[COURT OF APPEAL] A

SWINNEY AND ANOTHER v. CHIEF CONSTABLE OF NORTHUMBRIA POLICE FORCE

[1994 S. No. 206]

B

1996 March 21, 22 Hirst, Peter Gibson and Ward L.JJ.

Negligence—Duty of care to whom?—Police—Information identifying criminal given to police officer in confidence—Informant's identity recorded in document—Theft of document from unattended police car—Informant suffering threats and losing business—Whether police owing informant duty of care —Whether immune from suit—Whether action to be struck out C

The first plaintiff supplied information to a police officer as to the identity of the driver of a vehicle which had hit and killed another officer. The information, recorded in a document which included the first plaintiff's name, address and telephone number, was stolen from a police vehicle and came into the hands of the alleged driver. In consequence she and her husband, the second D plaintiff, were threatened with violence and arson. They brought an action against the chief constable alleging that a duty of care was owed in the storage and safe keeping of the information since the police knew of the violent character of the person involved, that the information had been given in confidence, and that as a result of the negligence of his officers they had both suffered psychological damage and been forced to give up the tenancy of E the public house which they had built up and run. The district judge granted the chief constable's application to strike out the plaintiffs' claim on the ground that it disclosed no reasonable cause of action. Laws J. allowed the plaintiffs' appeal and rescinded the district judge's order. The chief constable appealed. At the hearing of the appeal the Court of Appeal granted the plaintiffs leave to amend their statement of claim to add breach of confidence as a further cause of action arising from the pleaded F facts.

On the appeal:—

Held, dismissing the appeal, that it was arguable that a special relationship arose between the plaintiffs and the police through the assumption by the police of responsibility to preserve the confidentiality of information supplied by the first plaintiff, disclosure of which was likely to expose the plaintiffs to a risk G greater than the ordinary risk to the general public; that the immunity generally conferred on police officers from actions in negligence in relation to the investigation or suppression of crime had to be weighed against the need to protect the confidentiality of informants and to encourage them to come forward without fear of disclosure of their identity; that it was necessary to make a balanced assessment of all the public policy considerations in order to determine the question of immunity, and that the H appropriate time to make such an assessment was at the trial, when all the facts were known to the court; and that, accordingly, since on the facts as pleaded it was arguable that the police were not immune from suit the plaintiffs' claim would not be struck

A out as disclosing no reasonable cause of action (post, pp. 478H–479B, 484A–D, F, 485C–D, E–F, H–486A, C–E, F–H, 487C).

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, H.L.(E.); *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, H.L.(E.); *Alexandrou v. Oxford* [1993] 4 All E.R. 328, C.A. and *Elguzouli-Daf v. Commissioner of Police of the Metropolis* [1995] Q.B. 335, C.A. considered.

Decision of Laws J. affirmed.

B

The following cases are referred to in the judgments:

Alexandrou v. Oxford [1993] 4 All E.R. 328, C.A.

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

C

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Elguzouli-Daf v. Commissioner of Police of the Metropolis [1995] Q.B. 335; [1995] 2 W.L.R. 173; [1995] 1 All E.R. 833, C.A.

Hill v. Chief Constable of West Yorkshire [1989] A.C. 53; [1988] 2 W.L.R. 1049; [1988] 2 All E.R. 238, H.L.(E.)

Osman v. Ferguson [1993] 4 All E.R. 344, C.A.

D

Seager v. Copydex Ltd. [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415, C.A.

Seager v. Copydex Ltd. (No. 2) [1969] 1 W.L.R. 809; [1969] 2 All E.R. 718, C.A.

Weld-Blundell v. Stephens [1920] A.C. 956, H.L.(E.)

Welsh v. Chief Constable of the Merseyside Police [1993] 1 All E.R. 692

Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

E

The following additional cases were cited in argument:

Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145; [1994] 3 W.L.R. 761; [1994] 3 All E.R. 506, H.L.(E.)

Kirkham v. Chief Constable of the Greater Manchester Police [1990] 2 Q.B. 283; [1990] 2 W.L.R. 987; [1990] 3 All E.R. 246, C.A.

F

Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd. [1996] A.C. 211; [1995] 3 W.L.R. 227; [1995] 3 All E.R. 307, H.L.(E.)

Marcel v. Commissioner of Police of the Metropolis [1992] Ch. 225; [1992] 2 W.L.R. 50; [1992] 1 All E.R. 72, C.A.

Rigby v. Chief Constable of Northamptonshire [1985] 1 W.L.R. 1242; [1985] 2 All E.R. 985

Stansbie v. Troman [1948] 2 K.B. 48; [1948] 1 All E.R. 599, C.A.

White v. Jones [1995] 2 A.C. 207; [1995] 2 W.L.R. 187; [1995] 1 All E.R. 691, H.L.(E.)

G

The following additional cases, although not cited, were referred to in the skeleton arguments:

Abernethy v. Hutchinson (1825) 3 L.J.Ch. 209

Addis v. Gramophone Co. Ltd. [1909] A.C. 488, H.L.(E.)

H

Albert (Prince) v. Strange (1849) 1 M. & G. 25

Ancell v. McDermott [1993] 4 All E.R. 355, C.A.

Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd. [1990] 3 N.Z.L.R. 299

Bliss v. South East Thames Regional Health Authority [1987] I.C.R. 700, C.A.

Caparo Industries Plc. v. Dickman [1989] Q.B. 653; [1989] 2 W.L.R. 316; [1989] 1 All E.R. 798, C.A.; [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)

Clough v. Bussan (West Yorkshire Police Authority, Third Party) [1990] 1 All E.R. 431

Cook v. Swinfen [1967] 1 W.L.R. 457; [1967] 1 All E.R. 299, C.A.

Doe (Jane) v. Metropolitan Toronto (Municipality) Commissioners of Police (1990) 72 D.L.R. (4th) 580

Gartside v. Outram (1857) 26 L.J.Ch. 113

Hayes v. James & Charles Dodd [1990] 2 All E.R. 815, C.A.

Heywood v. Wellers [1976] Q.B. 446; [1976] 2 W.L.R. 101; [1976] 1 All E.R. 300, C.A.

Knightley v. Johns [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851, C.A.

L.A.C. Minerals Ltd. v. International Corona Resources Ltd. [1990] F.S.R. 441

Malone v. Metropolitan Police Commissioner [1979] Ch. 344; [1979] 2 W.L.R. 700; [1979] 2 All E.R. 620

Murphy v. Brentwood District Council [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908, H.L.(E.)

Nichrotherm Electrical Co. Ltd. v. Percy [1957] R.P.C. 207, C.A.

Nocton v. Lord Ashburton [1914] A.C. 932, H.L.(E.)

Page v. Smith [1996] A.C. 155; [1995] 2 W.L.R. 644; [1995] 2 All E.R. 736, H.L.(E.)

