Trinity Term
[2018] UKSC 40
On appeal from: [2016] EWCA Civ 1217

JUDGMENT

James-Bowen and others (Respondents) *v* Commissioner of Police of the Metropolis (Appellant)

before

Lady Hale, President
Lord Mance
Lord Kerr
Lord Wilson
Lord Lloyd-Jones

JUDGMENT GIVEN ON

25 July 2018

Heard on 6 and 7 March 2018

Appellant	*Respondents*
Andrew Warnock QC Lisa Dobie (Instructed by Weightmans LLP (Liverpool))	Nicholas Bowen QC David Lemer (Instructed by Penningtons Manches LLP)

LORD LLOYD-JONES: (with whom Lady Hale, Lord Mance, Lord Kerr and Lord Wilson agree)

1. This appeal raises the question whether the Commissioner of Police of the Metropolis ("the Commissioner") owes a duty to her officers, in the conduct of proceedings against her based on their alleged misconduct, to take reasonable care to protect them from economic and reputational harm.

Background facts

2. The pleaded facts may be summarised as follows. On 2 December 2003 the respondents, four police officers serving in the Metropolitan Police Service, ("the officers") took part in the arrest of a suspected terrorist, BA. BA subsequently made allegations that the officers had seriously assaulted and injured him during the arrest. The complaints were investigated by the Metropolitan Police Service's Directorate of Professional Standards and the Crown Prosecution Service who concluded that there was no case to answer. However, the Independent Police Complaints Commission decided in October 2004 that one charge relating to the use of excessive force should be brought against the first respondent. That charge was dismissed by the disciplinary panel in April 2005. Between 14 January 2005 and 2 February 2005 the Independent Police Complaints Commission released the officers' identities into the public domain. This led to threats of serious violence to the officers and their families on a website which supported BA.

3. On 18 October 2007 BA issued civil proceedings against the Commissioner in which he alleged that the Commissioner was vicariously liable under section 88 of the Police Act 1996 for the serious assaults which he alleged the officers had inflicted on him. His claim included claims for aggravated and exemplary damages. The officers were not defendants in the action nor were contribution proceedings brought against them by the Commissioner. The defence of the claim on behalf of the Commissioner was undertaken by the Metropolitan Police Directorate of Legal Services ("DLS"). A defence denying liability was entered. On 10 January 2008 an offer of settlement was rejected by BA.

4. On 18 March 2008 the officers attended a conference with Mr Jeremy Johnson of counsel, instructed by the DLS on behalf of the Commissioner. The officers subsequently alleged that counsel and the DLS solicitor assured them on that occasion that they were also acting for them and in their interests and told them that BA's claims would be vigorously defended. On 13 February 2009 an application by the Commissioner that the officers be permitted to give evidence from behind

screens was dismissed at the pre-trial review. On 10 March 2009 BA rejected a further offer of settlement because he wanted an apology or a finding in open court. The officers attended a second conference with Mr Johnson and the DLS on 11 March 2009. On this occasion the officers were accompanied by a solicitor from Russell Jones and Walker who attended only in relation to matters arising from a special measures application which had been made in respect of the evidence to be given by the respondents. At that conference the officers said that they would be reluctant to give evidence without special measures being in place. They allege that Mr Johnson informed them that he was no longer representing their interests but only the interests of the Commissioner. The officers allege that Mr Johnson indicated that the claim would be lost due to BA's medical evidence and they complained to him that they were unable to raise points on various aspects of the defence including medical evidence, expert evidence, CCTV footage and notes of arrest.

5. The trial of BA's claim commenced on 16 March 2009. The officers declined to give evidence voluntarily without special measures being in place. On the third day of the trial, 18 March 2009, the Commissioner settled the claim on the basis of agreed damages of £60,000 and agreed costs of £240,000 with an admission of liability and an apology for "gratuitous violence" to which BA had been subjected by the officers. Paragraph 82 of the Particulars of Claim in the present proceedings alleges that the Commissioner's office issued a press release stating:

> "The Commissioner has demanded an immediate investigation into the circumstances surrounding the officers' refusal to give evidence relating to this arrest in 2003. Whilst the arrest and subsequent events are historic this is a serious matter which has been referred to the IPCC."

In the present proceedings the officers maintain that this was tantamount to endorsing their culpability.

6. On 12 August 2010 the officers were each charged with one count of an assault occasioning actual bodily harm arising out of the arrest of BA. In June 2011, following a trial lasting five weeks, the officers were all acquitted.

The current proceedings

7. On 23 September 2013 the officers commenced the present proceedings against the Commissioner alleging breach of contract, negligence and misfeasance in public office arising from the manner in which the Commissioner had defended

BA's claim. They sought compensation for reputational, economic and psychiatric damage. In the particulars of claim the officers put forward three bases on which it was alleged that the Commissioner owed them a duty of care.

