, however, does not lead to the conclusion that the police should *never* have a duty of care to prevent crime and should therefore never be liable when they fail to do so. In other words, it should not operate as an absolute bar to the recognition of a duty of care. As Lord Slynn said in *Phelps*, although “the courts should not find negligence too readily, the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded.”⁹⁰ What the argument truly shows is the need for adequate control devices when assessing the negligence liability of the police in such circumstances. As we explain in Section III, even if one does not apply the *Hill* principle or the omission rule to the police, the existing framework of negligence liability regarding public authorities still provides adequate control devices.

(vii) *Constitutional and institutional competence of courts*

Negligence actions against public authorities, including the police, have the potential to engage the courts with questions of politics, such as the allocation of public funds and the prioritisation of competing citizens’ interests. The courts have traditionally been wary of intruding into such matters, regarding them as unsuitable for judicial resolution. This is broadly based on two grounds.⁹¹ First, in a democracy unelected judges should not overturn decisions that reflect the will of the electorate. Ultimately it is for the democratic process to determine how public resources should be allocated and how conflicting values should be prioritised. Secondly, judges should be slow to make decisions on issues outside their technical competence which other bodies are better suited to determine.

These concerns do not militate against the imposition of a duty of care in every case of police failure to prevent crime. Instead, they suggest that the framework of negligence liability should include within it a mechanism for preventing the courts from determining claims which are not suitable for judicial resolution. As Section III shows, this function is performed by “justiciability.”

In this section we have been critical of *many* of the arguments against police liability for failure to prevent crime. This is not the same as rejecting that there are valid reasons for keeping police liability in such cases within limits. Indeed, as we have shown above, we accept that such reasons exist and must be taken into account when deciding whether the police are negligent or not. We explain in greater detail how this should be done in Section III.

II. THE RATIONALE FOR DUTY

In this section, we outline positive reasons for the imposition of a duty of care on the police in cases of failure to prevent crime.

(a) “Wrongs should be remedied”

The law should strive to ensure that certain categories of individuals suffering physical harm as a result of a wrongful failure by the police do not remain uncompensated. This reflects the much-cited dictum that “the rule of public policy

⁹⁰ [2001] 2 AC 619, 655.

⁹¹ C. Booth & D. Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006), 30, 33.

which has first claim on the loyalty of the law” is that “wrongs should be remedied.”⁹² In Lord Dyson’s words, this is “a cornerstone of any system of justice... If the position were otherwise, the law would be irrational and unfair and public confidence in it would be undermined.”⁹³

Lord Bingham himself recognised that the dictum begs the all-important question of what the law recognises as a wrong.⁹⁴ Clearly the “wrong” in the dictum cannot be a legal wrong, since that is the precise issue to be resolved.⁹⁵ However, this does not make the dictum meaningless. As Lord Dyson has said extra-judicially, its meaning in practice is clear: “prima facie if A foreseeably suffers harm as a result of the careless acts of B and there is a relationship of sufficient proximity between the two of them, then A should be compensated by B for the harm he has caused.”⁹⁶

Robertson has defended the dictum’s theoretical foundations. According to him, it “seems to assume that the infringement of a duty that satisfies the first and second stages of the *Caparo* test constitutes a particular kind of *moral wrong*, the rectification of which is in the public interest. The first and second stages of the *Caparo* framework, then, are concerned with the question whether, as a matter of interpersonal justice (or interpersonal morality, the morality of what one *person* owes to another person, more broadly), the defendant should be regarded as owing a duty of care to the claimant. In light of that, what the dictum seems to be saying is that there is a public interest in remedying harm caused by conduct that can be regarded as wrongful *as a matter of interpersonal justice*. In other words, there is a public interest in remedying harm caused by conduct that would be regarded by public sentiment as moral wrongdoing for which the offender must pay.”⁹⁷ This is different from saying that “the law should remedy *harm* caused by others.”⁹⁸ The law is concerned with remedying wrongs, which “appear to be interpersonal moral wrongs for which the offender must pay, or infringements of duties that are justified by the notion of interpersonal responsibility identified through the elements of foreseeability and proximity.”⁹⁹

⁹² This was set out by Sir Thomas Bingham MR in his dissenting judgment in *X v Bedfordshire County Council* [1995] 2 AC 633, 663. It was endorsed by Lord Browne-Wilkinson in the House of Lords, despite reaching the opposite conclusion: *X v Bedfordshire County Council* [1995] 2 AC 633, 749. It was subsequently cited with approval in *Waters v Commissioner of Police of the Metropolis* [2000] 1 WLR 1607, 1618 (*per* Lord Hutton); *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, 446 (*per* Lord Hope), 456 (*per* Lord Clyde), 468 (*per* Lord Hutton); *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [2] (*per* Lord Steyn) and more recently in *Jones v Kaney* [2011] UKSC 13 at [108] and [113] (*per* Lord Dyson); *Crawford Adjusters v Sagicor General Insurance (Cayman Limited)* [2013] UKPC 17 at [73] (*per* Lord Wilson); *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, at [39] (*per* Hallett LJ).

⁹³ *Jones v Kaney* [2011] UKSC 13 at [113].

⁹⁴ T. Bingham, “A Duty of Care: The Uses of Tort”, above n. 27, 279. For similar criticism, see Lord Hoffmann, “Reforming the Law of Public Authority Negligence,” above n. 57, at [20]; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [100] (*per* Lord Rodger); *Crawford Adjusters v Sagicor General Insurance (Cayman Limited)* [2013] UKPC 17 at [81] (*per* Lady Hale).

⁹⁵ Given that the dictum is relevant at the third stage of the *Caparo* framework and thus before the elements of breach and damage are examined, it seems premature to speak about remedying “wrongs.” In this respect, the dictum is premised on the assumption that the two will be satisfied (A. Robertson, “On the Function of the Law of Negligence” (2013) 33 OJLS 31, 39).

⁹⁶ Lord Dyson, “The duty of care of public authorities: Too much, too little or about right?”, above n. 18, at 3.

