HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 11

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OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Mitchell (AP) and another (Original Respondents and Cross-appellants) *v* Glasgow City Council (Original Appellants and Cross-respondents) (Scotland)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

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LORD HOPE OF CRAIGHEAD

My Lords,

1. On 31 July 2001 the late James Dow Mitchell was attacked by his next door neighbour James Drummond. A stick or an iron bar was used in this attack, and Mr Mitchell was hit about the head and severely injured. On 10 August 2001 he died as a result of his injuries. The deceased, who was aged 72, and Drummond, who was in his mid 60s, were both tenants of the defenders, the local housing authority. Drummond was arrested and charged with the murder. On 12 July 2002 the Crown accepted his plea to culpable homicide. He was sentenced to eight years imprisonment. Later it was reduced to five years on appeal. The lenient way in which Drummond appears to have been treated must not be allowed to disguise the tragic circumstances of the deceased's death and the distress which it must have caused to the deceased's family.

2. The pursuers are the deceased's widow and his daughter. They claim damages from the defenders for the loss, injury and damage which they suffered as a result of the deceased's death. They base their case on two grounds. The first is negligence at common law. The second is that the defenders acted in a way that was incompatible with the deceased's right to life under article 2 of the European Convention on Human Rights and was accordingly unlawful within the meaning of section 6(1) of the Human Rights Act 1998. On 30 June 2005 the Lord Ordinary, Lord Bracadale, dismissed the action: 2005 SLT 1100. On 29 February 2008 an Extra Division (Lady Paton, Lord Reed and Lord

Penrose) by a majority (Lord Reed dissenting) recalled the Lord Ordinary's interlocutor and allowed a proof before answer on the pursuers' case at common law. By a different majority (Lady Paton dissenting) it excluded from probation their averments that the defenders acted in a way that was incompatible with the deceased's Convention right: 2008 SC 351. The defenders appeal to your Lordships against the allowance of a proof before answer. The pursuers cross-appeal against the exclusion from probation of their case under the Human Rights Act 1998.

The facts

3. Lady Paton set out in paras 4 to 17 of her opinion a succinct summary of the pursuers' averments about the events that led up to the deceased's death. They go back a long way. Drummond and the deceased's family had been neighbours since the 1980s. Drummond was given the tenancy of 225 Bellahouston Drive in May 1985. He moved there from Middleton Street, where he had behaved in an anti-social manner and attacked his neighbours with a tyre lever. The deceased became the tenant of the property next door at 221 Bellahouston Drive in March 1986. The defenders provided them with this accommodation under the Housing (Scotland) Act 1966, which was later replaced by the Housing (Scotland) Act 1987. In December 1994 there was an incident in the early hours of the morning. Drummond had been playing loud music which woke up the deceased. He banged on the wall to get it turned down. Drummond retaliated by banging on his wall and shouting abuse. A few minutes later he arrived at the deceased's door armed with an iron bar. He used it to batter the deceased's door and smash his windows. The police were called and Drummond was arrested. He shouted that he would kill the deceased when he got out of jail. A few days later, having been released on bail, he followed the deceased home shouting abuse. He told him that he would be dead meat after the court case. There were further such incidents at the beginning of January 1995. In March 1995 the defenders warned Drummond that if he persisted in this conduct they would take action to recover possession of his house.

4. Despite this warning Drummond continued to threaten to kill the deceased at least once a month. He was removed by the police in handcuffs on many occasions and intimidated elderly residents. The deceased and his family consulted city councillors and a member of the Scottish Parliament, who wrote to the defenders about the abuse which the deceased was suffering. Victim Support also wrote to the defenders

in August 1999 about other residents' fears of retaliation by Drummond if they gave evidence against him. They were however provided with a signed statement by a local resident confirming that she had heard Drummond threaten to kill the deceased on many occasions. In January 2001 an incident was recorded on video tape showing Drummond's behaviour towards the deceased which resulted in his being charged with a breach of the peace. The defenders warned him again that he might be evicted if his behaviour did not improve.

5. At the end of January 2001 the defenders served on Drummond a notice of proceedings for recovery of possession under section 47 of the 1987 Act. Para 8 of Schedule 3 to that Act provides that one of the grounds for the recovery of possession is that the tenant has been guilty of conduct in or in the vicinity of the house which is a nuisance or annoyance and in the opinion of the landlord it is appropriate in the circumstances to require him to move to other accommodation. The notice was valid for six months: see section 47(4). The defenders kept the deceased informed of the steps that they were taking against Drummond during this period. Their effect on his behaviour was to provoke more abuse. An incident on 12 June 2001 was video recorded and the deceased reported it to the defenders. There was a further incident on 10 July 2001 when the police were called and Drummond was again arrested and charged with a breach of the peace. The defenders received a police report of that incident.

6. On 26 July 2001 the defenders wrote to Drummond inviting him to a meeting to be held on 31 July 2001. He was told that the purpose of this meeting was to discuss the incident of 10 July 2001 and the notice of proceedings for recovery of possession that had been served on him in January as they were considering issuing a further notice. Drummond attended the meeting on 31 July 2001, which began at 2pm. The defenders told him that a fresh notice of proceedings to recover possession would be served on him. They said that they would continue to monitor complaints about his behaviour. They told him that continued anti-social behaviour could result in his eviction. Drummond lost his temper and became abusive. He then apologised to the defenders' staff for having lost his temper. After leaving the meeting Drummond returned to Bellahouston Drive. At about 3pm he assaulted the deceased and inflicted the injuries which caused his death.

7. The defenders did not warn the deceased that they had summoned Drummond to the meeting that was held on 31 July 2001. Nor did they make any attempt to warn either him or the police about his behaviour at

the meeting or of any possible risk of retaliation against the deceased as a result of it. The pursuers' case is that if he had been given these warnings the deceased would not have died. He would have been alerted to the fact that Drummond was likely to be angry and violent. He would have been on the look out and taken steps to avoid him. The pursuers also allege that the deceased's death was caused by the defenders' failure to act on the repeated complaints by instituting proceedings against Drummond to recover possession by October 1999. But they gave notice in their written case that they did not intend to maintain that argument, which the Lord Ordinary had rejected. It has been held in a series of cases that a local authority is not normally liable for errors of judgment in the exercise of its discretionary powers under a statute: see *Hussain v Lancaster City Council* [2000] QB 1; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2AC 373, para 82 per Lord Nicholls of Birkenhead. So it is the allegations of a failure to give warnings that, for the purposes of this appeal, form the basis of the pursuers' case against the defenders at common law and under the statute.

The averments of fault

8. The following are the duties that the pursuers allege against the defenders at common law: (a) following the report of the incident on 10 July 2001, to keep the deceased and the police informed of the steps which they proposed to take against Drummond; (b) to advise the deceased that he might be at real and immediate risk of injury; (c) to consider the deceased's safety when arranging the meeting of 31 July 2001; (d) to advise the deceased that a meeting had been arranged for 31 July 2001 at which further steps were to be taken regarding recovery of possession of Drummond's property; (e) to alert the police that a meeting had been arranged for that day; and (f) to advise the deceased of what had happened at the meeting and of Drummond's state of mind during it.

9. The pursuers also allege a contravention by the defenders of article 2 of the Convention in that, by failing to advise the deceased that the meeting of 31 July 2001 was to take place and of the events that transpired at that meeting, they acted in a way that was incompatible with his right to life. This is the basis of their claim that the defenders acted in a way that was unlawful within the meaning of section 6(1) of the Human Rights Act 1998.

The issue on the pleadings

10. The defenders seek dismissal of the action on the ground that the pursuers' pleadings are irrelevant: see their first plea in law. It is well established that an action will not be dismissed as irrelevant unless, even if the pursuer proves all his averments, it must necessarily fail: *Jamieson v Jamieson* 1952 SC (HL) 44, 50, per Lord Normand. Mr McEachran QC for the respondents, in his attractive address to your Lordships, pointed out that a pursuer's pleadings are only the framework for the leading of evidence. He maintained that it was not necessary for him to aver every detail, and that the significance of what was averred could not be judged adequately by the court until after it had heard all the evidence. He relied on Lord Keith of Avonholm's observation in *Miller v South of Scotland Electricity Board* 1958 SC (HL) 20, 33 that in claims of damages for alleged negligence it could only be in rare and exceptional cases that an action could be disposed of on relevancy. This was because the facets and detail of a case on which an assessment of the law must depend could not be conveyed to the mind by mere averments of the bare bones of the case.