(1) A retainer had arisen between them and the Commissioner's legal team because of the assurances given to them by counsel and the DLS solicitor.

(2) The Commissioner had assumed a duty of care to the officers by reason of those same assurances.

(3) The Commissioner owed the officers a duty of care in tort and concurrently in contract as employer or quasi-employer to take reasonable care to safeguard their safety, health, welfare (including economic and professional welfare) and reputational interests, in the preparation and conduct of the defence to BA's claim and when considering and effecting any settlement of it.

This third head of claim was said to include the following specific obligations to take reasonable care.

(a) To keep the officers informed of the progress of the case.

(b) To keep them and their families safe from threats by BA's supporters against their homes and physical safety.

(c) To explain and provide reasons in the event that the Commissioner believed that BA's civil claim could no longer be defended or that a conflict had arisen between the officers and the Commissioner.

(d) To consult the officers in sufficient time prior to the trial for them to obtain alternative and independent legal advice in the event that the Commissioner had decided to admit liability and make a public apology.

(e) To warn the officers in sufficient time (to enable them to take independent legal advice or any other necessary steps to protect their own interests) prior to the opening of the trial that the application for special measures had failed, that the Commissioner's lawyers were no longer acting

for the officers or protecting their interests and that the Commissioner was considering admitting liability and making a public apology.

8. The particulars of claim then provided detailed particulars of the alleged breaches of the duties. The officers do not allege that entering into an agreement on the terms of the settlement between the Commissioner and BA was in itself negligent. Their complaint is about the antecedent conduct of the defence by the Commissioner. In particular it is alleged that the Commissioner failed to conduct and prepare a competent defence to BA's claim. (See Jay J at para 23) Here complaint is made of the failure to proof or call as witnesses a list of named persons or to ascertain the availability of covert recordings. Complaint is made that evidence was lost, not located or not disclosed as a result of a systems failure. Complaint is also made of failure to take account of a list of miscellaneous evidential concerns raised by the respondents which, it is said, were either ignored or not adequately addressed. More generally, it is said that the Commissioner failed to keep the officers informed of the progress of the litigation and the preparation of the defence and failed to advise the officers within a reasonable time of the alleged conflict of interests. Complaint is made of the failure to obtain expert medical evidence to challenge the expert evidence called on behalf of BA and of a failure to apply for an adjournment of the trial.

9. By notice dated 28 April 2014 the Commissioner applied to strike out the claims pursuant to CPR Part 3.4(2) on the grounds that they disclosed no reasonable grounds for the making of a claim, alternatively for summary judgment pursuant to CPR Part 24 on the grounds that the claims had no real prospect of success.

10. On 1 May 2015 Jay J struck out the claims and entered summary judgment for the Commissioner. He considered that, in the absence of an express contract of retainer with the DLS, no retainer existed. Furthermore, the officers had no direct interest in the prior litigation and the possibility of consequential impact on their reputations was insufficient to create such an interest to which the Commissioner would be legally required to have regard or to promote or safeguard. The focus of the claim founded on the more general duty of care to protect the health, economic or reputational interests of the officers shifted during the hearing before Jay J. The judge seems to have been under the impression that the duty relied on by the officers was a duty to avoid psychiatric injury and that the claims for reputational damage and economic loss were entirely consequential on that head of damage. The judge considered that the officers had no real prospect of proving at trial that it was reasonably foreseeable that any breaches of duty by the Commissioner might cause psychiatric injury. However, the judge also observed that this basis of claim faced an insuperable difficulty under *Caparo Industries plc v Dickman* [1990] 2 AC 605 in that, given that the officers were not parties to BA's civil proceedings, the Commissioner's lawyers owed duties solely to the Commissioner and the Commissioner was free to protect his own interests as he saw fit. He stated:

> "The principled objection to this claim is that the postulated duty of care cuts right across the rights and obligations of the defendant itself, and those advising the defendant, in circumstances where no implied retainer existed. It would not be fair, just and reasonable to impose a concurrent conflicting duty of care in these circumstances: …" (at para 36)

The claim for misfeasance was struck out as inadequately pleaded.

11. The officers appealed to the Court of Appeal, save in respect of the claim in misfeasance. The Court of Appeal (Moore-Bick, Longmore and Patten LJJ) dismissed the appeal in relation to the existence of a retainer and in relation to the assumption of responsibility. In addition, it dismissed the appeal in relation to psychiatric injury on the ground that such injury was not reasonably foreseeable. However, it allowed the appeal on the remaining issue, holding that it was arguable that the Commissioner owed a duty of care to the officers to safeguard their economic and reputational interests and that this extended to the conduct of litigation by the Commissioner. Moore-Bick LJ, with whom the other members of the court agreed, accepted that the Commissioner's primary duty was to protect the interests of the Metropolitan Police Service, but he did not consider that a duty of the kind alleged by the officers necessarily cut across this. In his view it was in the interest of the Commissioner and the officers for the defence to be conducted as effectively as possible and a duty of care in that regard would not inevitably give rise to any conflict of interest. Accordingly, he considered it arguable that the Commissioner owed to the officers (1) a duty to defend the litigation as effectively as possible and (2) a duty, when deciding whether to compromise the claim and if so on what terms, to take reasonable care not to sacrifice their interests and professional reputation without good reason and without giving them reasonable warning of what he intended to do.