⁹⁷ A. Robertson, “On the Function of the Law of Negligence” (2013) 33 OJLS 31, 39-40.

⁹⁸ *Ibid*, 40, in response to Lord Rodger’s criticism of the dictum in *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [100].

⁹⁹ *Ibid*, 40.

Is it possible for A to commit an interpersonal moral wrong against B by *pure omission*? Some deny it.¹⁰⁰ On these views, if we ever have moral obligations to save someone's life or to save them from serious harm (again, moral obligations arising absent some special relationship between two individuals), we *never* owe these obligations *to* the person whose life we morally ought to save. In short, none of our *positive* moral obligations are *interpersonal* in character.

Consider the strange consequences of this view. Virtually everyone agrees that if A encounters a drowning child, B, in a shallow pool of water and A could, at almost no cost to herself, prevent B's death, and A knows all these facts, A has a moral obligation to do something. A idly stands by and breaches this obligation. A has done something wrong, but has A *wronged* the child? For the deniers, the answer is "no". Yet it seems obvious to us that A has not simply behaved wrongly in some impersonal way, like the person who burns a beautiful painting which no one has or ever will see, but has behaved wrongfully *in relation to* the child.

One argument for this follows from an interest theory of rights: A has paid insufficient regard to an extremely weighty interest of B's (namely, B's interest in life); it is this failure to give adequate attention to B's interests, not 'human interests in general', which means that A *wrongs* B.

It might be objected that the fact that an *interest* theory of rights generates this conclusion is neither here nor there since the most plausible moral theory of the legal rights *in tort law* is that the rights in tort law are rights which protect people's *choices* about how to use their bodies or property.¹⁰¹ This choice-based theory of rights helps to explain why harmless trespasses are wrongful – such trespassers take decisions about the use of others' land which were not theirs to make. Moreover, such theories entail that A does not violate B's rights in the above example. If A fails to rescue the drowning child, A does not make a choice about the use of B's body which was B's to make.

As McBride has argued, however, the most plausible view is that whilst *some* of our legal rights in tort law are indeed designed to protect certain choices which properly fall to us to make, this not true of *all* of our legal rights in tort law.¹⁰² Most pertinently, it is awkward to explain negligence liability as, in general, choice-protecting. The most natural explanation of why negligently running someone over is morally wrongful is that it substantially sets back their interests, not that it takes a decision which was the victim's to make. In short, then, there is little reason to believe that no interpersonal obligations are affirmative in character, and strong reason to believe that some are.

We explain in Section III how the consideration that wrongs should be remedied operates within the framework of negligence liability. As Lord Dyson stated, it seems "to be a good working principle. But it is no more than that."¹⁰³ The consideration does not exist in isolation, but forms part of a spectrum of factors that

¹⁰⁰ R Stevens, "Private rights and public wrongs", in M.N. Dyson (ed.) *Unravelling Tort and Crime* (Cambridge: CUP, 2014), text at notes 63-65.

¹⁰¹ *Ibid.*

¹⁰² See N.J. McBride, "Restitution for wrongs", in C. Mitchell and W. Swadling (eds.), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford: Hart Publishing, 2013), text at notes 62-65. It is also difficult to see how the choice-based theory of rights can explain liability for omissions where a person has created a risk of injury and then comes under a duty to take steps to quell that risk. It is equally true here that the person who risked the injury by their action has not taken a choice that was the victim's to make.

¹⁰³ Lord Dyson, "The duty of care of public authorities: Too much, too little or about right?", above n. 18, at 3.

the courts must consider before deciding whether it is “fair, just and reasonable” under the third *Caparo* factor to establish a duty of care in the specific circumstances of a case.

(b) Police’s special status and victims’ dependency¹⁰⁴

The police’s special status¹⁰⁵ derives from the fact that they are “the specialist repositories for the state’s monopolization of legitimate force in its territory.”¹⁰⁶ The police are singled out in the broader interests of society as the only body that are legally entitled to intervene and use force to protect citizens from criminal activity.¹⁰⁷ For that purpose, they are provided with specialist resources, equipment and training. A person faced with the threat of violence is permitted by law to take reasonable measures of self-protection, but beyond that her only option is to inform the police.¹⁰⁸ In essence, other than reasonably protecting herself, the law obliges her to entrust her physical safety in the police. Yet, in the majority of cases, a victim cannot protect or be reasonably expected to protect herself against the threat of violence. This enhances the special status of the police, but it also gives rise to a relationship of dependency between the police and any member of the public who finds herself in that position. The combination of the police’s special status and the victims’ dependency on them when threatened by a third party with a criminal act militates in favour of recognising that the police may potentially be liable in negligence in such cases.¹⁰⁹

To deny a duty of care on the police in circumstances where they carelessly take inadequate measures and the claimant suffers physical harm from the precise threat that she has informed them about would undermine not only their duty to protect her in these circumstances, but also the claimant’s duty to rely on them. In effect, it would destabilise the legal framework that prescribes a citizen’s acceptable response and delineates the police’s role in cases of violent threats. Moreover, a lack of a duty to take care on the police would, in Lord Bingham’s words, “not find favour with most ordinary people,”¹¹⁰ that is, it would erode public expectation of police behaviour and contradict the public sentiment as to whether a wrong has been committed in the specific circumstances.

(c) Public accountability for police conduct

One of the functions that tort law performs when it applies to public officials is holding them to account.¹¹¹ The same is true of an action against the police for

¹⁰⁴ See also, D.P.J. Walsh, “Liability for Garda negligence in the prevention and investigation of crime” (2013) 48 *Irish Jurist* 1, 18-20; L. McCabe, “Police Officers’ Duty to Rescue or Aid: Are they Only Good Samaritans?” (1984) 72 *California Law Review* 661, 675-677.

¹⁰⁵ J. Gardner, “Criminals in uniform”, above n. 56, explains the police’s “special moral position.”

¹⁰⁶ R. Reiner, *The Politics of the Police* (4th ed.) (Oxford: OUP, 2010), 7-8.