11. The defenders' argument that the pursuers' case is irrelevant does not, however, depend on the facets and detail of Drummond's behaviour or the way the defenders responded to it. If the sole issue at this stage had been whether the pursuers had averred enough for their common law case to go to proof on the issue of foreseeability, I would have been very reluctant to differ from the decision of the majority of their Lordships of the Extra Division that the pursuers should be allowed a proof before answer. But that is not the issue to which the defenders' argument is directed. They maintain that the question which this case raises is whether the failures in duty that are alleged against them were within the scope of their duty of care for the deceased. Questions about the existence or scope of a duty of care are questions of law. They are not questions of the kind that Lord Keith had in mind when he said that the circumstances of the case will normally have to be ascertained by evidence.

12. There will, of course, be cases where the existence or scope of a duty of care cannot safely be determined without hearing the evidence. But no advantage is to be gained by sending a case to proof when it is clear from the averments that, even if everything that the pursuer avers is proved, the case must fail. That is likely to be the case where the issue on which the case depends is one of principle or, as Lord Reed put it in para 135 of his opinion, of legal analysis. In such cases, it is not

just that there would be no advantage in sending the case to proof. It would be unfair for the defenders to be required to spend time and money on what will obviously be a fruitless inquiry. Lord Reid's comments in *Jamieson v Jamieson* 1952 SC (HL) 44, 63, on the value of the procedure for disposing of cases on relevancy without inquiry into the facts remain just as true today as they were when they were made nearly sixty years ago.

13. It should be understood too that there is no incompatibility between this way of disposing of a case and the pursuer's right under article 6 of the Convention to a fair trial. This is because of the assumption that is made that the pursuer will succeed in proving all that he avers. What he can aver will depend on what he believes he can prove. He is given an ample opportunity to set out the case that he seeks to make in his averments. When the court decides to dismiss a case on the ground that the pursuer's case is irrelevant it does so because, having studied those averments, it is satisfied that it is in as good a position to determine the issue of law on which the case depends as it would have been if it had heard all the evidence. The defenders submit that this is such a case.

The case at common law

14. The issue of principle on which the defenders challenge the pursuers' common law case was put into sharp focus by Mr McEachran at the outset of his argument. He said that there had been an operational failure by the defenders in circumstances where it was reasonably foreseeable that harm would flow to the deceased if they did not warn him about their meeting with Drummond. He stressed that his case was presented on a very narrow front. All he was saying was that there was a duty to warn, and that this duty arose because harm to the deceased was reasonably foreseeable. Beguilingly simple though this submission was, it raises fundamental issues about the scope of the duty that is owed to third parties by landlords, whether in the public or the private sector, whose tenants are abusive or violent to their neighbours.

15. Three points must be made at the outset to put the submission into its proper context. The first is that foreseeability of harm is not of itself enough for the imposition of a duty of care: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1037 - 1038, per Lord Morris of Borth-y-Gest; *Smith v Littlewoods Organisation Ltd* (reported in the Session Cases as *Maloco v Littlewoods Organisation*

Ltd) 1987 SC (HL) 37, 59, per Lord Griffiths; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 60, per Lord Keith of Kinkel. Otherwise, to adopt Lord Keith of Kinkel's dramatic illustration in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175,192, there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning. The second, which flows from the first, is that the law does not normally impose a positive duty on a person to protect others. As Lord Goff of Chieveley explained in *Smith v Littlewoods Organisation Ltd*, 76, the common law does not impose liability for what, without more, may be called pure omissions. The third, which is a development of the second, is that the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply upon foreseeability: *Smith v Littlewoods Organisation Ltd*, 77- 83, per Lord Goff.

16. The context is therefore quite different from the case where a person is injured in the course of his employment or in a road traffic accident. In cases of that kind it can be taken for granted that the employer owes a duty of care to the person who is in his employment or that a duty is owed to other road users by the driver of a vehicle which causes an accident. If commonplace situations of that kind had to be analysed, the conclusion would be that the duty is owed not simply because loss, injury or damage is reasonably foreseeable. It is because there is a relationship of proximity between the employer and his employees and the driver and other road users. This is sufficient in law to give rise to a duty of care. The duty is created by the relationship, and the scope of the duty is determined by what in the context of that relationship is reasonably foreseeable. In such cases this is so obvious that there is no need to ask whether it is fair, or whether it is just and reasonable, that the pursuer should recover damages.

17. In this case, as Mr McEachran pointed out, there was a relationship of proximity between the deceased and the defenders. He was their tenant, and so too was Drummond who lived next door. The defenders had accepted that they had a responsibility for the situation that had arisen as the parties' landlords. This was why they had decided to take steps to address Drummond's anti-social behaviour. That being so, he said, the only question was whether harm to the deceased was reasonably foreseeable as a result of the action which they were taking. He referred to passages in the speech of Lord Mackay of Clashfern in *Smith v Littlewoods Organisation Ltd* 1987 SC (HL) 37, 65-68, which indicated that the test was whether in all the circumstances a reasonable person in the position of the defenders would be bound to anticipate that

there was a real risk that the type of damage that resulted was likely to occur. Liability, he suggested, depended on the degree to which the harmful act was reasonably foreseeable: p 68.

18. There are other indications in the authorities that a high degree of likelihood of harm may be an appropriate limiting factor: see *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1030, per Lord Reid. In *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12; [2004] 1 WLR 1273, para 21 Lord Nicholls of Birkenhead said that the concept of reasonable foreseeability embraced a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. As the possible adverse consequences of carelessness increase in seriousness, so will a lesser degree of likelihood of occurrence suffice to satisfy the test of reasonable foreseeability. In that case the police authorities had entrusted a gun to an officer who was still on probation and had shown signs of instability and unreliability. As Lord Nicholls explained in para 32, loaded hand guns are dangerous weapons and the serious risks if a gun is handled carelessly are obvious. On the other hand the precautionary steps required of a careful person are unlikely to be particularly burdensome. Where such an article is handed over, the class of persons to whom the duty of care is owed is wide and the standard of care required is high.

19. It is not difficult to see that a duty of care was owed in the situation that arose in *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. But it is not so easy to reconcile an approach that relies generally on the likelihood of harm with the general rule that a person is under no legal duty to protect another from harm. Addressing this point in *Smith v Littlewoods Organisation Ltd* 1987 SC (HL) 37, at p 83, Lord Goff said:

> "I wish to emphasise that I do not think that the problem in these cases can be solved simply through the mechanism of foreseeability. When a duty *is* cast upon a person to take precautions against the wrongdoing of third parties, the ordinary standard of foreseeability applies; and so the possibility of such wrongdoing does not have to be very great before liability is imposed….*Per contra*, there is at present no general duty at common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm may be if the defender does not take steps to prevent it."

In *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057, para 17 Lord Hoffmann endorsed these remarks when he said that reasonable foreseeability was insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates a risk nor undertakes to do anything to avert it. Mr McEachran said that Lord Goff's observations in *Smith v Littlewoods Organisation Ltd* should not be followed, as his approach was not that of the majority. In any event, he said, the issue in this case was simply one of the foreseeability of harm to the deceased if no warning was given. There was already a relationship of proximity.

20. Lord Reed examined this issue with great care, and concluded that Lord Goff's analysis of the problem that arises in cases where harm is caused by a third party's wrongdoing is to be preferred: 2008 SC 351, para 94. The scope of the duty in cases where the risk has been created by the defender, such as *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, may be capable of being determined by assessing the degree of likelihood of injury. But I agree with Lord Reed that Lord Goff's approach is the one that should be applied to the problem raised by this case. We are dealing here with an allegation that it was the defenders' duty to prevent the risk of harm being caused to the deceased by the criminal act of a third party which they did not create and had not undertaken to avert. The point at issue is whether the defenders were under a duty in that situation to warn the deceased that there was a risk that Drummond would resort to violence. I agree that cases of this kind which arise from another's deliberate wrongdoing cannot be founded simply upon the degree of foreseeability. If the defender is to be held responsible in such circumstances it must be because, as Lord Reed suggests in para 97, the situation is one where it is readily understandable that the law should regard the defender as under a responsibility to take care to protect the pursuer from that risk.

Fair, just and reasonable

21. As the cases have developed it has become clear that Lord Goff was right to insist that something more than foreseeability is required, and answers have been provided to the question what that should be. As to what it is, in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618, Lord Bridge of Harwich referred to a series of decisions of the Privy Council and of this House which had emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed, and if so, what is its scope. He then set out the now familiar three-fold

test which requires, in addition to foreseeabilty and a relationship of proximity, that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. In *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2008] 3 WLR 593, para 42 Lord Bingham of Cornhill said that the three-fold test laid down by the House in *Caparo*, by which it must be shown that harm to B was a reasonably foreseeable consequence of what A did or failed to do, that the relationship was one of sufficient proximity, and that in all the circumstances it is fair, just and reasonable to impose a duty of care towards B, was currently the most favoured test of liability.

22. Lord Bridge acknowledged in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618 that the concepts of proximity and fairness amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. He said that the law had moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the various duties of care which the law imposes. These are cases where, as Lord Reed suggested in para 97, the imposition of a duty of care is readily understandable.