12. So far as breach of duty giving rise to actionable losses was concerned, Moore-Bick LJ noted that there was no allegation that the Commissioner's decision to compromise the claim was negligent in all the circumstances. However, the Commissioner's forensic difficulties were alleged to have been a consequence of failures on the part of the MPS to identify or make available certain important pieces of evidence. In his view the essential elements of the claim for breach of a duty of care in relation to the conduct of the proceedings were present. The Court of Appeal came to a different conclusion, however, in respect of the allegation that the Commissioner was in breach of duty by failing to warn the officers in good time that he intended to pursue the interest of the MPS, if necessary at their expense. Moore-Bick LJ agreed with the judge in dismissing as fanciful the suggestion that, had they been warned, the officers would have applied to be joined as defendants and would have instructed solicitors to conduct their defence independently.

13. The Commissioner now appeals to the Supreme Court. The sole remaining allegation in the proceedings is that the Commissioner owed a duty of care to the officers to conduct the defence of the proceedings brought against her "as effectively as possible" in order to protect the officers from economic or reputational harm. There is no cross appeal by the officers in relation to the alleged retainer, the alleged assumption of responsibility or the head of claim alleging psychiatric injury. Nevertheless, the subject matter of those heads of claim which have fallen by the wayside forms an important part of the context in which the central issue now falls to be decided.

The implied duty of trust and confidence

14. Both before the Court of Appeal and before this court Mr Nicholas Bowen QC on behalf of the officers has placed at the forefront of his submissions the duty of trust and confidence which exists between an employer and his employees. He submits that the duty of care for which he contends is simply a manifestation of the long-established term of trust and confidence which is implied into contracts of employment and that, accordingly, there is no scope or need for the court to conduct an assessment of whether the ingredients identified in *Caparo v Dickman* criteria are present and, in particular, whether the imposition of such a duty would be fair, just and reasonable.

15. Police officers hold the public office of constable and are not employees. They have no contract of employment and the terms on which they hold their office are governed principally by the Police Regulations 2003 (SI 2003/527). Nevertheless, the relationship of Commissioner and officer is closely analogous to that of employer and employee (*White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, per Lord Steyn at p 497E-F; per Lord Hoffmann at p 505C). In *Mullaney v Chief Constable of West Midlands Police* [2001] EWCA Civ 700 Clarke LJ, with whom Potter LJ and Bodey J agreed, considered (at para 52) that the relationship is so closely analogous as to make it just in principle to hold that a Chief Constable owes the same duties to his officers as an employer does to his employees. At this point of the discussion I am content to proceed on the basis that the Commissioner and these officers should be treated as if they were employer and employee, while recognising that, in the absence of any actual contract, any duty derived by analogy with the standard terms implied in an employment contract must necessarily sound as a duty of care, rather than be absolute.

16. The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment rather than a term implied from the particular provisions of a particular employment contract (*Malik v*

Bank of Credit and Commerce International SA [1998] AC 20, per Lord Steyn at p 45D). It was described by Lord Nicholls in *Malik* at p 35A, as a portmanteau concept. In that case the House of Lords considered it the source of a more specific implied obligation on the part of the employer bank not to conduct its business in a dishonest and corrupt manner, the breach of which gave rise to a cause of action for damage to the economic and reputational interests of its employees. Similarly, in *Eastwood v Magnox Electric plc* [2004] UKHL 35; [2005] 1 AC 503 the House of Lords recognised an obligation on an employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith (per Lord Nicholls at para 11). The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship (*Gogay v Hertfordshire County Council* [2000] IRLR 703; *McCabe v Cornwall County Council* [2004] UKHL 35; [2005] 1 AC 503; *Bristol City Council v Deadman* [2007] EWCA Civ 822; [2007] IRLR 888; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512; [2015] IRLR 112; *Stevens v University of Birmingham* [2015] EWHC 2300 (QB); [2016] 4 All ER 258). Furthermore, any decision-making function entrusted to an employer must be exercised in accordance with the implied obligation of trust and confidence (*Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661).