¹⁰⁷ This is important for the maintenance of civil peace (*Glamorgan Coal Co Ltd v Glamorganshire Standing Joint Committee* [1916] 2 KB 206, 226 (*per Pickford LJ*)).

¹⁰⁸ As Lord Hope said in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [63], members of the public “who are being intimidated by threats of death or serious injury are not permitted to take the law into their own hands. They are encouraged to report these threats to the police.”

¹⁰⁹ The relationship of dependency is relevant to the establishment of proximity. For details, see section III below.

¹¹⁰ T. Bingham, “A Duty of Care: The Uses of Tort”, above n. 27, 279.

¹¹¹ A.M. Linden, “Tort Law as Ombudsman” (1973) 51 *Canadian Bar Review* 155; A.M. Linden, “Reconsidering Tort Law as Ombudsman” in F. Steel & S. Rodgers-Magnet (eds.), *Issues in Tort law*

negligent investigation. Such an action forces the police to explain and justify their conduct in respect of the facts relating to the injury in public and as part of the adversarial process.¹¹² This is important to victims and their relatives. As Spencer has noted, often the real reason why these sue “is the desire for a proper investigation into what went wrong, with the possibility of a public condemnation at the end.”¹¹³ In this respect, the tort litigation performs a vindicatory role too, which is “to provide a *public and impartial public forum* for declaring the claimant’s rights (the legal origin of which must be established on other grounds) have been infringed.”¹¹⁴

There are of course other ways by which the police can be held accountable in such cases.¹¹⁵ These, however, do not undermine the accountability and vindicatory role of the tort action.¹¹⁶ To begin with, the complaints procedure set out by the relevant legislation suffers from limitations that dent the public’s confidence in it. Most of the complaints are dealt with internally by the relevant police force with the result that the process lacks the appearance of independence or objectivity that judicial scrutiny has. Although it is possible for the Independent Police Complaints Commission to intervene in some cases, the effectiveness of this body remains questionable.¹¹⁷ Overall, as the editors of a specialist work observe, “the chances of an aggrieved person being vindicated through a complaint are considerably lower than his chances of succeeding in a civil action.”¹¹⁸ External public inquiries do not suffer from similar shortcomings, but they are time-consuming and costly and thus difficult to establish as frequently as it is required. Moreover, such inquiries cannot be set in motion by the individuals concerned.

III. THE FRAMEWORK OF NEGLIGENCE LIABILITY

In this section we propose a different approach to the inquiry into the existence of a duty of care by the police in cases of failure to prevent a crime resulting in physical

(Toronto: Carswell, 1983), 1-23; C. Harlow & R. Rawlings, *Law and Administration* (3rd ed.) (Cambridge: CUP, 2009), Ch. 17.

¹¹² E. Chamberlain, “Negligent Investigation: Tort Law as Police Ombudsman” in A. Robertson & T. Hang Wu (eds.), *The Goals of Private Law* (Oxford: Hart, 2009), 283-310.

¹¹³ J.R. Spencer, “Suing the Police For Negligence: Orthodoxy Restored” (2009) 68 CLJ 25, 26-27. In *Hill*, the claimant brought the claim “with the object of obtaining an investigation into the conduct of the West Yorkshire police force,” having stated that “any damages awarded shall be devoted to an appropriate charity” ([1989] AC 53, 64 (*per* Lord Templeman)). Likewise, Joanna Michael’s mother said: “we obviously know it was not the police who murdered Joanna but they had the power to save her but didn’t because of simple carelessness and a failure to follow their own procedures... we want them to be held to account in the Courts for their lack of professionalism which we believe led directly to our daughter’s death” (<http://www.doughtystreet.co.uk/news/article/supreme-court-gives-permission-in-999-test-case>).

¹¹⁴ D. Priel, “A public role for the intentional torts” in K. Barker & D. Jensen (eds.), *Private Law: Key Encounters with Public Law* (Cambridge: CUP, 2013), 288-319 at 308. The vindicatory role of tort law in general has been recognized by Lord Scott in *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 at [18], [22]-[23].

¹¹⁵ P. Cane, *Atiyah’s Accidents, Compensation and the Law* (8th ed.) (Cambridge: CUP, 2013), 417-419

¹¹⁶ D.P.J. Walsh, “Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog” (2011) 22 *King’s Law Journal* 27, 44-46; L. Hoyano, “Policing Flawed Police Investigations: Unravelling the Blanket” (1999) 62 *Modern Law Review* 912, 933-934.

¹¹⁷ J. Crawley, “The worst of all outcomes” *The Guardian*, 8 April 2009 (available at <http://www.theguardian.com/society/2009/apr/08/police-complaints-commission>); A. Sanders & R. Young, *Criminal Justice* (Oxford: OUP, 2007), 612-630.

¹¹⁸ R. Clayton & H. Tomlinson (eds.), *Civil Actions Against the Police* (3rd ed.) (London: Sweet & Maxwell, 2004), 74.

injury to the claimant. This is not a new framework of negligence liability, but rather a different use of the framework which applies to all public authorities. This framework contains adequate control devices to prevent liability from being established too easily. However, it is currently used in a way that attaches too much weight on invalid considerations discussed in section I, and too little weight on valid considerations mentioned in section II. The aim of the re-adjustment proposed here is to achieve a better balance between the valid competing considerations at work.

(a) Justiciability

The first question is whether the claim is justiciable, i.e., appropriate for judicial resolution. This is a preliminary hurdle, so that if the answer is negative, the court will not inquire into the existence of a duty of care. Justiciability serves a useful function by ensuring that the courts do not decide cases outside their institutional competence.