23. It is possible to identify situations of that kind. One is where the defender creates the source of danger, as in *Haynes v Harwood* [1935] 1 KB 146, where a van drawn by horses in a crowded street was left unattended and bolted when a boy threw a stone at them. *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 may be seen as a case of this kind. Another is where the third party who causes damage was under the supervision or control of the defender, as in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 where the Borstal boys who escaped from the island and damaged the plaintiff's yacht were under the control and supervision of the officers who had retired to bed and left the boys to their own devices. Another, which is of particular significance in this case, is where the defender has assumed a responsibility to the pursuer which lies within the scope of the duty that is alleged: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, 350, per Lord Steyn; *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464. Other examples of that kind which may be cited are *Stansbie v Troman* [1948] 2 KB 48, where a decorator who was working alone in a house went out leaving it unlocked and it was entered by a thief while he was away; *W v Essex County Council* [2001] 2 AC 592, where the parents of an adopted

child had received assurances from the council that they would not be allocated a child who was known to be, or suspected of being, a sexual abuser; and the circumstances that were reviewed in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653, where a prisoner was placed in a cell with another prisoner with a history of violence who perpetrated a racist attack on him from which he died. See also *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. I am grateful to my noble and learned friends Lord Scott of Foscote and Lord Rodger of Earlsferry for their analysis of the cases from South Africa and Florida which their researches have revealed, as they illustrate the same point: assumption of responsibility in *Silva Fishing Corporation (Pty) Ltd v Maweza* [1957 (2)] SA 256; foolishly increasing the danger in *Bullock v Tamiami Trail Tours Inc* (266 F 2d 326).

24. Mr McEachran said that, as *Caparo Industries plc v Dickman* [1990] 2 AC 605 was a pure economic loss case, it ought not to be followed in a case of this kind which is one of personal injury. But the origins of the, fair, just and reasonable test show that its utility is not confined to that category. It can be traced back to the decision of the Court of Appeal in that case [1989] QB 653, where Bingham LJ at p 679, adopting Lord Keith of Kinkel's observation in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 241, that in considering whether or not a duty of care of particular scope was incumbent upon a defendant it was material to take into consideration whether it was just and reasonable that it should be so, also used the expression "just and reasonable" – an observation on which he said in *Simaan General Contracting Co v Pilkington Glass Ltd* (*No 2*) [1988] QB 758, 773, emphasis was increasingly being placed. It can be traced back further still to the speech of Lord Morris of Borth-y-Gest in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1039 where, in a passage that Lord Keith quoted in *Peabody*, pp 240-241, he said that it would be "fair and reasonable" that a duty of care should exist in that case, where absconders from a Borstal institution damaged the plaintiff's yacht while the officers who ought to have been supervising them were asleep. Taylor LJ gathered these expressions together in the formula "fair, just and reasonable": [1989] QB 653, 696. Counsel for the appellants then adopted that expression in the House of Lords at [1990] 2 AC 605, 609, which the House in its turn accepted.

25. Mr McEachran also said that it was unclear whether the three-fold test was part of the law of Scotland, at least in cases where damages were claimed for personal injury. It had been adopted by Lord Hamilton in *Gibson v Orr* 1999 SC 420. But the only case that he had been able

to cite in support was *Forbes v City of Dundee District Council* 1997 SLT 1330, where the point had been conceded, and in the Inner House in *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* 1997 SC 59 Lord Morison, in his dissenting opinion, had described the "fair, just and reasonable" test as uncertain and wide-ranging. In *Perrett v Collins* [1998] 2 Lloyd's Rep 255, 263 Hobhouse LJ too expressed his misgivings. He said that the concept of justice and fairness was vague: the law could not be remade for every case. The test is indeed broadly expressed. But I see no good reason why, as a general guide to what is required, it should not be regarded as part of Scots law. It is really no more than an expression of the idea that lies at the heart of every judgment about legal policy. If liability is to attach, it should be in situations where this is readily understandable because, looking at both sides of the argument, it is fair and reasonable that there should be liability. *Smith v Chief Constable of Sussex Police*, which is reported together with *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593, provides a recent example of its application in a case of personal injury. It was adopted without criticism by Lord Mackay of Clashfern when he spoke for the House in *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* 1999 SC (HL) 9, 12. It was applied by Lord Brodie in *West v Castlehill LLP* [2008] CSOH 182, para 23 in a situation where he would not have regarded an analysis based simply on foreseeability to be adequate. There is no principle of Scots law that contradicts it, and the fact that the law of liability for negligence has developed on common lines both north and south of the Border provides powerful support for the defenders' argument that it should be applied in this case.

This case

26. Lord Bridge was careful to emphasise in *Caparo Industries plc v Dickman* [1990] 2 AC 605 that the question to which the three-fold test must be directed is not limited to the question whether there is a duty of care at all. It is to be applied too to the question whether the situation gives rise to a duty of care of a given scope. It is the scope of the duty that lies at the centre of the argument in this case. The defenders do not deny that they owed a duty of care to their tenants in the exercise of their contractual duties as landlords, it having been accepted that this does not extend to the exercise of discretionary powers under the statute: *Hussain v Lancaster City Council* [2000] QB 1. But this case falls outside the ambit of their contractual duty. In short the question is whether, acknowledging that the defenders were the deceased's neighbour's landlords, that relationship was such that it is fair, just and reasonable that they should be held liable in damages for the omissions

to warn that are relied on in this case. As Taylor LJ observed in the Court of Appeal in *Caparo Industries plc v Dickman* [1989] QB 653, 703, the question is one of fairness and public policy.

27. The assertion that there was a duty to warn is deceptively simple. But the implications of saying that there was a duty to warn in this case are complex and far reaching. This, it may be said, is a clear case where there had been threats to kill and Drummond's behaviour suggested that, if provoked, he might give effect to them. But if there was a duty to warn in this case, must it not follow that there is a duty to warn in every case where a social landlord has reason to suspect that his tenant may react to steps to address his anti-social behaviour by attacking the person or property of anyone he suspects of informing against him? And if social landlords are under such a duty, must social workers and private landlords not be under the same duty too? In this case it is said that the duty was owed to the deceased. But others in the neighbourhood had complained to the defenders about Drummond's behaviour. Was the duty to warn not owed to them also? It is said that there was a duty to keep the deceased informed of the steps that they proposed to take against Drummond, and in particular to warn him that a meeting had been arranged for 31 July. This suggests that the defenders would have had to determine, step by step at each stage, whether or not the actions that they proposed to take in fulfilment of their responsibilities as landlords required a warning to be given, and to whom. And they would have had to defer taking that step until the warning had been received by everyone and an opportunity given for it to be acted on. The more attentive they were to their ordinary duties as landlords the more onerous the duty to warn would become.

28. These problems suggest that to impose a duty to warn, together with the risk that action would be taken against them by anybody who suffered loss, injury or damage if they had received no warning, would deter social landlords from intervening to reduce the incidence of anti-social behaviour. The progress of events in this case shows that the defenders were doing their best to persuade Drummond to stop abusing his neighbours. These attempts might have worked, as no doubt they have done in other cases. Far better that attempts should be made to cure these problems than leave them unsolved or to be dealt with, inevitably after the event, by the police. As in the case of the police, it is desirable too that social landlords, social workers and others who seek to address the many behavioural problems that arise in local authority housing estates and elsewhere, often in very difficult circumstances, should be safeguarded from legal proceedings arising from an alleged failure to warn those who might be at risk of a criminal attack in

response to their activities. Such proceedings, whether meritorious or otherwise, would involve them in a great deal of time, trouble and expense which would be more usefully devoted to their primary functions in their respective capacities: see Lord Brown of Eaton-under-Heywood's observations in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593, para 133. There are other considerations too. Defensive measures against the risk of legal proceedings would be likely to create a practice of giving warnings as a matter of routine. Many of them would be for no good purpose, while others would risk causing undue alarm or reveal the taking of steps that would be best kept confidential.

29. As I have already noted, in *Caparo Industries plc v Dickman* [1989] QB 653, 703, Taylor LJ summed the matter up by saying that fairness and public policy were the tests. Public policy was at the root of the decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 about the scope of the duty owed by the police which the House followed in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 WLR 1495 and again in *Smith v Chief Constable of Sussex Police*: see *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593. I would take the same approach to this case. The situation would have been different if there had been a basis for saying that the defenders had assumed a responsibility to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to rely on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship. But it is not suggested in this case that this ever happened, and Mr McEachran very properly accepted that he could not present his argument on this basis. I would conclude therefore that it would not be fair, just or reasonable to hold that the defenders were under a duty to warn the deceased of the steps that they were taking, and that the common law case that is made against them is irrelevant. I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.