17. If the present case is approached on the basis of implied contractual terms, the issue becomes whether, in unpacking this particular portmanteau implied term of trust and confidence, it is possible to extract a duty of care owed by an employer to its employees to conduct litigation in a manner which protects them from economic or reputational harm. It is significant that, despite the researches of counsel, we have not been referred to any decided case in any jurisdiction which holds that an employer owes such a duty of care to his employees. To derive such an obligation from the implied term of trust and confidence would be to move substantially beyond the specific derivative duties established to date.

18. Although in *Malik* the House of Lords derived from the mutual implied contractual obligations of trust and confidence an implied obligation owed by the bank to its employees not to conduct a dishonest or corrupt business and held that damage to reputation resulting from breach sounded in damages, this is at a considerable remove from a duty to exercise care in the conduct of business so as to avoid economic or reputational damage to employees. This point was, in fact, emphasised by Lord Nicholls in a cautionary footnote:

> "…, [T]here are many circumstances in which an employee's reputation may suffer from his having been associated with an unsuccessful business, or an unsuccessful department within a business. In the ordinary way this will not found a claim of the nature made in the present case, even if the business or department was run with gross incompetence. A key feature in

> the present case is the assumed fact that the business was dishonest or corrupt." (at p 42C-D).

19. In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 doctors sued their employer claiming damages, inter alia, in breach of contract and negligence, in respect of the failure of the employer to notify them of their entitlement under their contracts of employment to purchase, during a limited period of time, additional years of pension entitlement. The House of Lords held that the claimants' common law claims were to be determined by reference to the contractual relationship and not in tort. The doctors' claim succeeded but it is noteworthy that it did so on the narrow ground that where a contract negotiated between an employer and a representative body contains a term conferring on an employee a valuable benefit contingent upon his acting to obtain it, of which he could not be expected to be otherwise aware, there was an implied obligation on the employer to take reasonable steps to publicise that term. It is significant that the House of Lords did not base its decision on a more general duty of care owed by an employer to protect the economic interests of employees.

20. Similarly, in *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615 the Court of Appeal refused to derive from the mutual duty of trust and confidence a standard obligation, implied by law as a term of all contracts of employment, which requires an employer to take reasonable care for the economic well-being of his employees. The claimant, a senior employee and director of the defendant company, retired on grounds of ill health. He later brought an action for damages for breach of contract alleging that in failing to warn him of the effect which resigning from his employment would have on his entitlements under its insurance scheme, the defendant company had acted in breach of an implied term of the contract of employment requiring it to take reasonable care for his economic well-being. Dyson LJ, with whom Thomas LJ and Sir Andrew Morritt V-C agreed, rejected the proposed implied term. Having observed (at para 42) that it was not for that court "to take a big leap to introduce a major extension of the law in this area" when the House of Lords had declined to do so in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 and *Spring v Guardian Assurance plc* [1995] 2 AC 296, he developed (at para 43) the more fundamental objection that such an implied term would impose an unfair and unreasonable burden on employers. While an employer might assume responsibility under the *Hedley Byrne* principle, it was a quite different matter to impose on an employer the duty to give his employee financial advice or generally to safeguard his economic well-being.

21. Furthermore, I have difficulty in understanding how this principal argument on behalf of the officers can circumvent the requirement adverted to by Lord Bridge in *Caparo v Dickman* that the imposition of the duty must be fair, just and reasonable. In order to establish such a duty of care, the officers rely here upon a

class of implied terms which are implied in law as a necessary incident of a particular class of contractual relationship. In *Crossley* Dyson LJ observed at para 36:

> "… [R]ather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."

This approach was commended by Lady Hale in *Geys v Societe Generale, London Branch* [2013] 1 AC 523 at paras 55, 56. The argument that such an implied term should extend to the conduct of litigation raises, therefore, precisely the same question as to whether the proposed term is fair and reasonable as arises if the claim is put in tort. Such an implied term, implied by law as an incident of a standardised contract, could not, to my mind, be wider in scope than the duty imposed by the law of tort. (*White v Chief Constable of South Yorkshire Police*, per Lord Griffiths at p 464C-G; per Lord Goff at p 483C-E; per Lord Steyn at p 498A-B; per Lord Hoffmann at pp 505B-506B. See also the observations of Underhill LJ in *Yapp v Foreign and Commonwealth Office* at para 120.) It is difficult to see why such an implied term should extend further than a concurrent duty in negligence. Accordingly, it seems to me that the battlefield on which the conflicting contentions as to the existence of such a duty must be fought out is the scope of the duty of care in tort.