After an exhaustive review of the authorities in *Connor v Surrey County Council*,¹¹⁹ Laws LJ summarised the current approach as follows: (i) where a public authority makes “a pure choice of policy under a statute which provides for such a choice to be made,” the claim will be non-justiciable; (ii) where the decisions involves policy and operations, the court’s conclusion would be sensitive to the particular facts, though “the greater the element of policy involved... the more likely it is that the matter is not justiciable;” (iii) where the decision is purely operational, it will be justiciable. This acknowledges that unclear cases are bound to arise.¹²⁰ Even so, it is worth remembering that justiciability is merely the first of several analytical steps in determining whether a public authority is liable in negligence. Although an issue may be justiciable, there is no guarantee that the other requirements will be satisfied. Hence it is important not to have an excessively wide concept of justiciability.¹²¹

In the police context, the application of the test means that the deployment of resources and selection of strategy in an investigation that Lord Keith discussed in *Hill* are likely to be non-justiciable, whereas operational negligence by an officer would be justiciable. *Rigby* provides a good illustration. Firing the canister without a fire service in attendance was an operational negligence for which there could be liability, but the failure to obtain equipment delivering CS gas less dangerously was non-justiciable because the decision of what equipment to purchase was a policy one connected with the allocation of resources. Likewise, if on similar facts to *Michael*, the failure to respond to an emergency call was due to a police officer’s individual act of carelessness, e.g. the call taker’s missing of the call as a result of watching sport on TV, the issue is justiciable. However, if it was due to an insufficient number of patrol cars arising from the allocation of resources then the issue would be non-justiciable. The same would be true if the alleged negligence related to the way that the provision of patrol cars was strategically prioritised.

¹¹⁹ [2010] EWCA Civ 286 at [103] (*per* Laws LJ). The policy/operation distinction has been criticized in *Stovin v Wise* [1996] AC 923, 951 (*per* Lord Hoffmann), S.H. Bailey & M.J. Bowman, “The Policy/Operational Dichotomy – A Cuckoo in the Nest” (1986) 45 *Cambridge Law Journal* 430. However, it is important not to exaggerate the criticism. In many cases the distinction makes practical sense and is understood by public employees themselves.

¹²⁰ For the same, see *Kent v Griffiths* [2001] QB 36, 47 (*per* Lord Woolf MR).

¹²¹ *Clerk & Lindsell on Torts* (20th ed.) (London: Sweet & Maxwell, 2010), para. 14-07.

(b) Duty of Care

If the claim is justiciable, the court will consider whether a duty of care is owed. As Lord Bingham said in *Smith*, “the most favoured test of liability is the three-fold test laid down by the House [of Lords] in *Caparo Industries plc v Dickman* [1990] 2 AC 605, by which it must be shown that harm to B was a reasonably foreseeable consequence of what A did or failed to do, that the relationship of A and B was one of sufficient proximity, and that in all the circumstances it is fair, just and reasonable to impose a duty of care on A towards B.”¹²²

(i) Reasonable Foreseeability of Harm

A duty of care will only be imposed where a reasonable person in the position of the defendant would have realised that his carelessness may cause the claimant to suffer the type of harm that he has suffered. Whether the requirement is satisfied depends on the facts of each case. The scenario we have in mind assumes that the police appreciate that there is a foreseeable risk that if they fail to act reasonably the claimant will suffer physical harm at the hands of the third party. If that is not the case, there can clearly be no duty of care.

(ii) Proximity

“Proximity” denotes closeness of some sort between the parties at the time of the alleged negligence, but its precise meaning remains elusive.¹²³ The important point, as Deane J noted in the Australian case *Shire of Sutherland v Heyman*, is that “both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.”¹²⁴ The scenario under consideration is one of pure omission. The question is how “proximity” can be established with a view to imposing an affirmative duty on the police to protect the claimant from harm by a third party.

Under the existing law, there are four possible categories. The first is where the police create a source of danger¹²⁵ with which the third party interferes to cause harm.¹²⁶ The second category is where the police have sufficient control over the third party who causes the damage to the claimant,¹²⁷ e.g. if that party is a detainee.¹²⁸ Both categories are of limited application in the scenario discussed here, since the police do not often create the source of danger or have sufficient control over the third party.

¹²² [2008] UKHL 50 at [42]. See also, *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, at [40]-[43] (per Hallett LJ).

¹²³ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 410 (per Lord Oliver); *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194 at [28] (per Lord Dyson MR).

¹²⁴ (1985) 157 CLR 424, 498.

¹²⁵ Where the police do not create a source of danger but still prevent alternative means of rescue, the case may be regarded as involving conduct making the situation worse. On this and related problems, see C. Booth & D. Squires, *The Negligence Liability of Public Authorities* (Oxford: OUP, 2006), 161-163; R. Bagshaw, “The duties of care of emergency service providers” [1999] LMCLQ 71; D. Nolan, “The liability of public authorities for failing to confer benefits” (2011) 127 LQR 260, 272-275.

¹²⁶ *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 272-273 (per Lord Goff); *Mitchell v Glasgow City Council* [2009] 1 AC 874 at [23] (per Lord Hope). *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 can be understood in this way.

¹²⁷ *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 272 (per Lord Goff); *Mitchell v Glasgow City Council* [2009] 1 AC 874 at [23], [29] (per Lord Hope), at [82] (per Lord Brown).

¹²⁸ *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

The third category is where the claimant has a particular relationship with the police, which the courts have treated as entitling her to rely on protection by the police, e.g., if she is a detainee¹²⁹ or an employee.¹³⁰ Whether this is an independent category or part of the next one is unclear; either way, it is also of narrow application.