Petrovitch v. Callinghams Ltd. [1969] 2 Lloyd's Rep. 386

Royal Brunei Airlines Sdn. Bhd. v. Tan [1995] 2 A.C. 378; [1995] 3 W.L.R. 64; [1995] 3 All E.R. 97, P.C.

Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948) 65 R.P.C. 203, C.A.

Smith v. Littlewoods Organisation Ltd. [1987] A.C. 241; [1987] 2 W.L.R. 480; [1987] 1 All E.R. 710, H.L.(Sc.)

Smith Kline & French Laboratories (Australia) Ltd. v. Secretary to the Department of Community Services and Health [1990] F.S.R. 617

Stubbings v. Webb [1993] A.C. 498; [1993] 2 W.L.R. 120; [1993] 1 All E.R. 322, H.L.(E.)

Target Holdings Ltd. v. Redferns [1996] A.C. 421; [1995] 3 W.L.R. 352; [1995] 3 All E.R. 785, H.L.(E.)

Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461, C.A.

United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904; [1977] 2 W.L.R. 806; [1977] 2 All E.R. 62, H.L.(E.)

Weld-Blundell v. Stephens [1919] 1 K.B. 520, C.A.

Williams v. Settle [1960] 1 W.L.R. 1072; [1960] 2 All E.R. 806, C.A.

INTERLOCUTORY APPEAL from Laws J.

By a writ issued on 3 February 1994 in the Newcastle upon Tyne District Registry of the High Court the plaintiffs, Mary Kathleen Swinney and James John Swinney, claimed damages for personal injuries and loss suffered as a result of the negligence of police officers of the defendant, the Chief Constable of Northumbria Police Force. In their statement of claim of 4 February 1994 the plaintiffs, who were wife and husband, alleged, inter alia, that (1) following fatal injuries received by a police officer on 22 March 1991 in Hexham, the first plaintiff had received information which could have helped to identify the criminal responsible and she had given all such information to Detective Constable Dew who had recorded it, including the first plaintiff's name, on a document; (2) at

A all material times the defendant or his officers knew of the violent and ruthless character of the persons about whom such information had been given and they should have realised the sensitive nature of the confidential information given; (3) the defendant therefore owed a duty of care to the plaintiffs to ensure that the recorded information was securely stored in a place where criminals likely to be associates of or acquainted with the person whose identity had been revealed would not have any opportunity B to see or obtain it, alternatively in a place where there would not be any foreseeable risk of them so doing; (4) the information either should have been solely stored in a secure position in a manned police station or in a police officer's notebook which would at all times remain safe in his custody; (5) in breach of that duty and negligently the defendant's officers had left the document containing all the information in a police vehicle C on 8 April 1991 which had been broken into by criminals who had obtained the information; (6) the document had thereafter been shown by those criminals to the person whose name the first plaintiff had supplied, and as a result the plaintiffs had been threatened with violence, arson and had both suffered psychiatric damage; (7) such matters had been caused by the defendant's officers' negligence (i) in leaving a record of sensitive confidential criminal information about a murder in an unattended police D car in an area where vehicle crime was common, (ii) in failing to ensure that the information was stored in a secure position in a manned police station, (iii) in failing to ensure that the record of the sensitive information was at all times kept in the possession and under the control of a police officer, and (iv) in failing to follow their own advice about valuable items not being left in unattended vehicles; and (8) the plaintiffs had thereby E suffered injury, loss and damage in that the first plaintiff had suffered an extreme anxiety state which had prevented her continuing the business established with the second plaintiff and the second plaintiff had developed an anxiety state which in time had led to a formal depressive illness.

On 19 July 1994 District Judge Lancaster granted the defendant's application under R.S.C., Ord. 18, r. 19(1)(*a*) to strike out the claim as disclosing no reasonable cause of action. On 24 January 1995 Laws J. F allowed the plaintiffs' appeal and granted the defendant leave to appeal.

By notice of appeal dated 28 February 1995 the defendant appealed on the grounds that the judge had been wrong in law to hold that (1) the facts as pleaded by the plaintiffs in their statement of claim disclosed an arguable case in law that the defendant owed to the plaintiffs a duty of care; (2) such an issue could only be resolved by the trial judge after G hearing all the facts and the defendant's application to strike out was premature; (3) to hold against the defendant's contention that the plaintiffs' action was bound to fail on grounds of public policy and was to be barred from proceeding on such grounds; and (4) the issues of public policy raised should be resolved by the trial judge and not at an interlocutory stage of proceedings and/or were dependent on the particular facts of the case.

H On 22 March 1996, during the hearing of the appeal, the plaintiffs applied for leave to amend the statement of claim to add an extra cause of action alleging breach of the duty of confidentiality of the defendant's officers, and alleging (a) that the first plaintiff gave the information to

D.C. Dew in confidence and confident that since he was aware of the sensitivity of the information he and any other police officers to whom it was divulged would take all reasonable steps to ensure the confidentiality would be preserved, (b) that the duty of confidentiality was implied because of the sensitivity of the information passed on, the foreseeable consequence of it being obtained by a local criminal and the trust the first plaintiff had in D.C. Dew, and (c) further or alternatively the duty was expressed in that the evidence as recorded showed that the first plaintiff requested confidence, that she should only be contacted "in confidence," and those terms were accepted by the police officers.

The facts are stated in the judgment of Hirst L.J.

Jeremy Gompertz Q.C. and *Toby Wynn* for the defendant chief constable. As a matter of public policy the police are immune from liability for negligence in the investigation of crime, at least when the harm to the plaintiff was caused by a third party: see *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 63–64 and *Osman v. Ferguson* [1993] 4 All E.R. 344, 350–351, 353–354. [Reference was also made to *Rigby v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242; *Kirkham v. Chief Constable of the Greater Manchester Police* [1990] 2 Q.B. 283; *Welsh v. Chief Constable of the Merseyside Police* [1993] 1 All E.R. 692 and *Elguzouli-Daf v. Commissioner of Police of the Metropolis* [1995] Q.B. 335, 347, 348–350.] There is an overwhelming public interest in ensuring that, provided the police act in good faith, they should be able to operate without constantly having to consider whether their actions may give rise to civil liability. Only a deliberate disclosure of the informant's identity would have rendered the police liable.

The chief constable owed no duty of care to the plaintiffs. There must be a sufficient relationship of proximity between the parties if the duty is to arise, and it must be fair, just and reasonable to impose the duty upon one party for the benefit of the other. An incremental approach to novel situations by analogy with established categories is appropriate: see *Alexandrou v. Oxford* [1993] 4 All E.R. 328, 334, 338, 340, 341, 344 and the *Elguzouli-Daf* case [1995] Q.B. 335, 349–350, 352. The plaintiffs are in no different position from the many thousands of citizens who supply information to the police.