The case under the 1998 Act

30. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way that is incompatible with

a Convention right. The defenders are what is known as a core public authority. So there is no doubt that the pursuers will be entitled to obtain a judicial remedy against them under section 8 of that Act if they can establish that they acted in a way that is incompatible with the deceased's Convention rights. The Convention right which they invoke is that guaranteed by the first sentence of article 2, which provides that everyone's right to life shall be protected by law. This provision enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction: *Osman v United Kingdom* (1998) 29 EHRR 245, para 115. The question is whether an act which is incompatible with that aspect of the right is disclosed by their averments.

31. The test that the averments must satisfy is a high one. It was accepted in *Osman* that article 2 of the Convention may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual: para 115. But the court went on to say this in para 116:

> "For the court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

It defined the circumstances in which the obligation arises later in the same paragraph:

> "it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

32. The pursuers seek to meet the "real and immediate" test. In article 14 of the Condescendence they aver that the defenders "knew or ought to have known that there was a real and immediate risk to James Dow Mitchell's life on 31 July 2001." This is, to say the least, a bold averment. The defenders are entitled to notice of the basis on which it is to be proved. The pursuers assert that "the defenders" knew that there was a real and immediate risk. But the defenders can only know something through the mind of one or more of their officials. The pursuers do not say who these officials were or by whom or how this knowledge was demonstrated. So one can assume that actual knowledge is not something that they believe they can prove. Their averment must be tested by the weaker alternative. Have the pursuers averred a basis elsewhere in their pleadings for alleging that the defenders "ought to have known" that there was a real and immediate risk to the deceased's life on 31 July 2001?

33. As Lord Bingham of Cornhill said in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593, para 32, in its formulation of the "real and immediate" test the Strasbourg court, in para 116 of its *Osman* judgment, laid emphasis on what the authorities knew or ought to have known at the time. One must beware of the dangers of hindsight. The court must try to put itself in the same situation as those who are criticised were in as events unfolded before them. These events must, of course, be viewed in their whole context. The long history of Drummond's behaviour must be taken into account as well as what took place at the meeting on 31 July 2001. Two facts stand out from this history. The first is that Drummond had threatened to kill the deceased on countless occasions during the past six and a half years. But he had never actually used violence against him, apart from the incident in December 1994 when he damaged his door and broke his windows. The second is that, while Drummond lost his temper at the meeting and was abusive, he is not said to have uttered any threats against the deceased or to have been armed with any kind of weapon. In short, he did not say or do anything to alert the defenders to a risk that he would attack the deceased when he got home, let alone that he would inflict injuries from which he might die.

34. I agree with Lord Reed that there is no basis in the pursuers' averments for saying that the defenders ought to have known that, when Drummond left the meeting, there was a real and immediate risk to the deceased's life: para 144. Taking their averments at their highest, there was nothing to suggest that the deceased's life was really at risk at all, let alone that any such risk was immediate. Lady Paton would have allowed a proof before answer. Relying on dicta in the Court of Appeal

in *Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325; [2007] 1 WLR 1821, she said that it was not possible to rule out the possibility that the defenders themselves had brought about a situation in which a lower threshold of risk might be appropriate. But, as I said in that case when it subsequently reached the House of Lords, the way the test was expressed in *Osman* offers no encouragement to the idea that where the positive obligation is invoked, as it is in this case, the standard to be applied may vary from case to case: [2008] 3 WLR 593, para 70. The standard is constant and not variable, and its limits must be observed in every case where it is alleged that a public authority has violated its positive obligation under the article. Assuming all that the pursuers offer to prove can be established, this case falls well short of that standard. There was nothing to suggest that such a violent attack on the deceased could have been predicted when Drummond left the meeting on 31 July 2001. The situation disclosed by this case is far removed from those referred to in *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74; [2009] 2 WLR 115, where the Strasbourg Court has indicated that there may be a positive operational duty to protect particular individuals. The statutory case too is irrelevant.

Conclusion

35. I would allow the appeal and dismiss the cross-appeal. I would recall the interlocutor of the Extra Division and restore the interlocutor of the Lord Ordinary.

LORD SCOTT OF FOSCOTE

My Lords,

36. On 31 July 2001 Mr Mitchell was violently assaulted by his neighbour James Drummond and died from his injuries. Both Mr Mitchell and Mr Drummond were tenants of Glasgow City Council and the latter's propensity for violence and anti-social behaviour towards, in particular, Mr Mitchell were well-documented and known to the Council. The final and fatal violence of 31 July followed a meeting on that day between Council officials and Mr Drummond at which the Council officials had informed Mr Drummond that a notice of proceedings to recover possession of his council dwelling would be served on him and that any continuance of his anti-social behaviour

could lead to his eviction. The history is more fully described by my noble and learned friend Lord Hope of Craighead in paragraphs 3 to 6 of his opinion.

37. In the action which has now reached your Lordships' House Mr Mitchell's widow and daughter seek to hold the Council liable in damages for "loss, injury and damage as a result of fault and negligence …" of the Council. The damages claim is based also on the contention that the Council "… acted unlawfully and in a way incompatible with [Mr Mitchell's] Convention right to life": see paras 1 and 2 of the Pleas in Law for Pursuers.

38. It is not, of course, suggested that the Council or its officials were in any way complicit with Mr Drummond in his attack on Mr Mitchell, nor that in summoning Mr Drummond to the 31 July meeting and informing him of the notice proposed to be served and the likely consequences if his anti-social behaviour were to continue the Council or its officers were in breach of any duty they owed to Mr Mitchell. Indeed, it might be said that the Council had a duty to Mr Mitchell as his landlord to take those steps. What is complained of, and is alleged to be a breach of a common law duty of care owed by the Council to Mr Mitchell, is that the Council neither warned Mr Mitchell that the meeting was about to be held nor, following the meeting, warned him that it had been held, thereby denying Mr Mitchell the opportunity, forewarned, of taking precautions to safeguard himself from the possibly violent reactions of Mr Drummond. It is the Council's omission to warn that constituted the essential core of the submissions of Mr McEachran QC in support of the action.

39. It is a feature of the common law both of England and Wales and of Scotland that liability in negligence is not imposed for what is sometimes described as a "mere" omission (see eg. Salmond & Heuston on the Law of Torts 21st Ed. (1996), p.219). Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 referred at 580 to the duty to

> "…take reasonable care to avoid acts *or omissions* which you can reasonably forsee would be likely to injure your neighbour" (emphasis added).

Yet it is accepted in both jurisdictions that the Pharisee who passed by the injured man on the other side of the road would not, by his failure to

offer any assistance, have incurred any legal liability. A legal duty to take positive steps to prevent harm or injury to another requires the presence of some feature, additional to reasonable forseeability that a failure to do so is likely to result in the person in question suffering harm or injury. The Pharisee, both in England and Wales and in Scotland would have been in breach of no more than a moral obligation.

40. The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a wide variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant : (eg. employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (eg. a fire on the defendant's land as in *Goldman v Hargrave* [1967] 1 AC 645). Sometimes the additional feature may be found in the assumption by the defendant of responsibility for the person at risk of injury (see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 per Lord Goff of Chieveley at 272). In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or lessened the injury to the victim, the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission.

41. There are two features of the circumstances relating to or leading up to the fatal attack by Mr Drummond on Mr Mitchell that may be thought relevant to the question whether a duty to act with a view to the protection of Mr Mitchell was cast upon the Council. First there is the landlord/tenant relationship between the Council and Mr Mitchell and between the Council and Mr Drummond. The relationship between the Council and Mr Mitchell undoubtedly gave rise to duties owed by the Council to him. A covenant for quiet enjoyment and the obligations of the landlord thereunder is an obvious example. But a landlord's covenant for quiet enjoyment does not protect his tenant against criminal acts of third parties (see Halsbury's Laws Vol 27(1) para.512) whether or not the third parties also are tenants of the landlord. The landlord/tenant relationship goes nowhere, in my opinion, to cast a legal

duty on the Council to protect Mr Mitchell from the risk of being assaulted by Mr Drummond.

42. Second, it was what was said at the 31 July meeting by the Council officials to Mr Drummond that apparently provoked him into inflicting on Mr Mitchell the fatal assault. Was this causative link enough, or arguably enough, to cast upon the Council a delictual duty of care to take steps to protect Mr Mitchell? This, to my mind, is the critical question that arises on this appeal.