The last category is where the police have “assumed responsibility” for the claimant’s safety.¹³¹ Although the phrase is hard to pin down, it seems to require an undertaking by words or conduct to protect the claimant, coupled with reliance by the claimant on that. In *Michael v Chief Constable of South Wales*,¹³² a woman made an emergency call to the police to inform them that her ex-partner had threatened to return to her house and kill her.¹³³ Her call was not given immediate priority and the woman was killed by the time the police arrived at her house. The Court of Appeal ruled that there was no “assumption of responsibility.” According to Longmore LJ, the fact that the police operator told the victim that they “would call her and that she should keep her phone free... was a routine expression of expectation that [they] would call her not an assurance that they would and, still less, was it any assumption of responsibility for [her] safety or to ensure that [they] did indeed call her.”¹³⁴ Together with *Alexandrou v Oxford*,¹³⁵ the case suggests that when an individual makes an emergency call to the police to report a threat of violence, the receipt of the call or an indication by the police that they are going to deal with it is not enough to give rise to an “assumption of responsibility.” Instead something more specific is needed, such as a positive act or an assurance to protect her. This is in line with a narrow reading of *Osman v Ferguson*.¹³⁶ A majority of the Court of Appeal found that a pupil and his father, who were being harassed and eventually killed by a schoolteacher obsessed with the pupil, were in a relationship of proximity with the police.¹³⁷ The claimants had informed the police about various incidents of vandalism by the third party and the police assured them that they would act and not to worry about it, on which the claimants detrimentally relied. This is also consistent with Lord Brown’s understanding of “assumption of responsibility” in *Smith*, where he said that the police would assume responsibility for a threatened person’s safety “if, for example, they had assured him that he should leave the matter entirely to them and so could cease employing bodyguards or taking other protective measures himself.”¹³⁸

From the above analysis it follows that in many cases where a claimant makes an emergency call to the police to report a threat of violence, like in *Michael*, or reports such threats and related incidents to the police over a long period of time, like in *Smith*,¹³⁹ there will be no proximity. In our view, this should be overturned. In

¹²⁹ *Reeves v Commissioner of Police of the Metropolis Area* [2000] 1 AC 360.

¹³⁰ *Mullaney v Chief Constable of West Midlands* [2001] EWCA Civ 700.

¹³¹ *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 272 (*per* Lord Goff); *Mitchell v Glasgow City Council* [2009] 1 AC 874 at [23] (*per* Lord Hope); at [82] (*per* Lord Brown).

¹³² [2012] EWCA Civ 981.

¹³³ There was a dispute as to whether this was audible, but the court proceeded on the assumption that the claimant’s version of the facts was correct.

¹³⁴ *Ibid*, at [22].

¹³⁵ [1993] 4 All ER 328. The Court of Appeal held that the police did not owe a duty to answer an automated 999 call made to the local police station via a shop owner’s burglar alarm system, nor did they owe a duty to take reasonable care when investigating the incident for which the call was made.

¹³⁶ [1993] All ER 344.

¹³⁷ Ultimately the *Hill* policy factors prevented a duty of care from arising.

¹³⁸ [2008] UKHL 50 at [135].

¹³⁹ In *Smith*, the trial judge found that there was no proximity, though Lord Bingham in his dissent would have held otherwise ([2008] UKHL 50 at [60]).

particular, a finding of proximity should arise where the following factors are satisfied:

- (i) *The claimant is at a special risk of personal harm,*¹⁴⁰ i.e., a greater risk than the general public. The circumstances in which the risk will be special must be left to the courts to develop on a case-by-case basis. Guidance on this can be found in the New Zealand case *Couch v Attorney-General*,¹⁴¹ where the majority held that “the necessary risk must be... special in the sense that the plaintiff’s individual circumstances, or her membership of the necessary class rendered her particularly vulnerable to suffering harm of the relevant kind” from the third party.¹⁴² In any case, there is no doubt that a person facing a specific threat to her physical safety from a specific individual is at a special risk.
- (ii) *The police are aware or should have reasonably been aware* that the claimant is at a special risk of personal harm.¹⁴³
- (iii) *The police are given special powers by law to protect the class of persons to which the claimant belongs,* i.e., members of the public at a special risk of physical harm.
- (iv) *The claimant is dependent upon the police as regards protection against the risk* on the basis of the legal and civic duties imposed on her to inform the police about the incident and to refrain from taking measures beyond reasonable self-protection *and/or* her vulnerability in the sense that she cannot be reasonably expected to protect herself adequately against that risk.

According to this analysis, proximity is based on two broad elements: first, the distinguishability of a claimant from the general public, *and* second, her relationship of dependency with the police. Significantly, it does not require a specific undertaking by the police to protect the claimant or a conscious reliance by the claimant on that.

In terms of the analytical framework, the finding of proximity in these cases could be explained in one of two ways. First, by regarding this as a new category, under which the police have a relationship of proximity with a claimant who satisfies the specific criteria. Secondly, by extending the notion of “assumption of responsibility” so as to say that where those criteria have been satisfied the police have assumed responsibility to the claimant and hence have a relationship of proximity with her. This of course would necessitate an expansion of the narrow

¹⁴⁰ It may be asked why should this be restricted to cases of personal harm (cf. *Smith v Chief Constable of Sussex Police* [2008] UKHL 50 at [100] (*per* Lord Phillips)). Although the precise scope of this is to be developed in the future, as Lord Bingham noted at [55], “the law attaches particular importance to the protection of life and physical safety.”

¹⁴¹ [2008] NZSC 45.

¹⁴² *Ibid.*, at [112].

¹⁴³ Thus in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 62 the House of Lords was correct to rule that there was no proximity between the police and the victim. As Lord Keith said, the victim “was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them because the police had no knowledge and could reasonably have no knowledge that the victim was at a higher risk of being harmed by the Yorkshire Ripper than other members of the public.”

meaning that the concept appears to have in this context. Yet, in truth that narrow meaning seems to be at odds with the way that the concept is understood across the tort of negligence. In *Phelps*, Lord Slynn said that “the test is an objective one,” meaning that “it is not so much that responsibility is assumed as that it is recognised or imposed by law.”¹⁴⁴ This suggests that the defendant can assume responsibility irrespective of whether he intends to do so or whether the claimant consciously relies on it. Accordingly, such an adjustment would not be as radical as it may initially appear. Even so, in our view the creation of a new category is preferable to an extension of the scope of assumption of responsibility, since the latter has the potential to skew the conceptual meaning of assumption of responsibility.

(iii) *Fairness, Justice and Reasonableness*

At this stage the courts balance policy factors for and against liability with a view to determining in which direction the law should incrementally develop.¹⁴⁵ This is followed in cases involving negligence claims against the police for failure to prevent crime.¹⁴⁶ The starting point in such cases is that there is no duty of care on the basis of the *Hill* principle. This means that the balancing is weighed in favour of the *Hill* policy factors, so that they can be displaced only in exceptional cases by potent considerations of public policy to the contrary. As shown above, this is a false starting point.