22. In the present case the courts below have proceeded on the basis that, with the exception of the claim in respect of psychiatric injury which is no longer pursued, harm was arguably foreseeable. Furthermore, it was clearly arguable that by virtue of their relationship, akin to that of employer and employee, the parties were in a sufficiently proximate relationship to give rise to a duty of care. The argument therefore focussed on whether the imposition of a duty of care was fair, just and reasonable as indicated in *Caparo*. In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] 2 WLR 595 this court recently held, with regard to this aspect of *Caparo*, that it is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Since the police generally owe a duty of care not to inflict physical injury by their actions when such a duty arises under the ordinary principles of the law of negligence, unless statute or other common law principle provides otherwise, there was no requirement in that case to examine whether the recognition of the claimed duty would be fair, just and reasonable. However, this ingredient will be of critical importance in a situation where it is proposed that a duty of care should be imposed in novel circumstances. Thus Lord Reed observed (at para 29):

> "Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

23. Contrary to the submission of Mr Bowen on behalf of the officers, the present case is very clearly one in which it is sought to extend a duty of care to a new situation. As Lord Reed explained in *Robinson*, in determining whether such a duty should be recognised the law will proceed incrementally and by analogy with previous decisions. He referred, in particular, to the following passage in the judgment of Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44, which was approved by Lord Bridge in *Caparo* at p 618:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."

The theme was developed by Lord Bingham in *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 where he observed at para 7:

> "… I incline to agree with the view … that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo Industries plc v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true."

In addition, the proposed duty will be tested against considerations of legal policy and judgement will have to be exercised with particular regard to both the achievement of justice in the particular case and the coherent development of the law.

24. The law protects reputation in a variety of ways in different circumstances. Causes of action such as libel, slander, malicious falsehood and passing off are designed to protect reputation. Moreover, a variety of other causes of action including breach of confidence, misuse of private information and causes of action in relation to data protection and intellectual property may often indirectly achieve this result. The common law does not usually recognise a duty of care in the tort of negligence to protect reputational interests. However, there are exceptions. In *Spring v Guardian Assurance plc* [1995] 2 AC 296 a majority of the House of Lords held that an employer who gave a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence for a breach of duty which caused him economic loss. Lord Lowry, Lord Slynn and Lord Woolf reached this conclusion on the basis of the three ingredients identified by Lord Bridge in *Caparo*. Lord Goff (at p 316E-F) concluded that a duty of care was owed to the former employee on a narrower ground. In his view the source of the duty of care was the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ie an assumption of responsibility by the authors of the reference to the plaintiff in respect of the reference, and reliance by the plaintiff upon the exercise by them of due care and skill in respect of its preparation. This case was essentially concerned with negligent mis-statement and it may be that assumption of responsibility is the better rationalisation of the recognition of a duty in these circumstances. (See *NRAM Ltd (formerly NRAM plc) v Steel* [2018] UKSC 13; [2018] 1 WLR 1190 per Lord Wilson at para 24 referring also to *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 per Lord Goff at p 181 and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 per Lord Steyn at p 837.)

25. This decision should be contrasted with *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228. Following their reinstatement, police officers, against whom disciplinary proceedings had been taken, brought actions in negligence against their Chief Constables on the basis that they were vicariously liable for the investigating officers. The claimants alleged that the investigating officers had failed to conduct the proceedings properly or expeditiously and claimed, inter alia, damages in respect of loss of overtime earnings during their suspension and damages for injury to reputation. The House of Lords considered the submission that a duty of care was owed to the claimants to be unsustainable. First, Lord Bridge explained (at p 1238B-G), anxiety, vexation and injury to reputation did not constitute reasonably foreseeable damage capable of sustaining an action in negligence within *Donoghue v Stevenson* [1932] AC 562. Secondly, it was not reasonably foreseeable that the negligent conduct of a criminal investigation would

cause injury to the health of the suspect, whether in the form of depressive illness or otherwise. Thirdly, while it is reasonably foreseeable that a suspect may suffer some economic loss which might have been avoided had more careful investigation established his innocence at an earlier stage, such a claim would encounter the formidable obstacles in the path of liability in negligence for purely economic loss. Fourthly, it would be contrary to public policy to prejudice the discharge by police officers of their public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.

26. To my mind *Calveley* has an important bearing on the present case. If a Chief Constable does not, in principle, owe a duty of care to protect the economic and reputational interests of his officers in respect of the prosecution of an investigation or disciplinary proceedings, it is difficult to see why he should owe a duty to his officers as to the manner in which he defends a claim brought against him by a third party. In the former situation the Chief Constable has himself initiated the investigation or proceedings over which he has at least a substantial measure of control and he is responsible for making allegations against officers. In the latter situation his role is essentially responsive to allegations made by third parties.

27. In these circumstances it is necessary to test the proposed duty of care against relevant policy considerations and to consider the coherence of the resulting state of the law if such a duty is recognised.

Conflicting interests

28. The fact that a duty of care may give rise to conflicting interests will often be a weighty consideration against its imposition. In *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 a majority of the House of Lords held that health care and childcare professionals investigating allegations of child abuse did not owe a duty of care to the parents of the children concerned. Lord Nicholls explained (at para 85) that conflict of interest was a persuasive factor here. When considering whether a child has been abused, a doctor should be able to act single-mindedly in the interests of the child and he ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse were to prove unfounded he might be exposed to claims by a distressed parent.

