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Hillsborough Case: Contemporary Approach to Tort Liability of the Police to be Reviewed?

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Introduction

The issue of police negligence in connection with the Hillsborough disaster is an area which is widely addressed in a vast number of research papers and articles. However, at the same time, the civil litigation that took place as a result of Hillsborough is most often discussed from the position of the secondary victim's psychiatric injury, as opposed to public body liability. This work aims to assess some of the Hillsborough cases from a perspective of police immunity, with a view of the general approach to police negligence in tort law. On the basis of this analysis, conclusions will be made about the controversies and difficulties that the protective approach towards police liability causes, both generally and in regards to the framework of the Hillsborough disaster itself, and whether, all things considered, the existing situation is in need of redress.

In the first chapter of this paper I will focus on the description of events that took place on 15th of April, 1989 at the Hillsborough Stadium. The purpose of this overview is to clarify what factors contributed to the disaster, as well as to what extent the South Yorkshire Police were responsible.

In the second chapter, I will analyse the history of the inquiries and reports that were conducted and published in the period from August, 1989 up to the present day. Special attention will be paid to the recently published Hillsborough Independent Panel Report, which caused significant resonance within the media due to the facts it revealed about the major cover-up of South Yorkshire Police. The purpose of this chapter is to contextualise the latter discussions connected with police liability within the particular Hillsborough disaster situation.

The third part of this work covers the question of public bodies' liability in English law in general, as well as police liability in particular, which includes the overview of the case law that is connected with the issue of police immunity and the evolution of this principle. This is done in order to establish how the Hillsborough cases were different from all other police negligence claims, as well as to outline the important principles that guide public bodies' liability in England.

The fourth chapter is concerned with analysis of the cases brought to court as a result of the Hillsborough disaster, with special attention being paid to *White v Chief Constable of South Yorkshire Police*.¹ In this part of my work I will try to establish to

¹ [1999] 2 AC 455 (HL).

what extent the decision taken by the judges was, firstly, influenced by the policy considerations and, secondly, whether these considerations had anything to do with protective approach towards civil liability of the police.

Finally, conclusions will be made about the effectiveness of the police immunity approach in English law and possible difficulties that are connected with the wide application of this principle, both in connection with the events of Hillsborough and generally.

1. Hillsborough on the 15th of April, 1989.

In this chapter I will be focusing upon the events of the 15th of April, 1989, paying special attention to the way in which the policing of the stadium was organised and carried out by the South Yorkshire Police (abbreviated to SYP hereafter), and also how the police officers responded to the unfolding tragedy and its aftermath. The purpose of this analysis is to establish to what extent SYP were responsible for the disaster and how the situation was dealt with as it began to break out and during the aftermath. Due to the fact that detailed examination of all the arrangements is not required in the framework of this paper, other arrangements as well as the layout of the relevant part of the grounds and the state of the stadium will be described in brief.

For the purpose of this work, the events that took place at Hillsborough are subdivided into 2 categories according to the time period during which they took place: the build-up before the catastrophe and then the crush itself, which happened between 2.44 and 3.05 pm, and the time period immediately after the disaster. At the end of the chapter I will summarise the facts about the response of SYP to the events at Hillsborough.

1.1 The Hillsborough Stadium and Arrangements at the Grounds

The incident that is in the focus of this paper took place on the 15th of April, 1989, at the Hillsborough Stadium in Sheffield, during the FA Cup semi-final match between Liverpool and Nottingham Forest football clubs. Due to a fatal sequence of events, a severe crush occurred in pens 3 and 4 of the stadium, which resulted in the death of 96 Liverpool supporters who were caught in the crowd which formed on the standing terraces. This disaster is often referred to as being the worst tragedy in the history of football.²

The accident occurred in the western part of the grounds, in the standing areas that were divided with the help of metal fences into smaller spaces ('pens'). These fences were put up following the events in 1981 when severe crushing occurred on the terraces, which lead to 38 spectators being injured. The fences were designed to solve crowding problems and also to divide the spectators into several groups so that they could not relocate anywhere else along the terraces: segregation of the crowd