A better approach would be to recognise that two considerations are of utmost importance and must always be considered, assuming of course that the justiciability and proximity hurdles have been surpassed. One is the notion that “wrongs should be remedied,” meaning that a claimant in a relationship of proximity with the police who has suffered foreseeable physical harm as a result of police carelessness should not remain uncompensated. The other is that no duty of care should be imposed on the police where that would be incompatible with the legal framework which sets out the powers and responsibilities of the police. In the rest of this section, we consider how the latter consideration affects the imposition of a duty of care on the police for failure to prevent crime.

It is imperative to note that in appropriate cases the courts should not stop there. Where *valid* policy factors against liability arise on the facts of a case, the courts must take these into account.

Compatibility with the legal framework setting out police powers

In our view, a duty of care should be imposed only where that is compatible with the legal framework which outlines the powers and responsibilities of the police. There are two reasons for this.

¹⁴⁴ [2001] 2 AC 619, 654; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 181 (*per* Lord Goff); *Customs & Excise Commissioners v Barclays Banks* [2007] 1 AC 181 at [5] (*per* Lord Bingham). This was endorsed in respect of police negligence liability in *An Informer v A Chief Constable* [2012] EWCA Civ 197 at [165]-[166], [168] and [172] (*per* Pill LJ), at [100] (*per* Arden LJ).

¹⁴⁵ J. Stapleton, “Duty of Care Factors: A Selection from the Judicial Menus” in P. Cane & J. Stapleton (eds.), *The Law of Obligations: Essays in Honour of John Fleming* (Oxford: Clarendon Press, 1998), 59-95.

¹⁴⁶ *Swinney v Chief Constable of Northumbria* [1997] QB 464, 484 (*per* Hirst LJ), 487 (*per* Ward LJ); *An Informer v A Chief Constable* [2012] EWCA Civ 197 at [103], [114] (*per* Arden LJ), at [180] (*per* Pill LJ).

The first is deference to the will of the legislature.¹⁴⁷ Thus where the framework is statutory and the statute explicitly provides that there should be no private law liability for the breach of a duty or the failure to exercise a power conferred by the statute on the public authority, it would be inappropriate to undercut this by imposing a duty of care in negligence. Most frequently, however, statutes are silent on whether they are actionable in private law. Following *Stovin* and *Gorringe*, the current position in such cases is that it is not possible to impose a common law duty of care on a public authority based solely on the existence of a statutory duty or power. In *Gorringe*, Lord Scott stated that “if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute was not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would... exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty.”¹⁴⁸ Nonetheless, Lord Scott’s analysis is not necessarily a correct interpretation of Parliament’s intention in these cases. As Howarth has argued, “it is perfectly possible for Parliament to intend to leave questions of liability to the common law, neither seeking to add a statutory liability to it, nor seeking to restrict it.”¹⁴⁹ Accordingly, Lord Steyn’s approach in *Gorringe* is preferable, i.e., “in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy?”¹⁵⁰ It may be that the answer to both questions is negative, thereby allowing for a duty of care to arise in common law on the basis of the nature and purpose of the statutory functions without undermining the Parliament’s intention.

The second reason for this consideration is to prevent the employees of a public authority from acting in a way that may undermine the primary purpose for which the statute or the common law has conferred powers on them. Accordingly, the courts must carefully examine the main purpose of the public authority’s duty and ask whether the imposition of a duty of care on the claimant would be inconsistent with that purpose in the sense of giving rise to a conflict of interest between the claimant and the class of persons intended to be protected.¹⁵¹

This should not be confused with the policy arguments supporting the *Hill* principle. That principle establishes that the primary duty of the police to prevent crime is owed to the public at large and that imposing liability on the police to prevent crime for the benefit of an individual member of the public would interfere negatively with the performance of the primary duty. In other words, there would be a conflict between the duty owed to a private individual and that owed to the public at large. That represents a “weaker version of conflict.”¹⁵² It fails to identify with precision what the relevant interests are in each case and how they conflict with one another,

¹⁴⁷ *Stovin v Wise* [1996] AC 923, 935 (per Lord Nicholls).

¹⁴⁸ [2004] 1 WLR 1057 at [71].

¹⁴⁹ *Draft Copy of D. Howarth, Textbook on Tort (2nd ed.) (2004)*, Ch. 5 (on file with authors)

¹⁵⁰ *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [3].

¹⁵¹ H. Wilberg, “Defensive practice or conflict of duties? Policy concerns in public authority negligence claims” (2010) 126 LQR 420. For discussion in the case law, see *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23.

¹⁵² *Ibid*, 425.

and relies on defensiveness in the sense discussed above. In contrast, the argument set out here is based on a “strong conflict of duties.” As Wilberg has explained, “the feared inhibition or distortion in this version is of a very specific nature. The governing statute in these cases privileges or prioritises protection of one of the competing interests affected by the authority’s functions as paramount.... That paramountcy means that the authority’s primary public duty has two crucial features. First, it requires action against the class of persons posing the relevant threat to the paramount interest... Secondly, in deciding whether and when such action is to be taken, the authority must not consider the interests of that class of persons to outweigh the interests of the protected class; the latter are paramount and must prevail in any conflict.”¹⁵³

How does this consideration apply to cases of careless failure to prevent crime by the police as a result of which a proximate victim has foreseeably suffered personal injury? This requires an in-depth examination of the legal framework establishing the powers and duties of the police. Although this is now partly found in statute, such as the Police Act 1996, s. 29 and Schedule 4 (modified by the Police Reform Act 2002, s. 83), its roots lie in the common law.¹⁵⁴ The powers and duties of the police have been discussed in several cases. In *Brooks*, Lord Steyn explained that the primary function of the police is to preserve the Queen’s peace, which means concentrating on the prevention of the commission of crime, the protection of life and property and the apprehension of criminals.¹⁵⁵ Likewise in *Glasbrook Bros Ltd v Glamorgan County Council*, the House of Lords held that the police have an absolute duty to take all steps which appear necessary to them or in general for keeping the peace, for preventing crime and for protecting from criminal injury.¹⁵⁶