> "At that time [when a doctor is carrying out his investigation] the doctor does not know whether there has been abuse by the parent. But he knows that when he is considering this possibility the interests of parent and child are diametrically opposed. The interests of the child are that the doctor should report any suspicions he may have and that he should carry out

> further investigation in consultation with other child care professionals. The interests of the parent do not favour either of these steps. This difference of interest in the outcome is an unsatisfactory basis for imposing a duty of care on a doctor in favour of a parent." (at para 88)

Similarly, in *SXH v Crown Prosecution Service* [2017] UKSC 30; [2017] 1 WLR 1401 Lord Toulson, with whom Lord Mance, Lord Reed and Lord Hughes agreed, considered (at para 38) that the duty of the Crown Prosecution Service ("CPS") is to the public and not to the victim or the suspect, who have separate interests, and that to recognise a duty of care towards victims or suspects or both would put the CPS in positions of potential conflict.

29. Yet, the fact that the recognition of a duty of care may potentially subject an individual to conflicting duties is not, of itself, necessarily conclusive against its recognition in all situations. Clearly, there will be many situations in which an individual will owe potentially conflicting duties to different persons. In *Gogay v Hertfordshire County Council* the managers of a children's home owed both a duty of care to the resident children and an implied contractual duty of trust and confidence to its staff, notwithstanding the fact that in the case of an actual conflict the interests of the child should prevail. (See Hale LJ at para 59) Similarly, in *D v East Berkshire* Lord Nicholls referred (at para 86) to the fact that a doctor often owes duties to more than one person. He may owe duties, for example, to his employer and to his patient. (See also *ABC v St George's Healthcare NHS Trust* [2017] EWCA Civ 336; [2017] PIQR P15.) However, in *D* the House concluded that the seriousness of child abuse as a social problem demanded that health professionals, acting in good faith in what they believe are the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused or in deciding what action should be taken. It is necessary, therefore, to have regard to the competing underlying policy considerations, when determining whether a duty of care may be imposed notwithstanding that it may give rise to a conflict of interests.

30. The interests of an employer who is sued on the basis that he is vicariously liable for the tortious conduct of his employees differ fundamentally from the interests of those employees. The financial, commercial and reputational standing of the employer may be at stake. It is the employer who will incur the cost of defending the proceedings which, however successful the defence may be, is most unlikely to be recovered in full, and who, if unsuccessful, will bear the liability to the claimant. The employer must be able to make his own investigation into the claim and to assess its strength based on the conduct of his employee and the prospects of a successful defence. In this regard, he will need to form his own view as to the reliability and veracity of his employee and as to how the employee is likely to perform as a witness. The interests of insurers may have to be taken into account.

The employer will have to decide what degree of importance he attaches to successfully defending the claim and what financial and other resources should be devoted to its defence. He may consider that, however strong the prospects of a successful defence, he cannot justify the cost and effort of defending the claim and that it should, therefore, be settled. The predominant interest of the employee, by contrast, will be that his reputation should be vindicated. The position will often be complicated further by the existence of inconsistent views or interests between different employees or groups of employees. (See, for example, *Mohidin v Comr of Police of the Metropolis* [2016] EWHC 105 (QB) (Gilbart J) [2016] 1 Costs LR 71, para 14)

31. In cases where an employer is alleged to be vicariously liable for the tortious conduct of his employee, the possibility of contribution proceedings between employer and employee highlights this potential conflict of interests. It is particularly relevant here that claims under the Civil Liability (Contribution) Act 1978 may be brought up to two years after judgment in the original claim or settlement of that claim (Limitation Act 1980, section 10). That the possibility of bringing such a claim is not fanciful, at least in cases where deliberate misconduct is alleged, is demonstrated by *Mohidin v Comr of Police of the Metropolis* where such a claim succeeded.

32. These stark differences between the interests of employer and employee strongly suggest that it would not be fair, just or reasonable to impose on an employer a duty of care to defend legal proceedings so as to protect the economic or reputational interests of his employee. Nor do I consider it realistic to suggest, as do the respondents in the present case, that this potential for conflict can be overcome by the recognition of a duty of care up to the time at which an actual conflict of interests arises, at which point "timeous notification" by the Commissioner could result in the duty of care ceasing to apply. Where an employer defends a claim against him founded on his vicarious liability for his employees, the potential for conflict is too great to permit such a compromise. Moreover, it would often be totally impracticable. A civil claim and its defence, as they proceed, often develop in unexpected ways. There could be no justification for imposing on an employer the burden of keeping under review at each stage of the proceedings the question whether an actual conflict has arisen. Furthermore, steps taken by the employee as a result of such "timeous notification" of the emergence of an actual conflict may well be disruptive of the litigation.