43. I have already remarked that the circumstances that can suffice to give rise to a duty to take positive action to protect someone from injury and transform what otherwise would be a mere omission into a breach of tortious or delictual duty are very varied but I have found the judgment of Schreiner JA, given in South Africa's Appellate Division in *Silva Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256, instructive. The appellant company owned fishing vessels and hired out one of them for a fishing expedition on terms that the company would receive 6s. out of every £1 in value of the fish that were caught. The vessel got into difficulties when its engine failed. The company became aware that the vessel was in distress but took no action to go to its aid or to try to effect a rescue and, after drifting for some days with its engine out of action, the vessel sank and the crew were drowned. The widow of one of the crew brought a damages action alleging that the company was in breach of its duty of care to the crew members. There was no allegation that the vessel was in any way unseaworthy or that the engine was defective in any respect (see at 257 C), and the duty, if there was one, was delictual not contractual. The defence was that the company owed no delictual duty. Schreiner JA said (at 260) that "… no liability in delict arises from mere omission …" (see also at 261 A to D) and then examined the circumstances of the case in order to answer the question whether the duty contended for, a duty to try and effect a rescue, had been cast on the company. Two features of the case persuaded Schreiner JA that that duty had been cast on the company. First, the drifting boat belonged to the company and, second, the members of the crew were not merely users of the company's boat but were "taking part with the [company] in a profit making enterprise" (p.260 C) that involved the use of the boat. It followed, held the judge, that the company owed them a duty to provide them with a boat that would take them safely to and from the fishing grounds and had "… not only a moral but a legal duty to provide adequate alternative means of propulsion or suitable means of rescuing the crew of a drifting boat or both" (262 H). He concluded that

> "The activity of the defendant in providing the boat for fishing purposes was beyond question potentially noxious to the crew, and when this situation crystallised and the defendant heard of engine failure and the boat's distress a legal duty …. arose to act with the means at its disposal."

44. The company plainly did not regard themselves as having assumed responsibility for taking steps to rescue the crew from the danger they were in as a result of a breakdown of the boat's engine, but Schreiner JA treated them as having assumed that responsibility. He did so because the boat was the company's boat, supplied for use by the crew members for the purposes of the joint enterprise, and the boat was essential to that joint enterprise. There seems to me no equivalent in the present case to those features. The Council's comparable obligation to Mr Mitchell was to act as a responsible landlord and to take steps to terminate Mr Drummond's tenancy in order to remove him from the locality where he was causing such trouble. That obligation cannot, in my opinion, suffice to justify treating the Council as having assumed responsibility for Mr Mitchell's safety. The Council did not, in my opinion, have any delictual duty to protect Mr Mitchell against assaults from Mr Drummond that those steps might possibly provoke. I can agree that it would have been prudent for one of the Council's officers, following the 31 July meeting, to have warned Mr Mitchell to watch out for squalls. But it does not follow that a failure to have done so can be represented as a breach of a delictual duty of care. Nor can the Council's omission to have warned the police of the situation be so represented. Neither the relationship between the Council and its tenants, Mr Mitchell and Mr Drummond, nor the actions of the Council on 31 July in giving Drummond a final warning about his conduct, can suffice, in my opinion, to cast upon the Council the delictual duty contended for. The attempt to found an action upon the Council's failure to warn is, in my opinion, an attempt to found an action upon a mere omission. For these reasons, no more than supplemental to the reasons given by Lord Hope, and with those given by my noble and learned friends Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, with all of which I am in full agreement, I would allow the Council's appeal on the duty of care issue.

45. On the claim based on a alleged breach of Mr Mitchell's Convention rights I can add nothing to and am in full agreement with Lord Hope's reason for his conclusion that the claim must fail.

46. I would, therefore, allow the appeal, dismiss the cross-appeal and make the order Lord Hope has proposed.

LORD RODGER OF EARLSFERRY

My Lords,

47. In this action the widow and daughter of Mr James Mitchell, who lived in a council house at 221 Bellahouston Drive in the Mosspark area of Glasgow, seek damages from Glasgow District Council ("the Council") for the death of Mr Mitchell. He died in August 2001 as the result of an assault by James Drummond, who lived in a neighbouring council house at 225 Bellahouston Drive. The pursuers aver that Drummond had behaved in a threatening and aggressive manner towards Mr Mitchell on numerous previous occasions and that Mr Mitchell had complained to the Council about his behaviour. In January 2001, after a breach of the peace directed at Mr Mitchell, the Council gave Drummond the notice required as a first step towards recovering possession of his house. Following a further incident involving Mr Mitchell in July 2001, council officials summoned Drummond to a meeting on 31 July. At the meeting he was told that a fresh notice would be issued for recovery of possession of his house. He became angry, but eventually calmed down and apologised. Less than an hour later, Drummond carried out the attack on Mr Mitchell which led to his death. Drummond was convicted of culpable homicide. The circumstances and the parties' arguments are more fully described in the speech of my noble and learned friend, Lord Hope of Craighead.

48. Of course, Mrs Mitchell and her daughter had a claim to compensation for Mr Mitchell's death under the Criminal Injuries Compensation Scheme. In theory, they also had a delictual claim for damages against Drummond, but that would not have been worth pursuing. Instead, they seek to make the Council liable in damages for Mr Mitchell's death at common law and under the Human Rights Act 1998. In saying that, I recognise that the pursuers may well feel that they have interests going beyond the merely pecuniary for pursuing the case against the Council, but that makes no difference to the legal issues which the House has to decide. I deal first with the pursuers' common law claim.

49. On record, the pursuers aver a number of different duties of care which, they allege, the Council owed to Mr Mitchell. But, at the hearing before the House, Mr McEachran QC put the pursuers' common law case on a single basis. He concentrated on their averments that the Council were under a duty to consider Mr Mitchell's safety when arranging the meeting for 31 July 2001, at which further steps were likely to be taken regarding the recovery of possession of Drummond's house. They were accordingly under a duty to advise Mr Mitchell that the meeting was to take place. The pursuers further aver that, if the Council had done so, Mr Mitchell would have been on the look-out for Drummond and would have taken steps to avoid him.

50. The alleged duty of the Council to warn Mr Mitchell about the meeting has to be seen in the context of the Council's relationships with Mr Mitchell and with Drummond. Both were tenants of the Council. More particularly, they were secure tenants under the Housing (Scotland) Act 1987 ("the 1987 Act"). Along with the right to buy, the concept of secure tenancies was introduced by the Tenants' Rights Etc (Scotland) Act 1980. The aim was to give public sector tenants much the same security of tenure as private sector tenants. The 1987 Act has since been replaced by the Housing (Scotland) Act 2001 but the basic concept of a secure tenancy remains the same.

51. The rights and duties of the parties to a secure tenancy are to be found in the terms of the lease, supplemented by certain provisions – for instance, on repairs - which are imposed by the 1987 Act. Rightly, Mr McEachran did not suggest that there was any contractual term, whether express or implied, or any term imposed by the Act, which put the Council under a duty to protect one of their tenants from injury inflicted by the criminal actions of another tenant. When the position of the parties is regulated in this way by a mixture of contract and statute, prima facie there is little room for the common law of delict to impose a duty of care on the Council to provide that protection. Indeed imposing such a duty would tend to run counter to the thrust of the housing legislation towards recognising public sector tenants, in general, as responsible individuals with rights, rather than as a class of people who could not be expected to look after their own interests.

52. As the term implies, under the 1987 Act a "secure tenant" is someone who has security of tenure. It is this secure tenure which makes the tenant's house, in a very real sense, his castle as well as his home. The tenant can be removed from his house only on limited grounds set out in Part I of Schedule 3. These include the situation

where the tenant has been guilty of conduct in, or in the vicinity of, the house which is a nuisance or annoyance: paras 7 and 8. In such cases, under section 47(1) the landlord may raise summary cause proceedings in the sheriff court for recovery of possession of the house. But, in terms of subsections (2) and (3), the landlord can only take these proceedings if he has served a notice on the tenant specifying the ground for recovery and a date, which must be at least four weeks from the date of service of the notice, after which the landlord may raise the proceedings. In any proceedings, the sheriff has power under section 48 to make an order for recovery of possession, but only if he is satisfied that it is reasonable to do so (para 7), or if other suitable accommodation will be available for the tenant (para 8). This is a slow-motion procedure to deal with anti-social behaviour. It is clearly not designed to provide an immediate response to emergencies created by a tenant's criminal behaviour. The inference is that such emergencies are to be dealt with in some other fashion.

53. The meeting which Drummond attended on 31 July is to be seen against this background. As already explained, notice of proceedings under the Act had been served on Drummond at the end of January. On that occasion, the pursuers aver, the Council had advised Mr Mitchell of the situation. Following the January notice, the Council had not raised proceedings, however, and that notice was due to expire in late August. The Council were considering issuing a further notice of proceedings and, at the meeting on 31 July, the officials told Drummond that a further notice was to be issued.

54. The pursuers' averments therefore describe actions on the part of the Council officials which were bound up with the possible exercise of the Council's power under section 47 of the 1987 Act to raise proceedings for recovery of possession of Drummond's house. Moreover, as the pursuers also aver, Mr Mitchell had previously urged the Council to take such proceedings. Indeed, although the point is no longer pressed, among the breaches of duty alleged against the Council on record is a failure to instigate legal proceedings for the recovery of property from violent tenants, such as Drummond, within a reasonable time after complaints had been made, and, in any event, by October 1999 at the latest.