John Powell Q.C. and *Richard G. Craven* for the plaintiffs. The police owed the plaintiffs a duty of care because the information was given to the police in confidence and disclosure of the plaintiffs' identity constituted a breach of confidence. The duty of care is established on either the tripartite test of foreseeability, proximity and reasonableness, or on the test of assumption of responsibility and reliance: see *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145 and *White v. Jones* [1995] 2 A.C. 207. [Reference was also made to *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 191, 193.] In general a person is not responsible for injury to another caused by a third party: see *Weld-Blundell v. Stephens* [1920] A.C. 956. However, a duty to prevent deliberate wrongdoing by a third party may arise from a special relationship: *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1030 et seq., 1070. [Reference was also made to *Stansbie v. Troman* [1948] 2 K.B. 48, 51–52.]

A Immunity from liability for negligence should only be granted in exceptional cases. [Reference was made to *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 and *Alexandrou v. Oxford* [1993] 4 All E.R. 328.] The police can be under a duty of confidence in respect of information imparted to them: see *Marcel v. Commissioner of Police of the Metropolis* [1992] Ch. 225, 235, 237, 257, 261, 262. [Reference was also made to *Osman v. Ferguson* [1993] 4 All E.R. 344.] The considerations invoked in B favour of immunity in the *Hill* case [1989] A.C. 53, 63, are inapplicable in the present case. Retention of a confidence does not involve any diversion of resources, matters of policy and discretion or reopening investigations. There are strong public policy considerations favouring the imposition of a duty: the preservation of confidences imparted by police informants, protection of such informants, encouragement of the public to inform C about crime, compensation in those rare cases where inadvertent disclosure is to the informant's detriment, free speech in a sometimes violent neighbourhood, and the security and well-being of inhabitants of such areas. [Reference was made to *Kirkham v. Chief Constable of the Greater Manchester Police* [1990] 2 Q.B. 283; *Welsh v. Chief Constable of the Merseyside Police* [1993] 1 All E.R. 692 and *Elguzouli-Daf v. Commissioner* D *of Police of the Metropolis* [1995] Q.B. 335.]

The plea based on the proposed amendment arises out of the same or substantially the same facts as the original cause of action. The court, in the exercise of its discretion, may allow the amendment even though the limitation period has expired. The amendment raises an issue of law only and requires no further evidence than that which will in any event be adduced in the action. [Reference was made to R.S.C., Ord. 20, r. 5 and E *The Supreme Court Practice* 1995, vol. 1, pp. 377–378, note 20/5–8/16.] There is clearly a cause of action for which the court may award damages: see *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 280–281, 287; *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931; *Seager v. Copydex Ltd. (No. 2)* [1969] 1 W.L.R. 809, 813, 815 and the Report on Breach of Confidence (Law Com. No. 110) (Cmnd. 8388), F paragraph 3.1.

Gompertz Q.C. in reply. No distinction has been shown to exist between the present case and *Osman v. Ferguson* [1993] 4 All E.R. 344 and *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, nor is there any basis for the court to focus on the particular facts of the case which can be decided by the application of established legal principles: see *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd.* [1996] A.C. 211, 236. G

Whether framed in contract or in tort the proposed amendment is barred by section 11 of the Limitation Act 1980. Further, the proposed amendment is no more than another way of pleading negligence. Breach of the duty of confidence if proved is an equitable remedy. In no case, save *Weld-Blundell v. Stephens* [1920] A.C. 956 where the damages were nominal, has a defendant been held liable in damages where confidential H information has been negligently or inadvertently passed to another. [Reference was also made to *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923 and the Law Commission Report on Breach of Confidence, paragraphs 3.8 and 4.14.]

HIRST L.J. We have this morning had an application by Mr. Powell, on behalf of the plaintiffs, Mary Kathleen Swinney and James John Swinney, for leave to amend the statement of claim by adding an extra cause of action for breach of confidence. The facts of the case will be fully rehearsed in the main judgments which we are about to deliver, so the two judgments should be read together.

The proposed amendment adds three paragraphs, 5(a) to 5(c), alleging that the information which the first plaintiff gave to the police officer was given in confidence, and that, as a result, a duty of confidentiality was either implied, for which purpose the plaintiffs say they rely on the sensitivity of the information passed on, and the foreseeable consequences of it being obtained by a local criminal; alternatively, it is alleged that the duty of confidentiality was express. Under that heading the computer printout containing the information is relied upon. As a result, in paragraph 12 of the proposed amended statement of claim, it is said that what occurred was caused by the negligence, and then there is added "and/or breach of the duty of confidentiality of the defendant's officers." In his submission in favour of being granted leave to amend, Mr. Powell recognised that the amendment was sought at a time after the Limitation Act 1980 has applied, but he relied on and sought to invoke the well known powers of the court under R.S.C., Ord. 20, r. 5(2) and (5):

> "(2) Where an application to the court for leave to make the amendment . . . is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. . . . (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

He therefore invited the court to exercise its discretion under those two rules.

Mr. Gompertz, in his very helpful argument, recognised that the court has a discretion under those rules, and he recognised, as is most clearly the case, that in particular rule 5(5) applies because the amendment arises not only out of substantially the same facts, but out of identical facts. It merely states a new framework, namely the cause of action of breach of confidence, in which to place those same facts. It is therefore common ground that this court has a discretion at the present juncture to grant that amendment.

Put in summary form Mr. Powell submitted that the authorities, and in particular the "Spycatcher" case, *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, establish the existence of this cause of action. He referred particularly to the speech of Lord Goff of Chieveley in which he stated, at p. 281:

> "I start with the broad general principle . . . that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has

A notice, or is held to have agreed, that the information is confidential . . . reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection."

He then said, at p. 281: "it is well settled that a duty of confidence may arise in equity independently of such cases . . ." He further said, at p. 286, B that the remedy of damages exists on the footing that it is now available "despite the equitable nature of the wrong, through a beneficent interpretation of [Lord Cairns's Act] . . ." He also stated, at p. 287: "It is not to be forgotten that wrongful acts can be inadvertent, as well as deliberate . . ." So it is clear on that authority that the conduct, in order to be a breach, need not necessarily be intentional.

C In the present case, it is the heart of Mr. Powell's submission that the alleged disclosure was negligent, and if that is so and he makes that good, then clearly in principle he may come within Lord Goff of Chieveley's framework for the establishment of this cause of action.

Mr. Powell also relied on *Seager v. Copydex Ltd.*, which appears in two stages, first [1967] 1 W.L.R. 923, and secondly as *Seager v. Copydex Ltd. (No. 2)* [1969] 1 W.L.R. 809. In the latter case it is clearly stated that D this remedy is akin to a remedy in tort: see *per* Lord Denning M.R., at p. 813A, and *per* Winn L.J., at p. 815. It was also a case where the breach was wholly inadvertent because, as is stated in the headnote in *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 924:

"although the defendants honestly believed that the alternative grip was the result of their own ideas, they had unconsciously made use E of confidential information given to them by the plaintiff as a spring-board for activities detrimental to him, thereby infringing a duty of confidence."