Behind the similarity in these approaches lie important differences, especially in the way that the duty to protect life is understood. Lord Steyn in *Brooks* thought that the duty of the police is owed to the public at large and not to an individual victim since such a duty would be detrimental to the exercise of the public function. In contrast, the earlier case law seems to envision an entitlement by an individual victim to protection by the police. In a passage cited with approval by the House of Lords in *Glasbrook*,¹⁵⁷ Pickford LJ said in *Glamorgan Coal Co Ltd v Glamorganshire Standing Joint Committee*: “if one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether this contention in the dispute be right or wrong.”¹⁵⁸ Pickford LJ continued, “there is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty.”¹⁵⁹ The court in *Glasbrook* acknowledged that the police’s duty is subject to limits. Lord Blanesburgh observed

¹⁵³ *Ibid*, 424-425.

¹⁵⁴ *Kent v Griffiths* [2001] QB 36, 47 (*per* Lord Woolf MR); *Glasbrook Bros Ltd v Glamorgan County Council* [1924] 1 KB 879, 896 (*per* Atkin LJ). The powers and duties of constables were historically provided at common law. When constables were appointed under legislation in the nineteenth century, they were given the powers and duties of constables at common law. For details, see Lord Mackay (ed.), *Halsbury’s Laws of England* (5th ed.) (London: LexisNexis, 2013), Vol. 84, paras. 1-2 and 40.

¹⁵⁵ [2005] UKHL 34 at [30].

¹⁵⁶ [1925] AC 270, 277 (*per* Viscount Cave LC); 285, 287 (*per* Viscount Finlay); 292 (*per* Lord Carson). See also, *Rice v Connolly* [1966] 2 QB 414, 419 (*per* Lord Parker CJ); *Haynes v Harwood* [1935] 1 KB 146, 161-162 (*per* Maugham LJ).

¹⁵⁷ [1925] AC 270, 277-278 (*per* Viscount Cave LC); 288 (*per* Lord Shaw); 291 (*per* Lord Carson).

¹⁵⁸ [1916] 2 KB 206, 229.

¹⁵⁹ *Ibid*, 229.

that the police's "absolute duty to afford protection to life and property was only... limited by the extent of their available resources and by the urgency of competing claims upon their services."¹⁶⁰ The same point was recognised by Atkin LJ in the Court of Appeal, when he said that "one understands the suggestion that the police may be asked to give protection which they cannot give, because it would be beyond their resources without leaving the other members of the public insufficiently protected. The obvious course is to refuse such protection."¹⁶¹ The limitation, however, is not the same as that proposed by Lord Steyn in *Brooks*. It seems to require an inquiry into whether in the specific circumstances there were other more demanding cases to deal with or whether committing adequate resources would put the police in a position where they would be unable to deal with other cases that may potentially arise. It suggests that the police should not protect an individual if attempting to do so will leave the public unprotected, but it does not support the view that in general the police have no duty to protect an individual because doing so would undermine the protection they offer to the public at large. Overall, the duties of the police as traditionally understood by the courts¹⁶² go beyond what Lord Steyn envisaged in *Brooks*. Modern legislation has followed nineteenth century legislation in fortifying the common law position, thus little turns on that.

Against this background, it is submitted that the imposition of a duty of care in the narrow circumstances identified here would be compatible with the legal framework establishing the powers and duties of the police. First, following Lord Steyn's approach in *Gorringe*, the relevant statutes do not *exclude* a private law remedy. Secondly, finding a duty of care in such cases would not require the police to act in a manner that undermines their primary purpose derived from the legal framework within which they operate. It would not lead to any conflict of interest between the claimant and those that the common law and legislation intend to benefit from police protection. As Wilberg states, "if the primary duty of the police requires them to apprehend suspects and to protect life and property then a duty of care owed to a victim will not run directly counter to that primary duty nor discourage the discharge of that duty. To the contrary, that primary duty will be reinforced by a duty to take care to protect potential victims."¹⁶³ Finally, the imposition of a duty of care is in line with the traditional understanding of the legal framework establishing the functions of the police, which envisions a duty on behalf of the police to protect identifiable victims from personal injury as long as they have the resources to do so and that does not impinge on the safety of other members of the public.

(c) Breach of Duty

As in all negligence claims, after establishing a duty of care, the claimant needs to show that the police have breached the duty and that the breach has caused her damage that is not remote. For the most part, the normal rules apply as in cases between private individuals. However, the application of the rules on breach requires further comment.

The police would breach their duty if their conduct falls below the standard of care expected of someone in their position in light of all the circumstances of the case.

¹⁶⁰ [1925] AC 270, 306.

¹⁶¹ *Glamorgan County Council v Glasbrook Bros Ltd* [1924] 1 KB 879, 899.

¹⁶² The judges in *Glasbrook*, of course, were not concerned with the imposition of a duty of care on the police, but still they were delineating the duties of the police in light of the existing legal framework.

¹⁶³ H. Wilberg, "Defensive practice or conflict of duties?", above n. 151, 432.

In general, the defendants would fall below the required standard if they do not do something that the reasonable police officer would have done in those circumstances, or they do something that he would not have done.¹⁶⁴ Where police officers exercise “professional” judgment, as they do when tackling crime, the relevant test would be the *Bolam* test.¹⁶⁵ This has two elements. First, the applicable standard would be that “of the ordinary skilled man exercising and professing to have that special skill,”¹⁶⁶ i.e., an appropriately trained and skilled police officer. Secondly, a police officer would not be “guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body” of professional men “skilled in that particular art.”¹⁶⁷ This allows a police officer to escape liability by showing that there is a responsible body of opinion¹⁶⁸ in the police, even if that is the minority, which support the decision he made.