² Hillsborough Independent Panel, *Hillsborough: The Report of the Hillsborough Independent Panel* (2012-13, HC 581), para 1.6; Editorial, 'Hillsborough Disaster and its Aftermath' BBC (19th December 2012) <www.bbc.co.uk/news/uk-19545126> accessed 21th March 2013.

was achieved.³ Pens 3 and 4 of the western terraces, which became the centre of the accident, could be accessed via a long tunnel built under the tribunes. Before getting to the tunnel, the visitors had to go through the turnstiles at one of the entrances in order to get inside the grounds.⁴

The first major issue that contributed to the gravity of the disaster was the state of Hillsborough Stadium itself. According to the Hillsborough Independent Panel Report, the state of the grounds was not fully corresponding with the Green Guide, which, though not being a legally binding document is widely relied on in terms of the requirements needed for a sports venue to be safe.⁵ The turnstiles were prone to malfunctioning,⁶ which would slow down the whole process of entering the grounds in case of a big gathering of people. As well as that, the width of the gates that lead from the pens to the pitch was much less than specified in the Green Guide.⁷ However, the most important fact in connection with the Hillsborough events is that the safety certificate for the stadium was last received prior to the erection of the fences that formed pens 2 and 3.⁸ Therefore, while the pens apparently carried out their segregation function successfully, the safety of this construction for the visitors could be put under question.

The tragic events of the 15th April took place at the part of the stadium where access was gained through the Leppings Lane entrance. The signs inside the Leppings Lane end that directed the supporters towards various parts of the grounds were, according to the later examinations in the Taylor Inquiry, not efficient in providing the spectators with alternative routes that led to different parts of the standing terraces: as soon as a person passed the turnstiles, he or she would immediately see the entrance to the tunnel with an inscription ‘Standing’ above it, as well as a letter ‘B’. All of the tickets to the west terrace were marked with this letter; therefore, once again, almost all the visitors were likely to take this way to the terrace, simply unaware of the fact that there were two more ways leading to the west terrace to pens 1 and 2 or to pens 6 and 7.⁹

³ Phil Scraton, ‘Death on the Terraces: the Contexts and Injustices of the 1989 Hillsborough Disaster’ (2004) 5(2) *Soccer and Society* 183, 185.

⁴ RT HON Lord Justice Taylor, *The Hillsborough Stadium Disaster 15 April 1989* (Cm 765, 1989) paras 37-46.

⁵ Hillsborough Independent Panel (n 2) para 2.1.42.

⁶ *ibid* para 1.123.

⁷ *ibid* paras 6.9.

⁸ *ibid* para 1.141.

⁹ Lord Taylor (n 4) paras 40-44.

The policing of the match was carried out by South Yorkshire Police, as it had been during the similar semi-finals in earlier years. SYP was responsible for a number of arrangements that had to do with ticket allocation and crowd control in and around the ground.¹⁰ Only 21 days before the 15th of April, 1989, Chief Superintendent Brian Mole, who had extensive experience in policing the matches at Hillsborough, was replaced by David Duckenfield. The latter had very little experience of policing football matches of this scale and the rationale behind Mr. Mole's removal is still not entirely clear to this day; it happened in the circumstances that were described as 'highly controversial' by the Hillsborough Independent Panel Report.¹¹

During the Hillsborough Disaster match, there were approximately 1,200 men from SYP at the stadium, the number which constituted nearly 38 percent of the overall number of people in SYP.¹² One of the main goals of the pre-match arrangements undertaken by the police was to divide the supporters of Liverpool and Nottingham Forest within the stadium, in order to avoid the disturbances and fights that were likely to happen as a result of clashes between the fans. The places were allocated in such a way that supporters of Liverpool and Nottingham Forest would not queue for the same turnstiles or stand close to each other in the pens or tiers. Instead, specific place allocation was carried out in such a way that supporters of each club would be seated in the areas close to the entrances which, from experience of games from previous years, were the most likely for each set of fans to use. These arrangements resulted in Liverpool fans taking up the north and west parts of the venue, whereas Nottingham Forest fans were predominantly seated in the south and east sides. North and west parts could be accessed from Leppings Lane, south and east sides-from Peninstone Road.¹³

The decision to allocate seats in the way described above had one important consequence: despite the fact that the number of Liverpool supports would, as a rule, exceed the number of Nottingham forest supporters, the former ones were given 24,256 seats (of which 10,100 standing) as compared with 29,800 (of which 21,000 standing) for the latter. Taking into consideration the obvious fact that seating places are normally more expensive than standing ones, a conclusion can be made that

¹⁰ ibid para 35.