55. So, on the afternoon of 31 July 2001, the Council officials were taking a step towards doing what the Council were empowered to do under section 47 and what Mr Mitchell wanted the Council to do. Later that afternoon Drummond assaulted Mr Mitchell. On behalf of the

Council, Mr Smith QC argued that the pursuers were seeking to make the Council liable for an omission – for failing to warn Mr Mitchell. And, of course, that is right. But the position of the Council is not exactly comparable to, say, someone watching and doing nothing as a child drowns in a shallow pool or a blind man walks into the path of an oncoming car. In such cases the observer plays no part in the events. Here, however, what the Council officials told Drummond undoubtedly led on to his assault on Mr Mitchell. According to the analysis and terminology of Hart and Honoré, *Causation in the Law* (2nd edition, 1985), pp 194-200, by telling Drummond at the meeting that the Council were going to issue a fresh notice of proceedings, the officials provided an opportunity for Drummond to assault Mr Mitchell. It might be preferable to say that what the officials did at the meeting provided a particular reason why, foreseeably, Drummond might choose to assault him. Or, to adopt the expression used by Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956, 986, what they did can be seen as having "given the occasion" for Drummond's attack. The question therefore is whether the law should impose a duty of care on the officials when fixing such a meeting to warn someone in Mr Mitchell's position and so give him an opportunity to take avoiding action.

56. A convenient starting-point is to be found in the speech of Lord Goff of Chieveley in *Maloco v Littlewoods Organisation* 1987 SC (HL) 37, 76-77:

> "Another statement of principle, which has been much quoted, is the observation of Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956, when he said, at p 986: 'In general … even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do.' This *dictum* may be read as expressing the general idea that the voluntary act of another, independent of the defender's fault, is regarded as a *novus actus interveniens* which, to use the old metaphor, 'breaks the chain of causation.' But it also expresses a general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others. Of course, if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty. We are therefore thrown back to the duty of care. But one thing is clear, and that is that liability in negligence for harm caused by the deliberate wrongdoing of others cannot be founded simply upon foreseeability

> that the pursuer will suffer loss or damage by reason of such wrongdoing. There is no such general principle. We have therefore to identify the circumstances in which such liability may be imposed."

Lord Goff went on, at p 83, to reject the idea that the problem in that case could be solved simply through the mechanism of foreseeability. Like Lord Hope, I respectfully agree with the reasons Lord Goff gave for rejecting Lord Mackay of Clashfern's approach, based on how foreseeable the unlawful conduct of the third party might be. In the final paragraph of his speech, at p 84, Lord Goff observed:

> "It is very tempting to try to solve all problems of negligence by reference to an all-embracing criterion of foreseeability, thereby effectively reducing all decisions in this field to questions of fact. But this comfortable solution is, alas, not open to us. The law has to accommodate all the untidy complexity of life; and there are circumstances where considerations of practical justice impel us to reject a general imposition of liability for foreseeable damage…. In truth, in cases such as these, having rejected the generalised principle, we have to search for special cases in which, upon narrower but still identifiable principles, liability can properly be imposed."

The House has to decide whether, in this case, there is some identifiable principle, narrower than the mere foreseeability of harm to Mr Mitchell, upon which liability can properly be imposed on the Council.

57. As Lord Goff explained, in some circumstances a defender who provides an opportunity for a third party to harm the pursuer in a foreseeable way must take reasonable care to prevent the harm. If I negligently collide with a cyclist who is knocked unconscious, I must surely take reasonable care to move her from the path of oncoming vehicles. Whether I must also take reasonable care to prevent her belongings from being stolen may be more debatable. Similarly, a decorator who leaves the door of an empty house unlocked is indeed liable if a thief then enters and steals, because the main point, at least, of the decorator's duty to lock the premises is to prevent theft: *Stansbie v Troman* [1948] 2 KB 48. A police authority owes a duty of care to the public at large not to entrust a gun to a probationer officer whose family circumstances might make him volatile and unstable. So the authority

was liable to someone whom the officer shot in the course of an incident when he was intent on using the gun to maim his former partner and her boyfriend: *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273.

58. In all these situations the defender's act which provides the opportunity for the third party to injure the claimant is itself wrongful. As Lord Sumner pointed out in the passage from *Weld-Blundell v Stephens* quoted by Lord Goff, that is not enough to make for liability in delict for the harm which a third party subsequently deliberately chooses to inflict. But it is, at least, a start. In the present case, by contrast, not only were the Council officials not committing any wrong by holding the meeting with Drummond, they were taking steps towards exercising a statutory power given to the Council as landlords, to be used in the interests of good order in the neighbourhood of their houses. It was these entirely lawful and legitimate steps by the Council officials which provided the occasion for Drummond choosing to assault Mr Mitchell. No delictual liability can arise out of those legitimate steps as such. Nor, given the short time between the meeting and the assault, can the pursuers base their claim on any alleged duty to warn Mr Mitchell which would have arisen when the meeting took place. So they have to aver that, since the Council knew that Drummond had threatened to harm Mr Mitchell and was liable to be hostile to him after the meeting, they had a duty to warn him at the stage when they were setting things in motion by inviting Drummond to the meeting.

59. In certain respects the case is reminiscent of *Bullock v Tamiami Trail Tours Inc* (1959) 266 F 2d 326. The case dates from the 1950s when racial segregation was rife in parts of Florida. A black Jamaican minister and his wife, who looked white, were on a visit to the United States, where they embarked on a long-distance bus journey. While the bus was travelling through Taylor County, Florida, the couple sat in the front part, which was reserved for white passengers. When asked by the driver to move, they refused to do so. The bus company had issued instructions to drivers that, in such cases, they were not to call the police. The police were to be called only if a disturbance ensued. At a stop in a town in the area, the bus driver spoke to some police officers in the bus station restaurant and told them about the (apparently) mixed-race couple sitting up in the front, adding that there was nothing he could do about it. The police officers said that their hands were tied. This conversation was overheard by a man at the same table as the police officers, who then bought a ticket, boarded the bus, beat up the husband and slapped the wife. The couple sued the bus company for damages. The Fifth Circuit Court of Appeals held that a carrier, which

could reasonably foresee injury to its passenger caused by a fellow passenger, in time to prevent its occurrence, was subjected to the highest degree of care to its passenger either to protect him from, or to warn him of, the danger. The court went on to hold the company liable on the ground that "the danger should reasonably have been foreseen by Tamiami in time to act with the utmost care to avoid injury to its passengers, particularly by warning them and by not doing foolish things to increase their danger...".

60. In part, the court proceeded on the basis that the company should have warned the couple of the potential problems before they ever set off on their journey through Florida. Forewarned, the couple would have known of the local mores and the risks which they would therefore face on that part of the trip. But the court also focused on the conversation between the bus driver and the police officers: "the driver should not, either willfully or negligently, have informed the assailant of the Bullocks' position on the bus and of their apparent color and lack of color." In that part of Florida, a violent reaction was not unforeseeable. So the bus company was liable on the basis that the driver had negligently and foolishly increased the danger of an assault and had not taken steps to prevent it.

61. The case is perhaps instructive precisely because of the very factors on which the court relied to find the bus company liable. The company was held to be under a general duty to protect a passenger from a foreseeable assault by a fellow passenger. Under Scots law there is no equivalent general duty on a landlord to protect one tenant from an assault by the tenant of another house. Even assuming, without deciding, that a comparable duty of care might lie on a bus operator under Scots law, the difference is understandable since passengers on a bus are shut up together, while tenants can more easily protect themselves by taking avoiding action. In addition, the public conversation between the bus driver and the police officers in the restaurant, which triggered the assault, served no legitimate purpose, since he had been instructed not to report such situations to the police. By contrast, the meeting between the Council officials and Drummond was preparatory to a possible, legitimate, exercise of the Council's power under section 47 to recover possession of his house because of his behaviour.

62. Parliament chose to give the Council a power to raise proceedings in such circumstances; it chose not to impose a duty on the Council to raise them. So the mere creation of that statutory power cannot be regarded as imposing a common law duty to exercise the

power: *Stovin v Wise* [1996] AC 923; *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. In this case it can readily be seen that any such duty would be inappropriate since the Council have to consider a whole range of factors, including the possible need to rehouse the disruptive tenant and so perhaps replicate the difficulties elsewhere, before deciding whether to take proceedings. Suppose, then, that the Council had decided not to exercise their power to recover possession of Drummond's house, even though it was foreseeable that, if he continued to stay there, he might assault Mr Mitchell. If irrational, the decision might have been subject to judicial review. But if Drummond had indeed subsequently assaulted Mr Mitchell near his house, the Council could not have been held liable to the pursuers in delict on the basis that they had owed him a duty of care to take proceedings under section 47 to recover possession of Drummond's house and so reduce the risk of him attacking Mr Mitchell there.