33. In the present case, moreover, the Commissioner is not merely in a position analogous to that of an employer. She also holds public office and has responsibility for the Metropolitan Police Service. This adds a further dimension to this appeal because in the conduct of the proceedings against her she must be free to act as she considers appropriate in accordance with her public duty. This duty is, to my mind, totally inconsistent with her owing a duty of care to protect the reputational interests

of her employees when defending litigation based on vicarious liability for their alleged misconduct. As we have seen, in *Calveley* the House concluded that it would be contrary to public policy to prejudice the discharge by the police of their public duty to investigate alleged misconduct by officers by imposing a conflicting duty of care to protect the reputational interests of those officers. In the same way in *SXH* this court considered (at para 38) that to recognise a duty of care owed by the CPS to victims or suspects would not be conducive to the best interests of the criminal justice system. These considerations apply with equal force to the present case.

Policy considerations relating to the conduct of litigation

34. Considerations relating to legal policy and the practical conduct of proceedings also weigh heavily against the duty for which the officers contend.

35. First, there is an important public policy that parties in dispute should, in general, be able to avail themselves of the processes of litigation in order to resolve their disputes, without fear of incurring liability to third parties if they do so. This policy was expressed by Wilde CJ (with whom Maule J, Cresswell J, Williams J, Parke B and Rolfe B agreed) in *De Medina v Grove* (1847) 10 QB 172 at p 176:

> "The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause."

This policy underlies a number of legal principles including the general immunity which attaches to things said and done in court by witnesses and litigants and the principle that a duty of care is not owed by one litigant to an opposing litigant. (See, generally, *Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477 per Lord Mance at para 135.) An employer who wishes to defend a claim based on vicarious liability for the alleged conduct of his employees should be entitled to defend the claim in the way he sees fit, notwithstanding that his employees will or may as a result be subjected to public criticism during the trial process. He should be free to do so without having constantly to look over his shoulder for fear that his conduct of the defence may expose him to a claim by his employees. Decisions in the conduct of the defence, such as which inquiries to undertake, which experts to instruct, which witnesses to call or which resources to devote to resisting the claim, are essentially matters for the employer as defendant and should be taken free of anxiety as to possible future claims by the employees on the basis that the case should have been run differently. The proposed duty would, to my mind, inevitably inhibit the conduct of the defence. An employer would, understandably, be less likely to make admissions in circumstances where they are objectively justified or to make use of

evidence which reflects unfavourably on an employee, for fear of the subsequent repercussions. I have no doubt that the imposition of the duty of care contended for in the present case would, as the Commissioner submits, have a chilling effect on the defence of civil proceedings.

36. Secondly, the recognition of a duty owed by an employer to his employees to defend a claim effectively would be inconsistent with the important legal policy which encourages the settlement of civil claims and seeks to promote out of court settlement. The resulting risk of exposure to consequential claims would, in many situations, operate as a powerful disincentive to settlement.

37. Thirdly, the duty contended for could result in delay or disruption of civil proceedings. Disputes between employers and employees as to the appropriate way in which the defence should be conducted could well paralyse the defence. Resort to some form of dispute resolution procedure could be expensive and time-consuming. In many instances the employer may well feel compelled to make a contribution claim against his employees in order to negative the imposition of a duty of care owed to them. Moreover, the existence of such a duty may result in an employer needlessly prolonging proceedings against him in an attempt to establish that he has taken care to protect the interests of his employees. (See N McBride, PN 2017 (33) 3, 216 at p 219.)

38. Fourthly, the recognition of such a duty of care would be a fruitful source of satellite litigation. While there are some situations in which litigation about the conduct of prior litigation is unavoidable, it is generally to be discouraged. The acknowledgement of a duty owed by employers to their employees to protect their economic or reputational interests in the conduct of litigation would be likely to result in a proliferation of consequential claims which would often amount to a collateral challenge to the outcome of earlier proceedings.

Legal professional privilege

39. It is also necessary to say something about the issue of legal professional privilege. At first instance, it was submitted on behalf of the Commissioner that legal professional privilege was a further policy consideration for not imposing a duty of care in these circumstances. It was submitted that if such a duty of care existed an employer would in effect be compelled to waive privilege in circumstances where he would otherwise be entitled to assert privilege, because the correctness or reasonableness of his conduct of the underlying litigation could not be properly examined without relevant legal advice being properly exposed to judicial scrutiny. The response on behalf of the officers was that the relationship between the parties gave rise to a joint or common interest with the result that the Commissioner would,

in any event, be unable to rely on legal professional privilege against the officers to the extent that common interest privilege applied.

40. In his judgment Jay J expressly stated that he did not rely on legal professional privilege in coming to the conclusion that there was no arguable duty of care. The Court of Appeal did not address this point in its judgments.