¹¹ Lord Taylor (n 4) para 275; Hillsborough Independent Panel (n 2) paras 2.2.8, 2.2.14-15.

¹² Lord Taylor (n 4) para 47.

¹³ ibid paras 35-36.

Liverpool fans were in a disadvantaged position in terms of the cost of the tickets as well as the number of seats.¹⁴

The Leppings Lane entrance, as mentioned earlier, had already been the centre of a large problem crowd back in 1981, when the FA Cup Semi-Final was held between Tottenham Hotspur and Wolverhampton Wanderers. It was after these events that the terraces were divided into pens. Despite the fact that SYP were not officially in charge of them, common practice was that it was their task to monitor and maintain the terraces. On this topic, LJ Taylor in his report states:

What is clear, however, is that de facto the police at Hillsborough had accepted responsibility for control of the pens at the Leppings Lane end. The evidence of the senior officers who had been concerned with policing at Hillsborough over the years was all one way on this point.¹⁵

In contrast to previous major matches, during the 1989 Semi-Final all of the pens were to be opened from the very beginning so that the fans were able to ‘find their own level’,¹⁶ which in practice meant that the visitors were not provided with any directions at all by either the stewards or the police once inside the stadium and could move where they wanted to on the terraces.¹⁷ This arrangement ultimately turned out to play a major role in the disaster, as one of the tasks routinely carried out by the police on such matches was to make a decision about closing a particular pen when its filling capacity was reached. However, this judgment was to be made solely on the grounds of a visual estimation of the number of people in a pen, as the capacity of the pens was not strictly fixed, but the number of supporters in a pen was not supposed to exceed 54 people per 10 square meters. It is quite understandable, however, that this sort of estimation is complicated to carry out and, due to its vagueness, is unlikely to be a reliable criterion in deciding when a pen should be closed. Due to the fact that entering the pens together with supporters was considered to be dangerous for the police officers or the staff at the stadium, the visual estimation had to be done from the observation points, where no stewards were present.¹⁸

Before the match, several briefings were held for the police officers in charge of control, but the likelihood of crushing was not mentioned in any of them, even

¹⁴ ibid.

¹⁵ ibid para 166.

¹⁶ ibid para 58.

¹⁷ ibid para 171.

¹⁸ ibid paras 170, 178.

though SYP was aware of this possibility based on their experience of policing some of the earlier games at Hillsborough.¹⁹ According to the Taylor report, David Duckenfield was not notified about the troubles that took place at Hillsborough in 1981. Apart from that, he was unaware of the agreement between the police and the club itself regarding the fact that the Leppings Lane terraces were normally monitored by SYP and not the ground stewards.²⁰ In addition to this, the division of the authority between the Ground Commander Superintendent Greenwood and Superintendent Marshall—who was in control of the area outside the turnstiles leading to the Leppings Lane end—was vague and had not been clarified in the pre-match briefings.²¹ The obvious lack of order within the SYP forces policing the stadium was also observed in a testimony of one of the officers who was present at the grounds on the day of the disaster, cited in Lord Taylor's Interim Report. When describing his experience at Hillsborough, Mr. Bowens stated that 'Leads were coming from several different directions really'.²² The lack of centralised command was also confirmed by the evidence presented by Hillsborough Independent Panel Report.²³

All these facts combined create an overall impression that there were a number of issues that could, ultimately, affect the safety of those entering the grounds, all of which were to do with both the state of the stadium and the arrangements set up by the South Yorkshire Police. It is possible that, despite all of these problems, no tragedy would have occurred as most of the arrangements were in fact a common practice, and, despite previous problems (e.g. crush in 1981), the possibility of a large-scale disaster was arguably not that high. However, one fatal decision taken by the senior officers of South Yorkshire Police in combination with all the aggravating factors produced a tragic outcome.