Then the court went on to hold:

"Accordingly the plaintiff was entitled to damages to be assessed on the basis of reasonable compensation for the use of the confidential F information which had been given."

Basing himself on those statements of principle, Mr. Powell submitted that it was proper for him to ask the court to exercise its discretion in favour of the amendment.

Mr. Gompertz resisted the application. He submitted that this was really no more than a repetition of an existing allegation, and he asked what G was the purpose since, under this new proposed cause of action, negligence is also relied upon. He said it was no more than reframing the plaintiffs' original case in negligence in another form, though he did accept that, had this been included in the statement of claim from the outset, there would have been no basis on which he could have struck it out. He then submitted that the application was made very late, and on the legal aspects of the matter he submitted that in the circumstances of this case, namely H inadvertent disclosure without the existence of a contract, there was a doubt as to whether the cause of action existed in such circumstances. He relied on an interesting analysis by the Law Commission in their Report on Breach of Confidence (Law Com. No. 110) (Cmnd. 8388), presented

to Parliament in October 1981. The discussion of this problem is to be found at paragraphs 3.8 and 4.14, considering both *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, and the well known decision of the House of Lords in *Weld-Blundell v. Stephens* [1920] A.C. 956. Mr. Gompertz then said: why should this particular defendant be the test bed on which this interesting point of law should be possibly decided?

In my judgment, Mr. Powell has made good the point that he has an arguable case in breach of confidence, if he makes good the factual allegations in his statement of claim, though I do not hold that he will necessarily succeed, because it is quite clear that there are a number of pitfalls in front of him, as is illustrated by the analysis of the law contained in the Law Commission report. But I think the case is at least arguable for the reasons he gives. Indeed, the Law Commission themselves recognise that it is arguable.

I fully recognise that the application to amend is quite late, in the sense that a good deal of time has gone by since the events took place, but it is not late in terms of the history of the action, since the case has not yet reached the stage of discovery or of the summons for directions. There will therefore be plenty of time for the confidence aspect to be fully investigated before the case comes to trial.

Mr. Gompertz's arguments were well addressed and very fairly presented, but taking the matter as a whole, I have come to the conclusion that the right course is to grant the amendments sought, and I would so order.

PETER GIBSON L.J. I agree. The amendments suggested in paragraphs 5(a) to 5(c) simply spell out in more detail what is already averred, i.e. that the information which was passed by the first plaintiff to the police was confidential information.

So far as the new cause of action is concerned, that there has been a breach of the duty of confidentiality leading to loss and a claim for damages, the decision of the House of Lords in *Weld-Blundell v. Stephens* [1920] A.C. 956 shows that, where parties are in a contractual relationship and confidential information is disclosed or used through the negligence of the party to whom that information has been imparted, an action for damages will lie. In that case only nominal damages was awarded, but the principle that damages might be obtainable in such a case was thereby established.

In the Law Commission's Report on Breach of Confidence (Law Com. No. 110) (Cmnd. 8388) the Law Commission said, in paragraph 4.14:

> "There does not appear to be any clear answer in the present state of the law to the question . . . whether a person who is under a duty of confidence, but is not in any contractual relationship with the person to whom it is owed, can be liable for breach of confidence if the information to which the duty relates is disclosed or used owing to his negligence."

In the present case there was no contractual relationship between the first plaintiff and the police, but it might be said that the circumstances are akin to a contractual relationship. Without answering the question, to

A which the Law Commission refer in the passage which I have cited, it seems to me at least arguable that an action for damages does lie.

For the purposes of the application before us, in my judgment, it is sufficient to say that it is a matter which ought to go to trial and the question decided in the light of the facts as and when they are fully ascertained. For these reasons, as well as those given by Hirst L.J., I agree with the order he proposes.

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WARD L.J. I agree, and I only add my voice of caution that the ramifications of the grant of this leave, both for this case and for others that may follow it, are not for us to resolve today.

HIRST L.J. This is an appeal by the defendant, the Chief Constable C of the Northumbria Police Force, from the order of Laws J. dated 24 January 1995, whereby he ordered that the appeal of the plaintiffs against the order of District Judge Lancaster striking out the plaintiffs' claim be allowed.

The application to strike out was made under R.S.C., Ord. 18, r. 19 on the footing that the case disclosed no reasonable cause of action. By virtue of Ord. 18, r. 19(2) no evidence is admissible on the application D and the only material for consideration by the court is the facts as pleaded in the statement of claim, on the assumption (which, of course, may or may not be borne out in the end) that they are true. Furthermore it is, of course, an elementary principle that it is only appropriate to strike out if the defendant establishes beyond peradventure that the plaintiffs would be bound to fail at the trial should the case proceed. So long as the case is E arguable, it must be allowed to go ahead.

The grounds of attack on the present pleading are twofold. First, that the pleaded facts are incapable of founding a duty of care owed by the police to the plaintiffs, so that no cause of action in negligence is disclosed; secondly, in the alternative, that even if it is arguable that the facts would establish a cause of action in negligence so as to give rise to a duty of care, the chief constable would have an unanswerable defence to the claim F based on public policy. It is not in dispute, for the purposes only of the present application, that on the pleaded facts, if made out, there is a viable case that harm to the plaintiffs was reasonably foreseeable.

The statement of claim alleges that the plaintiffs, who are husband and wife, were at all material times tenants of a public house at Prudhoe, Northumberland. On 22 March 1991 a police officer was fatally injured G when he was run over by a car which he was trying to stop in Hexham. The driver got away and was not then caught. The pleading then proceeds as follows:

> "5. The first plaintiff received certain information which could have identified or helped to identify the criminal responsible. The first plaintiff, to assist in the arrest of the criminal, gave all the information which she had received to D.C. Dew who recorded the same, H including the first plaintiff's name, on a document. 6. At all material times the defendant or his officers knew of the violent and ruthless character of the persons about whom such information had been given and he or his officers did or should have realised the sensitive

nature of the confidential information which had been given. 7. In the premises the defendant owed a duty of care to the plaintiffs to ensure that the recorded information was securely stored in a place where criminals (likely to be associates of or acquainted with the person whose identity had been revealed) would not have any opportunity to see or obtain it alternatively in a place where there would not be any foreseeable risk of them so doing. 8. It is the plaintiff's case that as a consequence of the sensitivity of the information and the violence likely to follow to the plaintiffs if it were ever discovered by the criminal fraternity, having been obtained the information either should have been solely stored in a secure position in a manned police station or in a police officer's notebook which would at all times remain safe in his custody. 9. In breach of the said duty and negligently the defendant's officers left the document containing all the information including the identity of the first plaintiff in a police vehicle parked at Lowgate, Throckley on 8 April 1991. 10. The said vehicle was broken into and criminals obtained the document containing all the information supplied by the first plaintiff including her name. 11. Thereafter the document was shown by these criminals to the person whose name had been given by the first plaintiff and as a result the plaintiffs were threatened with violence, arson and have both suffered psychiatric damage."