41. The judgments below have established that the legal advisers who defended the claim brought by BA were instructed on behalf of the Commissioner only and that neither those lawyers nor the Commissioner undertook responsibility to the officers for the conduct of the litigation. The officers attended conferences with counsel in the capacity of witnesses not clients. The officers do not seek to appeal those conclusions. Accordingly, there can be no question of legal professional privilege belonging jointly to the Commissioner and the officers. However, the officers rely on common interest privilege and seek to employ it as a sword in asserting an entitlement to disclosure of material in the possession of the Commissioner which is privileged against disclosure to others. Whether the officers have such an entitlement will depend on whether such a claim is consistent with the underlying relationship of the Commissioner and the officers. (See *Phipson on Evidence*, 19th ed (2017), para 24-11.) In my view it is not.

42. If one sets to one side the decided cases which turn on contractual access rights, the cases show that something more than a shared interest in the outcome of litigation is required before common interest privilege can be used as a sword in the manner proposed here. For example, in *Dennis & Sons Ltd v West Norfolk Farmers Manure and Chemical Co-operative Co Ltd* [1943] Ch 220 Simonds J held that shareholders were entitled to disclosure of an accountants' report concerning the rights and duties of the board commissioned by the directors, notwithstanding that by the time the report was received the shareholders had commenced proceedings against the company in relation to the conduct of the company's affairs. The report had been commissioned by the directors on behalf of all the shareholders and not for the purpose of defending themselves against hostile litigation. The judge observed (at p 222) that the general rule applied equally as between a company and its shareholders and as between a trustee and his beneficiaries. A claim to privilege between the company and its shareholders would have been inconsistent with the nature of the relationship.

43. Similarly, in *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598, Barca and Wimpey each held half the shares in a joint venture company, DLW, which had claims against Aramco. Wimpey settled the claims without authority from Barca. In the resulting proceedings brought by Barca against Wimpey the Court of Appeal held that Barca was entitled to disclosure of privileged

documents of Wimpey generated in the original litigation as the Aramco claims had been made by Wimpey on behalf of itself and Barca (per Stephenson LJ at p 614).

44. In *Commercial Union Assurance Co plc v Mander* [1996] 2 Lloyd's Rep 640, at 647-648, Moore-Bick J provided the following example:

> "Although in many cases a relationship between two parties which supports common interest privilege will be one which also gives each of them a right to obtain disclosure of confidential documents relating to the matter in which they are both interested, one can readily think of situations in which that would not be so. Take the example given by Donaldson LJ in *Buttes v Hammer (No 3)* of tenants in a block of flats. One tenant, acting entirely for his own benefit, obtains legal advice concerning a dispute with the landlord over a provision in the lease which affects other tenants in a similar way. If he chooses to give a copy of the document containing that advice in confidence to another tenant who is willing to cooperate with him in pursuing a claim their common interest would be sufficient for the document to remain privileged in the latter's hands. I do not, however, see any basis upon which the second tenant could have insisted on seeing the advice if the first tenant did not wish to show it to him, even though they had a common interest in the subject matter. Both as a matter of principle and authority … it is not enough that the person seeking disclosure of confidential documents can show that he has an interest in the subject matter which would be sufficient to give rise to common interest privilege if the documents had been disclosed to him; he must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained."

45. In the present case the Commissioner and the officers are likely to have had a shared interest in successfully defending the claim brought by BA against the Commissioner, at least initially. It may well be that, had privileged documents been disclosed in confidence by the Commissioner to the officers at that stage, that shared interest would have enabled the officers to defeat an application for disclosure by a third party on grounds of common interest privilege. However, before the officers could compel disclosure of privileged material in the hands of the Commissioner, considerably more would be required. Although the relationship between the Commissioner and the officers is closely analogous to that of employer and employees, there is nothing in the present situation which resembles the relationship between a company and its shareholders, or between a trustee and his beneficiaries,

or between parties to a joint venture agreement. Here the relationship between the Commissioner and the officers does not require or justify such an entitlement of access to legally privileged material.

46. Considered against this background, there is force in the Commissioner's submission as to the practical consequences in this regard of the recognition of the duty of care for which the officers contend. Although employees would normally have no entitlement to disclosure of privileged material in the possession of their employer relating to the defence of the original proceedings, the effective defence of proceedings by the employees against the employer brought on the basis that the earlier proceedings were conducted in breach of duty may well require waiver of privilege in order to demonstrate the contrary. This has the potential to undermine the effective conduct of the defence of the original claim against the employer in that the possibility of such a claim in negligence and the likelihood of having to waive privilege may well inhibit frank discussion between the employer and his legal advisers. This is, therefore, a further consideration which weighs against the recognition of the duty of care for which the officers contend.

Conclusion

47. For these reasons I would allow the appeal. The imposition of the claimed duty would not be fair, just or reasonable.