1.2 The Build-up and the Crush

Despite the fact that the supporters were generally encouraged to arrive at the venue as early as possible, and could therefore enter the grounds from 11:30 am onwards, when the turnstiles were opened, the good weather meant that most of them were

¹⁹ Hillsborough Independent Panel (n 2) para 2.2.38.

²⁰ Lord Taylor (n 4) para 276.

²¹ ibid para 2.2.40.

²² Lord Taylor (n 4) para 153.

²³ n 86.

reluctant to do so.²⁴ Along with the late arrival of some fans, this lead to a crowd gathering outside the turnstiles shortly before the kick-off was about to take place.²⁵

Supporters began to arrive between 2:40 and 2:45pm and the crowd near the turnstiles at Leppings Lane end grew to 5,000 people.²⁶ According to the Hillsborough independent Panel Report, it was about 2:44pm when the police officers began to lose control over the supporters queuing near this entrance outside the stadium.²⁷ At this point, it was clear that something should be done to avoid casualties in the crowd, and one of the senior officers radioed to Chief Superintendent Duckenfield at 2:47pm, stating that the exit gates should be opened so that the fans could access the stadium swiftly. His first requests received no answer. The communications between the different groups of policemen as described in the Taylor Report confirm that there was a clear lack of capability to quickly and efficiently make decisions on the part of Chief Superintendent Duckenfield, who failed to confirm that the gate should be opened until it was 2:52pm.²⁸

By the time Gate C was opened, the situation was beginning to escalate rapidly. A throng of spectators rushed through the gate and, as soon as they passed the turnstiles, they immediately headed for the tunnel because, as it was mentioned earlier, there was no one to redirect them to the sides of the stadium and there were no signs showing alternative access to other pens.²⁹ No attempt was taken by either police officers or stewards to prevent the supporters from going through the tunnel,³⁰ and therefore, the mass of people went through it intending to get to the standing terraces, but in fact the tunnel only led to central pens 3 and 4, that were already full at that point, while there were considerably less people in the adjacent pens.³¹

Partly due to the tunnel being built upon a slant, the spectators ‘came through the tunnel with a great momentum’.³² The situation was aggravated by the teams going out on the pitch, which naturally resulted in the pressure becoming even worse as people were trying to push forward to be able to see the match. At this point, some of the fans in the front parts of the pens were clearly in distress, as they were calling out for the officers to open the gates connecting the pens and the pitch. However, their

²⁴ Lord Taylor (n 4) para 57.

²⁵ ibid paras 57-62.

²⁶ ibid para 66.

²⁷ Hillsborough Independent Panel (n 2) para 2.2.60.

²⁸ Lord Taylor (n 4) paras 67-68.

²⁹ n 17

³⁰ Scraton (n 3) 187.

³¹ Lord Taylor (n 4) para 63.

³² ibid para 71.

requests were ignored by the police as the latter were still not realising at that point how great the pressure from the spectators behind was;³³ and even then, they had been provided with clear instructions not to open these gates without a senior officers' explicit permission.³⁴

The supporters' attempts to escape the crush of the pens and get on to the pitch were, at first, considered to be pitch invasion and were ignored or cut off repeatedly; only one of the officers, seeing that the people were experiencing enormous pressure, opened the gate that allowed some supporters to escape from the jam. Fans were urged to climb over the fences to the adjacent pens or were helped by other people on the terraces above; distressed, people shouted for help. However, as Lord Taylor's report states, 'Realisation came at different moments to different officers in different places.'³⁵ One of the officers took the initiative and, contrary to the instructions, opened the gates leading on to the pitch, which allowed a number of fans to leave pen 4.³⁶

The game began at 3:00pm. At that point, those monitoring the stadium from the control-room realised that something was going wrong in the central pens, but, as the supporters were desperately trying to climb over the fence, concluded that a pitch invasion was about to happen. This urged the officers in charge to send the additional police forces, waiting in the gymnasium, on to the pitch to help their colleagues gain control over the situation.³⁷

By 3:04pm, the game was starting to get intense, which caused a surge when the spectators attempted to get into the pens from the tunnel, not yet realising that those already in the pens were suffering enormous pressure and were being crushed against the fences. The match was finally stopped at 3:05pm.³⁸

1.3 The Aftermath of the Disaster

The exit gates which led to the pitch were opened at 3:00pm, which allowed the spectators to escape from the tunnel that led to the pens. However, exiting the pens was still problematic due to the fact that the spectators, closely pressed to each other

³³ ibid paras 45, 71-80.