There are then particulars of negligence which I can summarise: (1) leaving a record of sensitive confidential criminal information about a murder in an unattended police car in an area where vehicle crime is common; (2) failing to ensure the information was stored in a secure position in a manned police station; (3) failing to ensure the record of the sensitive information was at all times kept in the possession and under the control of a police officer; (4) failing to follow police advice about valuable items not being left in unattended vehicles. It is then alleged that the plaintiffs have suffered injury and damage, including psychological damage caused by an extreme anxiety state, which it is alleged prevented the first plaintiff from carrying on the business of the public house, as a consequence of which the tenancy was given up; and which in the case of the second plaintiff resulted in a form of depressive illness. Then there are particulars of special damage relating to the alleged loss of profits in the public house.

The recorded messages referred to in paragraphs 5 and 7 of the statement of claim have very properly been disclosed by the defendant on affidavit, and were before the judge. It is plainly right to treat these as part of the pleaded case, since they are contained in a document which is specifically referred to in the pleadings, as follows:

> "INT. N460 Marie Swinney manageress of the Northumbria PH. Prudhoe who states she has information that the driver of G99LAO is from Lemington . . . Swinney requests the interview takes place in confidence . . ."

Then the second message:

> "Surname: Swinney. Forenames: Marie.
> "Address: Northumbria Hotel, West Road, Prudhoe.

A "Telephone . . .

"To be contacted 'in confidence' by telephone . . . She has information from her cleaner. The cleaner's sister may know identity of the driver (from Lemington). She does not want info. leak traced back to her, care to be taken when contacting Swinney. Please ring her first. Husband also aware."

B The first ground of appeal is that the statement of claim fails to establish the necessary special relationship of proximity between the plaintiffs, on the one hand, and the defendant (the police) on the other, so as to give rise to a duty of care in accordance with the well-established test that the special relationship must be of such a character as to distinguish the plaintiff as being particularly at risk in contrast to the C public generally, or any sections of the public. Laws J. held that this was established, as he stated:

"The risk of harm in this case arose on the pleaded facts specifically and only in relation to the plaintiffs, certainly Mrs. Swinney, because it was her name as an informant which the alleged actions of the police allowed to be revealed to the criminal or D his associates . . . In my judgment it is at the very least arguable on the pleaded facts that there existed a special relationship between the plaintiffs and the police such as to impose a duty of care upon the latter as regards the means by which they kept secure the confidential information, including her name, which Mrs. Swinney had given them. It follows that on the proximity issue the plaintiffs must E succeed . . ."

In *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1004–1005 the facts as summarised in the headnote were:

"Seven Borstal boys, who were working on an island under the control and supervision of three officers, left the island at night and F boarded, cast adrift and damaged the plaintiffs' yacht which was moored offshore. The plaintiffs brought an action for damages against the Home Office alleging negligence. They particularised that alleged negligence as being that, knowing of the boys' criminal records and records of previous escapes from Borstal institutions and knowing that craft such as the plaintiffs' yacht were moored offshore, the officers had failed to exercise any effective control or supervision over G the boys. The Home Office denied that they or their servants or agents owed the plaintiffs any duty of care with respect to the detention of the boys or to the manner in which they were treated, employed, disciplined, controlled or supervised. On the trial of the preliminary issue whether, on the facts pleaded in the statement of claim, the Home Office owed any duty of care to the plaintiffs capable H of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of Borstal training or to the manner in which such persons were controlled whilst undergoing such sentences . . ."

The House of Lords answered that question in the affirmative and, in the course of his speech, Lord Diplock gave a statement of the law which has since become classic, at pp. 1070–1071:

> "The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the tortious act of a criminal merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all. To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public. What distinguishes a Borstal trainee who has escaped from one who has been duly released from custody is his liability to recapture, and the distinctive added risk which is a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping is the likelihood that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped. . . . I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped."

The second case, which is of crucial importance not only on proximity but also on public policy, is *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53. The facts are summarised in the headnote, at p. 53:

> "The plaintiff's 20-year old daughter was attacked at night in a city street of the police area of which the defendant was chief constable and died from her injuries. Her attacker [Sutcliffe], who was convicted of her murder, was alleged to have committed a series of offences of murder and attempted murder against young women in the area in similar circumstances over a period of years before the

A deceased's murder. The plaintiff claimed on behalf of her deceased daughter's estate damages against the defendant for negligence, in that in the conduct of investigations into the crimes which had been committed the police failed to apprehend [Sutcliffe] and prevent the murder of her daughter."

That claim was not allowed to proceed by the House of Lords. The B leading judgment was given by Lord Keith of Kinkel, with whom Lord Brandon of Oakbrook, Lord Oliver of Aylmerton and Lord Goff of Chieveley agreed. Lord Keith of Kinkel, at p. 61, quoted the passage from Lord Diplock's judgment in the *Dorset Yacht* case [1970] A.C. 1004 to which I have just referred. He then proceeded, at p. 62:

"The *Dorset Yacht* case was concerned with the special C characteristics or ingredients beyond reasonable foreseeability of likely harm which may result in civil liability for failure to control another man to prevent his doing harm to a third. The present case falls broadly into the same category. It is plain that vital characteristics which were present in the *Dorset Yacht* case and which led to the imposition of liability are here lacking. Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of D the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea island in relation to the foreseeable conduct of the Borstal boys. It appears from the passage quoted from the speech of Lord Diplock in the *Dorset Yacht* case that in his view no liability would rest upon a prison authority, which E carelessly allowed the escape of an habitual criminal, for damage which he subsequently caused, not in the course of attempting to make good his getaway to persons at special risk, but in further pursuance of his general criminal career to the person or property of members of the general public. The same rule must apply as regards failure to recapture the criminal before he had time to resume his career. In the case of an escaped criminal his identity and description F are known. In the instant case the identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal G or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar, and all H females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to

the liability of the Home Office in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire police."

Mr. Gompertz, who argued his case throughout with distinction, submitted that to uphold proximity on the present pleaded facts would go well beyond any previous situation where the courts have held it to exist, and he invites us to place the case in the *Hill* category rather than in the *Dorset Yacht* category. In support of that argument he relied particularly on *Alexandrou v. Oxford* [1993] 4 All E.R. 328, a decision of Slade, Parker and Glidewell L.JJ. The facts taken from the headnote are as follows:

"The plaintiff's clothing shop was burgled on a Sunday evening. The burglars' entry activated the shop's exterior and interior burglar alarms and also a recorded telephone message to the local police station stating that the alarm had been activated. Two police officers promptly attended the scene, but failed to inspect the rear of the shop where the burglars had forced entry. Some hours later a substantial quantity of goods was removed from the shop. The plaintiff sued the chief constable for the value of the goods stolen, alleging that the police had been negligent by, inter alia, failing to take adequate precautions to discover why the alarm had been activated and in assuming that it was a false alarm."