As Lord Clyde acknowledged in *Phelps*, the *Bolam* test makes it “difficult to substantiate a case of fault against the background of a variety of professional practices.”¹⁶⁹ In effect, the test offers a measure of protection against negligence to police officers investigating and suppressing crime, since a breach of duty would only be established where they have done something that no other respectable body of police officers would have done. This can be seen as relevant in respect of deciding whether to impose a duty of care in the first place:¹⁷⁰ the difficulty of establishing that the police have breached their duty when tackling crime ensures that they are not held liable in negligence too readily even if they owe a duty of care to the claimant.

Two further points are worth noting. First, when there is an emergency, as is often the case with the police, the standard of care is that of a reasonable police officer taking decisions in the heat of the moment, i.e. instantaneously and under pressure. This is naturally lower than where the decision is taken with time for calm reflection. Secondly, the resources available to the police are taken into account in the standard of care expected of them when performing services that they are obliged to provide, such as fighting crime.¹⁷¹ This is because the rationale for the general rule of ignoring the defendant’s resources when assessing his standard of care, i.e., that a person who does not have the necessary resources to carry out an activity safely should not elect to carry it out, does not apply in these cases. Both points illustrate that even where there is a duty of care on the police, there may still not be negligence because of the difficulty in establishing breach.

(d) Causation and Remoteness of Damage

The normal rules concerning causation and remoteness of damage apply. Thus the claimant will need to prove on the balance of probability that had the police

¹⁶⁴ Cf. *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784 (*per* Baron Alderson).

¹⁶⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

¹⁶⁶ *Ibid*, 586.

¹⁶⁷ *Ibid*, 586.

¹⁶⁸ See further *Bolitho v City and Hackney Health Authority* [1998] AC 232.

¹⁶⁹ [2001] 2 AC 619, 672.

¹⁷⁰ *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 572, 591; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 655, 672. The argument found no favour with the majority when used by Lord Bingham in *D v East Berkshire Community NHS Trust* [2005] 2 AC 373. See further, D. Nolan, “Varying the Standard of Care in Negligence” (2013) 72 CLJ 651.

¹⁷¹ *Smith v Ministry of Defence* [2013] UKSC 41 at [171] (*per* Lord Carnwath); [2012] EWCA Civ 1365 at [51] (*per* Moses LJ in the Court of Appeal); *Walker v Northumberland County Council* [1995] 1 All ER 737, 751 (*per* Coleman J).

conformed to their duty of care, this would have prevented their injury. As ever, proving what would have happened rather than what did happen is not straightforward. Thus the factual causation element of the claim may often be a difficult hurdle. Moreover, none of the exceptions to proof of causation on the balance of probability are likely to apply in cases involving the police. Although cases involving the prevention of crime will usually involve asking the question – what would a third party have done had the police conformed to their duty? – a loss of chance analysis will not be applicable.¹⁷² This is because only lost chances of avoiding *economic* losses can serve as actionable injury and because the police do not undertake to protect the claimant’s *chances*.¹⁷³ Nor will it suffice to show that the police’s negligence increased materially increased the risk of the injury suffered.¹⁷⁴ Finally, since the nature of the defendant’s duty of care is to protect the claimant from the criminal acts of a third party, it cannot generally be argued that those acts ‘break the chain of causation’ between the police’s negligence and the injury suffered, so long as that injury was reasonably foreseeable.¹⁷⁵

IV. CONCLUSION

The article advances two propositions. The first is that the current law on the negligence liability of the police for failure to prevent a crime is unsatisfactory. The general rule of non-liability is based on two lines of argument, neither of which is persuasive. The *Hill* policy grounds used by the courts do not stand up to close scrutiny, whilst the application of the pure omission rule to the police is also problematic. At the same time, the current law does not attach adequate significance to arguments in favour of liability.

The second proposition is that the existing framework of negligence liability of public authorities can be re-adjusted to generate outcomes that better balance the valid considerations for and against liability in cases of police failure to prevent crime. The re-adjustment we propose suggests that the police should be liable where they fail to prevent a crime with the result that the claimant suffered personal harm by an act of a third party if the following conditions are satisfied:

- (1) The failure relates to an issue which is *justiciable*
- (2) The police have a *duty of care* in respect of the failure. That will be so where:

¹⁷² A loss of chance analysis has been applied in economic loss cases involving hypothetical questions about how third parties would have behaved had the defendant not been negligent. See *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602.

¹⁷³ See generally, S. Steel, “Rationalising Loss of a Chance in Tort” in S.A. Pitel, J. Neyers, E.A. Chamberlain (eds.), *Challenging orthodoxy in tort law* (Oxford: Hart Publishing, 2013), 235.

¹⁷⁴ The exception to proof of causation on the balance of probability established in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 only applies in situations where the claimant’s injury may have been caused non-tortiously, where there is uncertainty due to lack of scientific knowledge over what would have occurred. See *Sanderson v Hull* [2008] EWCA Civ 1211. That is unlikely to be the case in situations involving the police’s failure to prevent crime.

¹⁷⁵ See, analogously, *Reeves v Commissioners of Police for the Metropolis* [2000] 1 AC 360, 367-368 (*per* Lord Hoffmann): “[where] the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being. It would make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have been prevented negated causal connection between the breach of duty and the loss.”

- (a) It is *reasonably foreseeable* that the police failure to prevent the crime will result in *personal harm to the claimant*

- (b) The claimant has a relationship of *proximity* with the police. In most cases, this will be established because
 - (i) the police have specifically *assumed responsibility* to her or
 - (ii) she is at a *special risk of harm*, the police *know or should have known* about it, they have *the power to protect her* from the risk and she is *in a position of dependence* on them

- (c) The imposition of the duty of care is consistent with the performance by the police of their legal functions and there are no other valid policy considerations which on balance negate such imposition.

- (3) The police *breached their duty* in the sense that their action or inaction fell below the standard of care expected of a professional police officer

- (4) The breach of their duty *caused in a factual and legal sense* the claimant's personal harm