³⁴ Scraton (n 3) 188.

³⁵ Lord Taylor (n 4) para 71.

³⁶ ibid para 72.

³⁷ ibid para 78.

³⁸ ibid para 75, 80.

and the fences, were preventing each other from going through the gates.³⁹ The situation was further aggravated by the fact that at 3:04pm many people, as mentioned above, rushed forward which caused, as Lord Taylor describes it; ‘a horrendous blockage of bodies’,⁴⁰ which complicated the extraction of the victims from the pens even further.

As a result of the pressure which was created by the people rammed into the pens, some of the fans, pressed against the metal fences and other people’s bodies, had no ability to breathe.⁴¹ According to post-mortem reports, almost all of the 96 victims died from crush asphyxia caused by the reasons described above, with associated injuries such as rib fractures in some of the cases.⁴² It was established that the vast majority of the deceased were positioned at the front of the pen when the crush took place.

During these first minutes when the rescue started taking place, there was no police officer who would take responsibility for coordinating the actions of other policemen and volunteers from the spectators. There were more officers arriving from other parts of the ground, but only at 3:12pm did the rescue operation at gate 3 begin to be co-ordinated by Chief Superintendent Nesbitt.⁴³ In attempts to rescue those trapped in the pens, both the fans and police officers began to breach the mesh of the fences that separated the pens and the pitch with their hands and feet and succeeded, which enabled the people to leave the pens more swiftly.⁴⁴

At the same time, the police were exposed to a lot of aggression and even some assault from some of the fans who were already on the pitch, the latter being outraged by the fact that their pleas to be let out of the pens had been ignored for a considerable length of time.⁴⁵

At 3:13pm St. John’s ambulance arrived at the grounds. Despite the fact that there was no announcement made by the police that doctors are required on the pitch, several doctors and nurses from the public, including the Sheffield Wednesday’s club doctor, came to attend to the injured.⁴⁶

³⁹ ibid para 82.

⁴⁰ ibid para 81.

⁴¹ ibid para 77.

⁴² ibid para 109.

⁴³ ibid para 81-86.

⁴⁴ ibid para 85.

⁴⁵ ibid para 83.

⁴⁶ ibid paras 88-89.

Meanwhile, in the control room, the Chief Executive of the FA and Secretary of Sheffield Wednesday sought out Superintendent Duckenfield to find out what had happened. Duckenfield said that there had been an accident which apparently led to the death of people and that the match is not likely to be resumed. He explained that the incident occurred due to the fact that the gates leading inside the grounds were forced by the Liverpool fans.⁴⁷ However, as it was mentioned earlier, Mr. Duckenfield gave the order to open the gates himself and, in light of this evidence, his behavior appears to be inexplicable. This statement, 11 years on, will be one of the charge points in the prosecution against him.⁴⁸

At 3:30pm, a public announcement was made that doctors were needed on the pitch. The second public announcement, which provided the spectators with the information about what has happened on the grounds, was made as late as 3:56pm.⁴⁹

All in all, analysing the events that took place on the 15th of April, it can be said that Chief Superintendent Duckenfield was negligent in taking a decision to open the gates without considering the possible consequences of such an action. It could perhaps be attributed to the fact that he had no experience in policing a match which was to be attended by so many spectators. It is certainly true that there were a number of other issues that contributed to the accumulation of Liverpool fans both inside and outside of the grounds, however, if the exit gates had not been opened the situation would have never escalated as rapidly as it did.