In his judgment, which is the leading judgment in the case, Glidewell L.J. stated, at p. 338:

"It is possible to envisage an agreement between an occupier of a property protected by a burglar alarm and the police which would impose a contractual liability on the police. That is not, however, the situation in this case. The communication with the police in this case was by a 999 telephone call, followed by a recorded message. If as a result of that communication the police came under a duty of care to the plaintiff, it must follow that they would be under a similar duty to any person who informs them, whether by 999 call or in some other way, that a burglary, or indeed any crime, against himself or his property is being committed or is about to be committed. So in my view if there is a duty of care it is owed to a wider group than those to whom the judge referred. It is owed to all members of the public who give information of a suspected crime against themselves or their property. It follows, therefore, that on the facts of this case it is my opinion that there was no such special relationship between the plaintiff and the police as was present in the *Dorset Yacht* case."

Mr. Gompertz asked the question: if there was no special relationship with the plaintiff whose burglar alarm went off in *Alexandrou*'s case, so as to single him out from the general run of the public, why should the same not apply to the present plaintiffs on the facts of the present case?

However, in my judgment, Mr. Powell is right in his ably presented submissions that at least arguably this case falls into the *Dorset Yacht* category rather than the *Hill* category on proximity. I have in mind all the

relevant paragraphs of the statement of claim, but particularly the references in paragraph 6 to confidentiality, and the facts cited in paragraph 8 to show that the plaintiffs were particularly at risk. It seems to me that these aspects are vividly and perhaps compellingly demonstrated by the texts of the two messages, with their repeated references to the need for confidence. This seems to me to show that it is at least arguable that a special relationship did exist, which renders the plaintiffs distinguishable from the general public as being particularly at risk. In my judgment, *Alexandrou v. Oxford* [1993] 4 All E.R. 328 is arguably distinguishable because there was no element of confidentiality in that case, when that element looms so large in the present case. Thus the first ground put forward by Mr. Gompertz, namely the attack on the judge's conclusions on proximity, fails.

I now turn to the second issue, that of public policy. The first authority is the *Hill* case [1989] A.C. 53, in the paragraph immediately following the one I have already quoted from Lord Keith of Kinkel's judgment, at p. 63:

> "That is sufficient for the disposal of the appeal [the proximity factor]. But in my opinion, there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy."

Then he cited *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175 and *Anns v. Merton London Borough Council* [1978] A.C. 728. He then continued [1989] A.C. 53, 63:

> "Application of that second stage [in the *Anns* case] is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure—for example that a police officer negligently tripped and fell while pursuing a burglar—others would

be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."

The next relevant case is *Osman v. Ferguson* [1993] 4 All E.R. 344 where the headnote states, at pp. 344–345:

"P., a school teacher, formed an unhealthy attachment to a 15-year-old male pupil and harassed him by accusing him of deviant sexual practices, following him to his home and alleging a sexual relationship with a friend. In May 1987 P. changed his surname to that of the boy's and damaged property connected with the boy by throwing a brick through a window of the boy's home, smearing dog excrement on the front door and slashing the tyres of the car of the boy's father. In mid-1987 P. was dismissed from the school, but continued the harassment. The police were aware of those facts and in the latter part of 1987 P. even told a police officer that the loss of his job was distressing and there was a danger that he would do something criminally insane. In December 1987 P. deliberately rammed a vehicle in which the boy was a passenger. The police laid an information against P. in January 1988 alleging driving without due care and attention but it was not served. In March P. followed the boy and his family to their flat and shot and severely injured the boy and killed his father. The mother, as administratrix of the father's estate, and the boy brought an action against, inter alios, the Commissioner of Police of the Metropolis alleging negligence in that although the police had been aware of P.'s activities since May 1987 they failed to apprehend or interview him, search his home or charge him with a more serious offence before March 1988."

The Court of Appeal, consisting of McCowan, Beldam and Simon Brown L.JJ., held unanimously that the action should not be allowed to proceed on public policy grounds similar to those cited in the *Hill* case [1989] A.C. 53 where the facts were closely comparable: indeed, McCowan L.J. said [1993] 4 All E.R. 344, 354, that in his judgment the House of Lords' decision on public policy in the *Hill* case doomed the

A action to failure. He also quoted with approval, at p. 353, a statement of Glidewell L.J. in *Alexandrou v. Oxford* [1993] 4 All E.R. 328, 340:

> "In my view the observations of Lord Keith and Lord Templeman in *Hill*'s case in relation to the effect on the police of their being potentially liable in negligence was general, not limited to the facts of that case."

B McCowan L.J. also said that the principle in the *Hill* case [1989] A.C. 53 applies to both policy matters and operational decisions.

Finally, in this group of cases, there is *Elguzouli-Daf v. Commissioner of Police of the Metropolis* [1995] Q.B. 335. There the facts were, quoting from the headnote, at pp. 335–336:

> "The plaintiffs in both cases were arrested, charged and remanded
C in custody for serious offences but, after periods of detention of 22 and 85 days respectively, the Crown Prosecution Service ('C.P.S.') discontinued proceedings against them. In actions against the C.P.S., among others, the plaintiff in the first case claimed that the C.P.S. was negligent in failing to act with reasonable diligence in obtaining, processing and communicating the results of forensic scientific evidence which showed him to be innocent, and the plaintiff in the
D second case claimed that it should not have taken the C.P.S. 85 days to conclude that the prosecution was bound to fail."

Here again the public policy issue arose and was held to apply by this court, Steyn, Rose and Morritt L.JJ. Steyn L.J., having cited the *Hill* case [1989] A.C. 53, stated [1995] Q.B. 335, 349:

> "That brings me to the policy factors which, in my view, argue
E against the recognition of a duty of care owed by the C.P.S. to those it prosecutes. While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the C.P.S. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by
F the C.P.S. of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence. The C.P.S. would have to spend valuable time and use scarce resources in order to prevent law suits in negligence against the C.P.S. It would generate
G a great deal of paper to guard against the risks of law suits. The time and energy of C.P.S. lawyers would be diverted from concentrating on their prime function of prosecuting offenders. That would be likely to happen not only during the prosecuting process but also when the C.P.S. is sued in negligence by aggrieved defendants. The C.P.S. would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials. That is a spectre that would bode ill for
H the efficiency of the C.P.S. and the quality of our criminal justice system."