63. But here the pursuers are arguing for the imposition of a duty of care to Mr Mitchell at a stage before the Council had even reached the point at which they would decide whether or not to exercise their power to take proceedings. It so happens that the Council chose to invite Drummond to a meeting. So the contention is that the officials were under a duty, when fixing such a meeting, to advise Mr Mitchell. In other cases, the Council might go straight to issuing a warning of proceedings. Then, presumably, the supposed duty of care would arise when the warning was to be issued. In reality, the greatest risk of violence would occur when the Council exercised their power under section 47 and the sheriff granted an order under section 48. Parliament did not see fit, however, to impose any requirement on councils or sheriffs to protect other tenants, whether by warnings or otherwise, from possible violence at that stage. Nor has the Scottish Parliament imposed such a requirement under the Housing (Scotland) Act 2001. The presumption must be that both legislatures have proceeded on the basis that any possible criminal violence resulting from the operation of these powers is to be dealt with, in the usual way, by the police and criminal justice system. The pursuers point to no undertaking or other circumstance which would show that, exceptionally, the Council had made themselves responsible for protecting Mr Mitchell. That being so, it would be inconsistent with the scheme of the legislation, and neither fair, nor just nor reasonable, to impose a duty on the Council to warn Mr Mitchell of what they were proposing to do, whether at a preliminary stage or when actually exercising their section 47 powers. In short, I see no identifiable principle on which it would be appropriate to impose delictual liability on the Council for the loss and injury caused to the pursuers by Drummond's criminal act, simply because they did not warn

Mr Mitchell that their meeting with Drummond was taking place. The pursuers' common law case is accordingly irrelevant.

64. I turn now to the pursuers' claim that the Council violated Mr Mitchell's article 2 Convention rights.

65. It is trite law that, in certain circumstances, article 2 imposes a positive obligation on States to protect the lives of those within their jurisdiction. At its most fundamental, as the European Court held in *Osman v United Kingdom* (1998) 29 EHRR 245, 305, para 115, article 2 requires a State to put in place

> "effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions."

In Scotland there are, of course, criminal laws to deter the commission of offences against the person, police forces to prevent such crimes and to detect wrongdoers, and courts to impose penalties. In this way the United Kingdom complies with its basic positive obligation under article 2 with respect to people in Scotland.

66. The obligation of the United Kingdom under article 2 goes wider, however. In particular, where a State has assumed responsibility for an individual, whether by taking him into custody, by imprisoning him, detaining him under mental health legislation, or conscripting him into the armed forces, the State assumes responsibility for that individual's safety. So in these circumstances police authorities, prison authorities, health authorities and the armed forces are all subject to positive obligations to protect the lives of those in their care. The authorities must therefore take general measures to employ and train competent staff and to adopt appropriate systems of work that will protect the lives of the people for whose welfare they have made themselves responsible. These are general obligations, not directed at any particular individual, but designed to protect all those in the authorities' care. If, however, an authority fails to fulfil one of these obligations and someone in their care dies as a result, there will be a violation of his or her article 2 Convention rights. Authorities which are under these general obligations to persons in their care may also come under a distinct, additional, "operational" obligation to take special preventive measures

to protect a particular individual in their care. That operational obligation arises only where the authority knows, or ought to know, of a "real and immediate risk" to the life of the particular individual. I refer generally to the discussion of these matters in the speeches in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74; [2009] 2 WLR 115.

67. The pursuers aver that the Council knew or ought to have known that there was a real and immediate risk to Mr Mitchell's life on the day he was killed. As Lord Hope has explained, that bare averment is unsupported by any more specific averments of circumstances which would give it content. Indeed, according to the pursuers' averments, the real and immediate threat to Mr Mitchell occurred about an hour after the meeting, when no Council officials would be present or be under any duty to be present. But, even leaving that matter on one side, in my view, the pursuers' article 2 case is fundamentally irrelevant.

68. Mr Mitchell lived in the area covered by the Strathclyde Police Force. They were the public authority with the duty, and with the resources, to prevent criminal violence there. It was undoubtedly their duty to have in place appropriate systems for preventing criminal violence in Mosspark. Similarly, if they had been made aware of a real and immediate threat to Mr Mitchell's life in their area, Strathclyde police officers would have been under a duty to take the appropriate steps, in the circumstances, to prevent it. But that operational duty would have arisen only as part of the overall duty of the police force to prevent criminal violence.

69. The position of the Council is quite different. Mr Mitchell was a secure tenant of the Council. And, of course, if the Council had allowed their housing stock to fall into disrepair, so that tenants were at risk of suffering life-threatening injuries or of becoming seriously ill, the Council could have been in breach of article 2. But nothing like that is alleged here. What is said is that the Council were under a positive duty to protect Mr Mitchell from a criminal attack by Drummond. The basis of the claim is that Mr Mitchell had this article 2 Convention right against the Council simply because both he and Drummond were tenants of houses owned by the Council. But, as a secure tenant, Mr Mitchell was not in the custody or control of the Council. To judge by the pursuers' averments, he was not ill or otherwise in need of care because of old age. He was not living in Council sheltered accommodation or in a Council retirement home: he was living in an ordinary house. The Council had not deprived him of his freedom of movement or action or,

in any other way, assumed responsibility for his safety. Like anyone else, Mr Mitchell was free to come and go as he pleased, and to act as a responsible adult. Indeed, as already mentioned, the whole policy behind the introduction of secure tenancies was to free public sector tenants from some of the controls to which they had previously been subjected and to emphasise their independence as individuals with rights over their own homes. I therefore see nothing in the relationship of landlord and secure tenant to give rise to any positive article 2 obligation on the part of the Council to protect Mr Mitchell's life. The public authority with the positive duty to protect Mr Mitchell from criminal assaults by Drummond was Strathclyde Police, not the Council. That position did not change just because the fatal assault occurred when, as landlords, the Council took steps towards exercising their statutory power to recover possession of Drummond's house.

70. Indeed, any other conclusion would have significant implications for councils and housing associations and similar organisations, with duties to provide houses for people who may well not be desirable tenants. These bodies might come under a duty to take appropriate general steps - whether in designing or modifying their housing stock, or else by setting up CCTV or other systems for gathering information about what was going on in their neighbourhood, or by instituting patrols - to prevent outbreaks of criminal violence among their tenants. As it is, councils and housing associations etc do not have, and are not meant to have, the resources, staff or powers to take effective steps to prevent such crimes. On the contrary, they are resourced on the basis that they are landlords operating within a society where the responsibility for preventing violent crime lies with the police, who, in their turn, are given the resources, training and powers to do the job. Costly duplication of the work of the police is neither necessary nor indeed desirable.

71. It follows that, even if the Council officials had been aware of a real and immediate threat to Mr Mitchell's life from Drummond, they would not have been under any article 2 obligation to prevent it. The averments of a breach of Mr Mitchell's article 2 Convention rights by the Council are accordingly irrelevant.

72. For these reasons, and for the reasons given by my noble and learned friends, Lord Hope of Craighead, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood, I consider that the position in law is clear on the pleadings and that nothing would be gained by

allowing a proof before answer. I would therefore allow the appeal, dismiss the cross-appeal, and make the order proposed by Lord Hope.

BARONESS HALE OF RICHMOND

My Lords,

73. I too agree that this appeal should be allowed and the cross appeal dismissed. Your lordships have given a multitude of reasons for rejecting the common law claim and I believe that I agree with almost all of them. Three points stand out.

74. The first is that we are all agreed that, both north and south of the border, foreseeability of harm is not always enough to impose a duty of care. Mr McEachran QC, for the pursuers, argued their case with great charm. One can quite see why Mr Mitchell's widow and daughter think the council at least partly to blame for the grievous loss which they have suffered. Whatever might be the case south of the border, argued Mr McEachran, the law in Scotland was based on principle; and that principle is the foreseeability of harm to one's neighbour, set out by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580. *Donoghue v Stevenson* replaced the former categories of liability with a single, over-arching principle, henceforth to be applied to new factual situations as they arose. Admittedly, that was a case of physical harm. Different considerations might be appropriate where purely financial loss was caused. But this too is a case of physical harm, the most serious physical harm there can be. Categories should be a thing of the past. Considerations of whether it would be "fair, just and reasonable" to impose liability, introduced to limit the scope of liability for purely economic loss, simply did not arise.