Despite the fact that there were means available to those present in which control over a situation such as this could have been gained, Mr. Duckenfield failed to initiate any of them, perhaps owing to the fact that his assessment of the situation in terms of how dangerous it appeared to be was not adequate enough. For example, one of the possible solutions that could have saved lives would be to consider postponing the kick-off and, more importantly, announcing this postponement. This potentially would have prevented the tragedy as the spectators would not be pushing forward in order to get to the terraces in time for the beginning of the match. However, by the time SYP finally decided that the kick-off should be delayed, the players were already on the pitch.⁵⁰

Judging from the impression that Lord Taylor's and the Hillsborough Independent Commission's Report have produced, the response of the police officers to the

⁴⁷ ibid para 98.

⁴⁸ Scraton (n 3) 191.

⁴⁹ Lord Taylor (n 4) paras 89, 100.

⁵⁰ Hillsborough Independent Panel (n 2) p 100.

emergency at the preliminary stage where the first casualties were taken out of the pens can be described as quite conscientious, but obviously somewhat belated. The officers apparently were strictly following the instructions that they received during the briefings, which to a great extent prioritised the maintaining of order above the safety of those on the grounds.⁵¹ It is hardly possible in this case, however, to consider that all of the police officers were equally liable for what happened at the stadium that day.

⁵¹ ibid.

2. 23 Years after Hillsborough (1989-2012): Searching for the Truth

The following chapter is concerned with the investigations and inquiries that aimed to clarify the circumstances regarding the tragedy at the Hillsborough Stadium. During the time period from the 4th of August, 1989, to the 12th of September, 2012, there were a number of attempts to reveal the truth about what happened at Hillsborough, as well as to hold Mr. Duckenfield and Mr. Murray liable in connection with their negligence that led to the deaths of the Liverpool supporters.

Post-Hillsborough, the investigations can be divided in three main time-frame stages; the first one taking place from the 15th of April, 1989, to the 28th of March, 1991, the second one from 1996 to February 2000 and the third one from April 2009 to the present day.

2.1 From Taylor Inquiry to Hillsborough Independent Panel Report

From the very beginning, the Hillsborough events were the centre of very close public attention. On the 19th of April, 1989, a scandalous article about the details of the Hillsborough events was published in *The Sun* newspaper. What it contained was the apparent ‘truth’ about the behavior of the Liverpool fans at Hillsborough, who, according to the article, assaulted and attacked the police officers which prevented them from helping the victims and also picked the pockets of the dead. This information, as it was found out later, was provided to *The Sun* by some of the police officers of SYP as well as a Tory MP, Irvine Patnick, who, in turn, had acquired this detail from SYP policemen when he had spoken to them on the evening of the disaster itself. The article caused an outrage among the public—who began to sabotage the newspaper—as well as among the relatives of those who had died at Hillsborough, who they took it as an attempt to slander the Liverpool supporters in order to deprecate the blame of SYP.⁵²

It was also found out that the level of alcohol in the blood of the deceased was checked in the course of post-mortem examinations. This test was carried out for all of the victims regardless of their age. The rationale behind such an action still

⁵² Owen Gibson, ‘What the Sun Said 15 Years Ago’ *The Guardian* (7th July 2004) <www.guardian.co.uk/media/2004/jul/07/pressandpublishing.football1> accessed 20th March 2013; Hillsborough Independent Panel, *Hillsborough: The Report of the Hillsborough Independent Panel* (2012-13, HC 581) paras 142-145.

remains unclear, as there is no plausible explanation for it.⁵³ However, considering the desire of SYP to portray the fans at Hillsborough in an unfavorable light, it is possible that this in reality was just another attempt to diminish the responsibility of SYP for the tragedy. This was also the case during the Taylor Inquiry (discussed below): the police submitted the information for the Taylor Inquiry in the form of the Wain Report which was produced within SYP. Its most prominent feature was the stress it laid on the bad behavior of the fans, examples of which being that there were large numbers of people trying to enter the grounds without a ticket and drunkenness.⁵⁴ However, later the Hillsborough Independent Panel, similar to the Taylor Report, found no materials of evidence which could support these statements.⁵⁵