Steyn L.J. did, however, introduce one important qualification, namely that the public policy exception might not apply where the police or the

C.P.S. had voluntarily assumed responsibility to the plaintiff. This qualification was based on a decision at first instance of Tudor Evans J. in *Welsh v. Chief Constable of the Merseyside Police* [1993] 1 All E.R. 692, of which Steyn L.J. approved [1995] Q.B. 335, 349, as did Morritt L.J. in his concurring judgment, at pp. 352–353; Rose L.J. agreed. In the *Welsh* case [1993] 1 All E.R. 692 Tudor Evans J. held that there was no public interest immunity for the C.P.S. where they had expressly assumed responsibility to the plaintiff to inform a sentencing court that some earlier offences of his had been already taken into consideration, but failed to do so.

In his judgment Laws J. dealt with this point. Having cited the *Hill* case [1989] A.C. 53 and quoted the relevant passages, he said:

> "Thus in this case, as in the others, the public interest in minimising distractions and diversions from the public duties of the police tells in the defendant's favour. However, arguably at least, there is a public interest which pulls in the opposite direction. The police are bound to rely on information given by members of the public. On the television and otherwise, they make frequent and urgent appeals for such information. It is a vital factor in the pursuit of criminals. It is in the public interest that people should respond to such appeals—should assist the police when they can. Sometimes, if a person does so, he may put himself at risk if the fact comes to the knowledge of the criminal in question. This very case shows as much. But the law has for a long time recognised the need to protect police informants. It is a general rule that in a criminal prosecution witnesses may not be asked the name of an informer. The only exception to the common law rule is where disclosure is in the judge's opinion necessary to establish the innocence of the accused: *Marks v. Beyfus* (1890) 25 Q.B.D. 494, 498, *per* Lord Esher M.R. The rule has been evolved in the public interest, to ensure so far as possible that informers be not discouraged from coming forward by fear of risk, it may be serious risk, to themselves. But if it is in the public interest to keep safe the name of an informer from disclosure in a criminal trial, so here the plaintiffs may argue that the same interest requires that in the course of their duties, and before any trial takes place, the police should not be careless with information in their possession whose disclosure might put an informer to just the same risk. They should so far as reasonably possible keep such information safe and secure: on an officer's person, or at the police station. It may be that the demands of police operations will sometimes prevent that being done. It may be that that is the case here; however that may be, I entertain no doubt but that on the pleaded facts it is arguable that the public interest in preserving the springs of information coming into the hands of the police serves to neutralise the public interest which might otherwise confer immunity upon the police against liability in these proceedings. This is a case in which public policy, like Janus, points in two directions; and in my judgment the interlocutory process of this appeal is quite inapt to determine the question, which gaze should prevail. There is a balancing exercise to be carried out, upon the

whole circumstances of the case. It is not to be done on the pleadings, but by a judge hearing evidence."

Mr. Gompertz submitted that the *Hill* case [1989] A.C. 53 established that the police are immune from liability for negligence in the investigation of crime, at least where the harm to the plaintiff is caused by a third party, save where the police have assumed a responsibility to the plaintiff. He pointed out that the principle applies whether the alleged negligence relates to policy or operations. The reasons for the rule, to be drawn from Lord Keith of Kinkel's speech in the *Hill* case are, he said, that police resources should not be diverted from their essential public function in the pursuit of criminals in order to defend private actions at law, and that this is particularly pertinent when the claim is that the police have failed to save the plaintiff from harm caused by third parties: moreover, imposition of a civil liability might lead to an unduly defensive frame of mind among police officers investigating crime. He submitted that liability for the acts of third parties arising from the loss of documents, in circumstances comparable to the present, would place an intolerable burden on police officers, the C.P.S. and counsel to ensure that confidential documents are always kept in a safe or in personal custody. Thus the overwhelming public interest lies in ensuring that, providing the police act in good faith they should be able to operate without constantly having to consider whether, with the benefit of hindsight, their actions might give rise to civil liability.

He criticised Laws J.'s Janus analogy on the ground that in reality there was no conflict between the two strands of public policy identified by Laws J., since the police were not seeking voluntarily to disclose the identity of the informant. In summary, Mr. Gompertz contended the *Hill* case [1989] A.C. 53, and the ensuing cases, lay down a fundamental principle of public policy that there is a "blanket immunity" (his words) for police officers in relation to their activities in the investigation or suppression of crime. The only exception which he was prepared to recognise was if, in the circumstances of the present case, the police had deliberately broken the plaintiffs' confidence and disclosed the information, since it would be unthinkable that public policy would countenance such misconduct. But his exception did not extend to inadvertent disclosure, which he contended fell into a quite different category and was covered by the blanket immunity.

Finally he said that it was impossible, in the circumstances of the present case, to attribute to the police an assumption of responsibility since they were merely the recipients of information handed over to them by the plaintiffs.

I am unable to accept these submissions substantially for the reasons advanced by Mr. Powell. The *Hill* case [1989] A.C. 53 is, of course, one of cardinal importance. As was held in the *Alexandrou* case [1993] 4 All E.R. 328 and in the *Osman* case [1993] 4 All E.R. 344, it lays down a principle of general application which was not specifically limited to the actual facts of that particular case, and nothing I say should be interpreted as in any shape or form seeking to undermine that principle. However, in my judgment, that principle cannot be completely divorced from the

circumstances highlighted by Lord Keith of Kinkel in his judgment, which recurred mutatis mutandis in the *Osman* case and in the *Elguzouli-Daf* case [1995] Q.B. 335. It follows that I cannot accept Mr. Gompertz's submission that the police have a blanket immunity which gives them a complete answer in the present case. As Laws J. pointed out in his judgment, there are here other considerations of public policy which also have weight, namely, the need to preserve the springs of information, to protect informers, and to encourage them to come forward without an undue fear of the risk that their identity will subsequently become known to the suspect or to his associates. In my judgment, public policy in this field must be assessed in the round, which in this case means assessing the applicable considerations advanced in the *Hill* case [1989] A.C. 53, which are, of course, of great importance, together with the considerations just mentioned in relation to informers, in order to reach a fair and just decision on public policy.

Mr. Powell invited us to hold that most of the considerations advanced in the *Hill* case did not apply here. I prefer not to express any view on that either way without fuller knowledge of the facts. Suffice it to say that, if all the relevant aspects of public policy referred to above are considered in the round, it is in my judgment at least arguable that the immunity should not apply here.

I also consider that it is at least arguable in the present case that, on the facts pleaded on the statement of claim, including the texts of the two messages quoted, the police did, in fact, assume a responsibility of confidentiality to the plaintiffs, or at least to the first plaintiff. If that view should prevail, it would bring into play the exception identified by this court in the *Elguzouli-Daf* case [1995] Q.B. 335. It follows that I reject Mr. Gompertz's submission on the second ground also.

I wish to end this judgment by stressing a point with which I began, namely that I am upholding no more than the arguability of the plaintiffs' case on these two grounds. It by no means follows that they will succeed on either of them at the trial. Nor, for that matter, does it follow that the plaintiffs will establish, when all the evidence is considered, the necessary substratum of fact as pleaded in the statement of claim on which their whole case depends.