75. In common with your lordships, however, I agree that, even in the case of physical harm, there are some qualifications to the foreseeability principle. An illustration, albeit not on all fours but nonetheless instructive, can be found in another case from Scotland *MacFarlane v Tayside Health Board* [2000] 2 AC 59. It is entirely foreseeable that, if a doctor negligently performs a sterilisation operation or fails to warn that such an operation does not guarantee infertility, an unwanted child may result. An unwanted pregnancy and childbirth are physical harms to the mother. They also bring serious consequential

losses. Some may see these as purely financial, the cost of feeding, clothing, housing and caring for the child; others would see them as physical, the physical tasks of looking after and bringing up the child. It matters not how they are seen, because the foreseeable financial losses consequent on a physical injury have always been recoverable in addition to compensation for the injury itself. But in *McFarlane's case*, the House of Lords unanimously held that it was not fair, just and reasonable for such losses to be recovered. That principle curtailed the scope of the duty which would otherwise have arisen on conventional foreseeability principles (see, eg, Lord Hope at p 97E).

76. The second point upon which we are all agreed is that foreseeability alone is not enough to impose a duty to safeguard a person from the criminal acts of third parties. It is a necessary but not a sufficient condition. There must be something more. Lord Rodger in paragraph 57 and Lord Brown in paragraph 82 of their opinions have given some examples, none of which applies in this case. In essence, there must be some particular reason why X should be held to have assumed the responsibility for protecting Y from harm caused by the criminal acts of Z. I also share the view of Lord Rodger, in paragraph 55, that this is not a pure omission case. A driver who takes to the roads and thus is an actor in the drama is liable for the things which he fails to do as well as for the things which he does. His failure to keep a proper lookout, or to indicate when he proposes to change direction, is an omission. But he took the action of propelling his car in a particular way. Thus it could be said that the council were actors in this drama. They took the action of summoning Mr Drummond to warn him of what they proposed to do if he did not mend his ways. Just as the driver should not change direction without taking steps to safeguard other road users from harm, it could be said, the council should not take action against one tenant without taking steps to safeguard his neighbours from harm. Hence, it is not quite enough to say that the complaint of a failure to warn is a complaint of a pure omission. But the question remains whether it is fair, just and reasonable to impose such a safeguarding duty upon the council.

77. The third point on which we are all agreed is that it is not fair, just and reasonable to impose such a duty in a case such as this, where perfectly proper actions are taken for the general good of the community but may provoke another to commit a criminal act. Lord Hope, in paragraphs 27 and 28 of his opinion, and Lord Rodger, in paragraph 62 have given all the reasons why this would not be fair, just and reasonable. The advent of secure public sector tenancies has meant that social landlords have had to be given powers to deal with anti-social

behaviour by their tenants. It is in everyone's interests that those powers should be properly and responsibly used. But equally there are difficult choices to be made, given that social landlords cannot pick and choose their tenants with quite the freedom that private landlords can. So no-one now argues that there is a duty to use their powers in a particular way. If they do take action, it may be good practice to keep other tenants or even neighbours informed of the steps being taken, but landlords will also be concerned about the privacy interests of all concerned. They certainly should not be deterred from the responsible use of their powers by the threat of liability for the harm caused by the criminal acts of those anti-social tenants. Their anti-social tenants are presumed to be grown-ups with minds of their own who can make their own choices about how to behave. The liability is theirs and the fact that they may have no means to pay is not by itself a good enough reason to transfer the liability to someone else.

78. This is but the latest in a long line of cases from Scotland which have played such an important part in shaping the law of negligence for the whole of the United Kingdom. The Human Rights Act 1998 is, of course, unquestionably the law for the whole of the United Kingdom and must be read and given effect in the same way both north and south of the border. I too venture to think that, had the Extra Division had the benefit of the decision of this House in *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2008] 3 WLR 593, then they would have been unanimous in excluding the human rights case from probation.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

79. Suppose a landlord knows his disruptive tenant to be in dispute with a neighbour. Suppose further that the neighbour complains and the landlord then threatens the tenant with eviction for causing nuisance and annoyance. Suppose finally that the tenant blames the neighbour for this and attacks him. Is the landlord to be held liable to the neighbour (or to his dependents if the attack proves fatal)? The answer must be the same whether the neighbour too is one of the landlord's tenants or merely another resident in the area, and the same whether the landlord is a rich public authority or a poor private owner (so that this is not a case about the liability of public authorities). Does the landlord in these

circumstances owe the neighbour a common law duty of care—a duty of care, that is, with regard to the neighbour's safety from the tenant? Would that be fair, just and reasonable? More colloquially—but to my mind no less accurately—would this be a good idea?

80. That essentially is the question for your Lordships' determination on this appeal. There was some suggestion in argument that the test for liability was different (and more exacting) in England than in Scotland but that cannot be. That would be bizarre indeed, not least given that much of England's negligence law was forged in Scottish appeals. Naturally one assumes that the attack was reasonably foreseeable by the landlord—without that, there could be no question of liability. So much is trite law. But more is required. Whether liability arises depends too on general considerations of fairness and public policy. On the facts assumed above—fundamentally those of the present case but expressed more broadly since your Lordships are concerned here with a question of law which cannot depend upon the detailed circumstances of any particular case—should landlords be made liable for injuries deliberately inflicted by their tenants?

81. Generally speaking, people are not liable for the crimes of others. A is not ordinarily liable to victim B for injuries (or damage) deliberately inflicted by third party C. In some situations, of course, where, for example, C is employed by A or otherwise acting on A's behalf, A may be vicariously liable for C's crime. But it cannot be said that a landlord is vicariously liable for his tenant's crimes and a consistent line of authority holds that landlords are not responsible for the antisocial behaviour of their tenants: *Smith v Scott* [1973] Ch 314, *O'Leary v London Borough of Islington* (1983) 9 HLR 83, *Hussain v Lancaster CC* [2000] QB 1, and *Mowan v Wandsworth LBC* [2001] LGR 228.

82. A may also be liable for C's crime where he is under an obligation to supervise C and fails to do so: *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, where Borstal boys escaped (and caused damage in the vicinity whilst escaping: important because proximity too is a necessary condition of liability in these cases) whilst their warders were asleep, is a good illustration of this. Similarly, if A specifically creates a risk of injury, by, for example, arming C with a weapon, he may be liable for the resulting damage, as in the particular circumstances of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. Similarly, A may be liable if he assumes specific responsibility for B's safety but carelessly then fails to

protect B: see, for example, *Costello v Chief Constable of Northumbria* [1999] 1 All ER 550. It cannot credibly be suggested, however, that any of these situations arise here. Landlords are under no obligation to supervise their tenants and prevent their committing criminal acts; by threatening a disruptive tenant with eviction a landlord cannot sensibly be said to be creating the risk of personal violence towards others in the same way as the British Virgin Islands police created a risk by arming an erratic probationer; and there can be no question of landlords assuming responsibility for the safety of neighbours (or, indeed, visitors) even if they know their tenants to be threatening them.

83. As Lord Hope of Craighead has explained, the sole, and very narrow, basis upon which the pursuers now put their claim is that the defenders were under a duty to warn the deceased of precisely when they proposed to threaten their tenant with eviction since it would be this threat which predictably might precipitate violence on his part. To my mind this argument is convincingly disposed of by Lord Hope at paras 27 and 28 of his opinion and there is little I can usefully add on the point. In my opinion there will be very few occasions on which a bare duty by A to warn B of possible impending violence by C will arise. Given, as already stated, that A cannot in any meaningful sense be said to have created the risk of injury that foreseeably arose here, or to have assumed specific responsibility for B's safety from C, the contention that he was under a positive duty to warn B and that he is liable for B's death because of a mere omission to do so appears to me plainly unsustainable. I agree too with what my noble and learned friend Lord Rodger of Earlsferry says on this point.

84. I cannot help thinking that if the Extra Division had had the advantage of the House's decision in *Smith v Chief Constable of Sussex Police* [2008] 3 WLR 593 (reported together with *Van Colle v Chief Constable of the Hertfordshire Police*), the majority (in addition to Lord Reed) would have recognised both the impossibility of the pursuer's claim succeeding and the consequent desirability of striking it out at this stage (not allowing the pursuers a proof before answer)—see para 140 of my opinion in *Smith* and para 12 of Lord Hope's opinion above. Very different considerations, of course, arose in *Smith*. But realistically, if the police owed no duty of care in the circumstances arising there, it would be highly surprising if the pursuers owed a duty of care in the circumstances of the present case. Not least, it would be odd indeed if the pursuers were liable in law for not warning the deceased whereas, had the police been told of all the facts and nevertheless failed to protect the deceased, they (the body principally

charged with the protection of the public) would have been under no such liability.

85. With regard to the pursuer's cross-appeal against the exclusion from probation of their human rights claim under article 2 of the Convention, I have nothing to add to what has been said by Lord Hope and Lord Rodger. Again, had the Extra Division had the advantage of the decision of the House in *Van Colle*, it seems inconceivable that Lady Paton would not have been in agreement with the majority on this issue.

86. In the result, I too would allow the appeal, dismiss the cross appeal and make the order which Lord Hope proposes.