Immediately after the tragedy, Lord Justice Taylor was appointed by the then Home Secretary Douglas Hurd in order to carry out an inquiry into the facts of the Hillsborough Disaster. As a result of the Inquiry the Interim Report was submitted by Lord Justice Taylor on the 4th of August, 1989, four months from the events of Hillsborough. According to the report, the accident occurred due to the ‘failure of police control’;⁵⁶ despite the fact that there were other organizations at fault (e.g. Sheffield Wednesday Football Club who were aware of the potential problems that might occur at the Leppings Lane End due to the problems previously addressed, e.g. troubles with the turnstiles),⁵⁷ mainly it was SYP that were to blame for the deaths of the Liverpool supporters in the pens.⁵⁸ The Taylor Inquiry, despite the fact that it was aware of the amendments in the police officer’s witness statements, chose not to ask for the original statements where there were no amendments as, apparently, they were under the impression that the deleted parts had to do with opinion evidence.

The conclusions which the Taylor Interim Report came to caused a profound negative reaction in the South Yorkshire Police.⁵⁹ They were exposed to a lot of criticism and during Chief Constable Peter Wright’s statement at a press interview he expressed hope that the outcome of the inquests would not repeat that of the report.⁶⁰

⁵³ Hillsborough Independent Panel (n 52) paras 2.5.12-13.

⁵⁴ ibid para 76.

⁵⁵ ibid para 153.

⁵⁶ RT HON Lord Justice Taylor, *The Hillsborough Stadium Disaster 15 April 1989* (Cm 765, 1989) para 278.

⁵⁷ ibid para 290.

⁵⁸ Phil Scraton, ‘Death on the Terraces: The Contexts and Injustices of the 1989 Hillsborough Disaster’ (2004) 5(2) Soccer and Society 183, 188.

⁵⁹ Hillsborough Independent Panel (n 52) para 2.8.52.

⁶⁰ ibid paras 151-152.

After the publication of the Taylor Report, inquiries were conducted by the Coroner, which consisted of two stages. Firstly, the inquests were carried out, the aim of which was to collect information on all the victims of Hillsborough separately; the information included the level of alcohol in the blood of the deceased, medical evidence concerning the victim and the place where death occurred. These consisted of what Lord Stuart-Smith in his report calls ‘mini inquests’,⁶¹ where two police officers were presenting the evidence connected with one particular victim and a pathologist who, based on the post-mortem reports, made conclusions on the cause of death.⁶² The problem was that the evidence was very poor and incomplete, and, at the same time, the witness testimony that the evidence was constructed upon was not made available. In addition to that, the question of the cause of death of each of the victims was not raised during the inquest.⁶³ There was one feature of the inquiries that turned out to be particularly controversial, especially in the light of recent findings of the Hillsborough Independent Panel: for the purposes of the inquest the Coroner introduced a cut-off after which the response of the police or ambulance service were not taken into consideration due to the fact that, according to the evidence, by that time there was already no chance to save the victims.⁶⁴ This decision was later proved to be unreasonable in connection with medical evidence revealed in the course of the work of the Hillsborough Independent Panel. Due to all these reasons, the relatives of the victims considered the inquests not to be satisfactory.⁶⁵

Considering the results of the mini-inquests, it was decided by the Director of Public Prosecutions that the evidence examined in the course of the inquest did not form sufficient basis for initiating criminal proceedings of any kind against South Yorkshire Police, an outcome that left the families of the victims greatly disappointed.⁶⁶

After the decision not to prosecute, the second part of the inquests took place. It started in November, 1990, and was finished on the 28th of March, 1991, and on balance was more general than the first part. On the outcome of it, the verdict of the ‘accidental death’ was returned by the jury, another possible verdict in this case

⁶¹ RT HON Lord Justice Stuart-Smith, *Scrutiny of Evidence Relating to the Hillsborough Football Stadium Disaster* (Cm 3878, 1998) p 1.

⁶² *ibid* p 11; Scraton (n 58) 189.

⁶³ Scraton (n 58) 189.

⁶⁴ Hillsborough Independent Panel (n 52) p 21.

⁶⁵ *ibid* p 269.