However, for all these reasons I would dismiss this appeal.

PETER GIBSON L.J. This case, to my mind, exemplifies the difficulty facing a defendant who seeks to strike out pleadings against him on the ground provided for by R.S.C., Ord. 18, r. 19(1)(*a*), that the pleadings disclose no reasonable cause of action. The court is obliged to treat the facts averred in the statement of claim as true, notwithstanding that difficulties of proof may be obvious, and no other evidence is admissible. Accordingly, we must accept what is pleaded, and the relevant pleadings which Hirst L.J. has already recited.

It is to be noted that there is nothing pleaded as to why the document recording the confidential information was placed and left in the vehicle which was broken into, and we therefore do not know whether the police were in the course of investigating or suppressing crime when they went

in that vehicle with that document to the place where the vehicle was parked on 8 April 1991.

Mr. Gompertz, for the Chief Constable, submitted that the statement of claim should be struck out on two grounds: no duty of care and public policy. On duty of care, Mr. Gompertz referred at length to *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, and in particular the passage, at p. 62, where Lord Keith of Kinkel explains why in that case he came to the conclusion that the circumstances were not capable of establishing a duty of care owed by the police. Laws J. extracted the principle on which Lord Keith of Kinkel's reasoning was based as being to this effect:

> "Where the duty of care asserted by the plaintiff is a duty to prevent or avoid the risk of harm that might be caused not by the defendant himself but by a third party, there must be established a degree of proximity between plaintiff and defendant which may conveniently be characterised as a special relationship; that is a relationship which in the defendant's reasonable contemplation must distinguish the plaintiff as being particularly at risk in contrast to the public generally or any section of the public."

In agreement with him it seems to me properly arguable that an informant, giving in confidence sensitive information to the police, is in a special relationship to the police, that relationship being based on an assumption of responsibility towards the informant by the police, such that, when through the negligence of the police that information is disclosed to criminals, it can result in a valid claim by the informant in respect of consequent damage to the informant.

I have to say that it is not entirely clear to me that the husband of the informant in the present case, the second plaintiff, has an equally arguable case. But it was only mentioned by Mr. Gompertz by way of an aside that the second plaintiff may not have a sustainable case, and for the purpose of this appeal I would not treat him any differently from the first plaintiff in the circumstances.

For these and the other reasons given by Hirst L.J. on this first ground I therefore conclude that Mr. Gompertz has not shown that there is no duty owed to the plaintiffs.

On the question of public policy, Mr. Gompertz has relied heavily on the *Hill* case [1989] A.C. 53 as being applicable to the circumstances of the present case. He relies, in particular, on what was said by Lord Keith of Kinkel in that case, at p. 63. The comments of Lord Keith of Kinkel must be read and understood against the background of the case with which he was dealing, that is to say, a complaint that the police were negligent in the investigation of crimes at a time when the perpetrator of the crimes was unknown, and it was equally unknown who would prove to be the next victim of that criminal.

The circumstances of the present case seem to me to be plainly distinguishable. In the present case, as I have already pointed out, we do not know whether at the material time the police were in the course of investigating or suppressing crime. That seems to me to answer several of the points taken by Mr. Gompertz. But I would go further, in agreement with the judge, and hold that when one is considering whether the police

have an immunity from liability in negligence to which liability otherwise they would be subject, the court must evaluate all the public policy considerations that may apply. In the present case it seems to me plain that the position of an informant does require special consideration from the viewpoint of public policy. It is obvious that information imparted in confidence to the police by informants should normally not be disclosed and that it is in the public interest that confidentiality should be preserved. Further, it is a well recognised category of public interest immunity that prevents the disclosure of the name of a police informant, save in wholly exceptional circumstances. It must be right that the public should be encouraged to inform about crime to the police.

The general immunity which Mr. Gompertz asserted was in any event, as he accepted, subject to an exception. He did not dispute that where there is deliberate disclosure by the police of confidential information imparted by that informant to the police, the police will not be immune. But he sought to distinguish such a case from the case where there has been a negligent disclosure of the confidential information. For my part, I have difficulty in seeing why the police should be immune in such a case on the ground of public policy, regardless of whether or not the police were, at the time of the negligence, investigating or suppressing crime. But whether or not this is right, it seems to me that the judge was justified in taking the view that in a case of this sort the important public policy considerations asserted by the police must be balanced against the other public policy considerations to which I have referred, and that the appropriate time to do the balancing is at the trial, when all the facts are known to the court.

Accordingly, in agreement with Hirst L.J. I, too, would hold that the second objection by Mr. Gompertz to the statement of claim cannot prevail. For these as well as the reasons given by Hirst L.J., therefore, I, too, agree that this appeal should be dismissed.

WARD L.J. I can summarise my reasons very shortly. The plaintiffs must establish only that it is arguable that they have a good cause of action. It seems to me that it is indeed properly arguable that (1) the risk of theft of the documents from the police car is foreseeable, it being conceded that the harm to the plaintiffs in consequence of the theft is also foreseeable; (2) there is a special relationship between the plaintiffs and the defendant, which is sufficiently proximate: proximity is shown by the police assuming responsibility, and the plaintiffs relying upon that assumption of responsibility, for preserving the confidentiality of the information which, if it fell into the wrong hands, was likely to expose the first plaintiff and members of her family to a special risk of damage from the criminal acts of others, greater than the general risk which ordinary members of the public must endure with phlegmatic fortitude; (3) it is fair, just and reasonable that the law should impose a duty, there being no overwhelming dictate of public policy to exclude the prosecution of this claim. On the one hand there is, as more fully set out in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 63, an important public interest that the police should carry out their difficult duties to the best of their endeavours without being fettered by, or even influenced by, the

spectre of litigation looming over every judgment they make, every discretion they exercise, every act they undertake or omit to perform, in their ceaseless battle to investigate and suppress crime. The greater public good rightly outweighs any individual hardship. On the other hand, it is incontrovertible that the fight against crime is daily dependent upon information fed to the police by members of the public, often at real risk of villainous retribution from the criminals and their associates. The public interest will not accept that good citizens should be expected to entrust information to the police, without also expecting that they are entrusting their safety to the police. The public interest would be affronted were it to be the law that members of the public should be expected, in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected. The welfare of the community at large demands the encouragement of the free flow of information without inhibition. Accordingly, it is arguable that there is a duty of care, and that no consideration of public policy precludes the prosecution of the plaintiffs' claim, which will be judged on its merits later.

I would accordingly also dismiss the appeal.

Appeal dismissed with costs.
Legal aid taxation of plaintiffs' costs.

Solicitors: Crutes, Newcastle upon Tyne; Hay & Kilner, Newcastle upon Tyne.

[Reported by ROBERT RAJARATNAM ESQ., Barrister]