⁶⁶ Scraton (n 58) 189; Lord Stuart-Smith (n 61) p 10.

being ‘unlawful killing’. This did not, however, entirely clear South Yorkshire Police of any fault in respect of the deaths of the Liverpool supporters, as the formula ‘accidental death’ did not actually imply innocence.⁶⁷

Disciplinary proceedings were to be launched against Chief Superintendent Duckenfield and Superintendent Murray by the Police Complaints Authority, which in reality never happened as the former retired from the force and conducting proceedings against Murray only was considered to be unjust.⁶⁸

The next major stage in the Hillsborough Disaster investigation began in 1997, following the documentary ‘Hillsborough’ by Jimmy McGovern. After the documentary provoked a new wave of interest towards the tragedy, John Straw, the Labor Home Secretary declared a new inquiry was to be held into the Hillsborough events. The judicial scrutiny ordered by John Straw was aimed at the examination of new evidence, not previously available to the Taylor Inquiry. Lord Stuart-Smith was appointed for the purposes of carrying out this task. This inquiry did not result in any substantial findings which could have changed the public perception of the Hillsborough tragedy however,⁶⁹ and the outcome of it is now subject to criticism in relation to the results of the work of Hillsborough Independent Panel.⁷⁰

Later, in August 1998, the Hillsborough Family Support Group, which was formed from those people who lost their relatives at Hillsborough,⁷¹ demanded a private prosecution against Murray and Duckenfield, who were accused of misconduct in a public office and manslaughter. The trial took place on the 6th of June, 2000, and in the end resulted in the acquittal of Superintendent Murray. Chief Superintendent Duckenfield was not present at the process, and no judgment was ever pronounced in his respect due to the dismissal of the jury.⁷²

This process had two important features that have to be pointed out: firstly, the judge in fact promised the accused officers that if they are found guilty they still would not face the prospect of imprisonment. This decision was attributed to the

⁶⁷ Lord Stuart-Smith (n 61) p 11.

⁶⁸ Hillsborough Independent Panel (n 52) para 1.11.

⁶⁹ Editorial, ‘Hillsborough Disaster and its Aftermath’ BBC (19th December 2012) <www.bbc.co.uk/news/uk-19545126> accessed 21th March 2013.

⁷⁰ Richard Moorhead, ‘Hillsborough and SYP Lawyers’ *The Lawyer* (19th September 2012) <www.thelawyer.com/hillsborough-and-syplawyers/1014383.article> accessed 21st March 2013; Editorial, ‘Hillsborough Police Officers may Face Manslaughter Inquiry’ BBC (14th September 2012) <www.bbc.co.uk/news/uk-england-19598228> accessed 20th March 2013.

⁷¹ Margaret Aspinall, ‘Who We Are’ (*Hillsborough Family Support Group*) <<http://hfsg.co.uk/>> accessed 28th March 2013.

⁷² Scraton (n 58) 191-195.

danger the police officers are likely to be exposed to in prison. This was an exceptional practice which indicated an extraordinary attitude to Murray and Duckenfield.⁷³

The other peculiarity had to do with two questions that the judge addressed to the jury before the verdict. One of them was ‘Would a criminal conviction send out a wrong message to those who have to react to an emergency and take decisions?’⁷⁴ What this question reflects is, in essence, the same policy consideration that was later used in *White v Chief Constable of South Yorkshire Police*.⁷⁵ As well as that, the judge urged the jury to consider whether a fact of the disaster by itself should mean that Duckenfield and Murray were negligent in performing their duties. According to the response from the bereaved families, these two questions were the weight that tilted the balance in favor of acquittal.⁷⁶

The third stage of the investigations began in April 2009. South Yorkshire police received a request to disclose all evidence that had any relevancy towards the Hillsborough disaster.⁷⁷

Subsequently, in December 2009, Home Secretary Alan Johnson formed the Hillsborough Independent Panel with the aim to scrutinise the evidence disclosed by the South Yorkshire Police closely.⁷⁸ The Panel was, in many ways, different from its predecessors that were also looking into the facts of the tragedy: firstly, it owes its existence to the initiative of families of the Hillsborough victims and does not have the judge at the forefront of it. Secondly, the main focus of the Panel’s activity was not to hold an inquiry, but to analyse the disclosed materials.⁷⁹

After almost three years of work, having processed over 450,000 pages of documents that related to the Hillsborough disaster, the Hillsborough Independent Panel published a report in September 2012 which revealed a major cover-up by the South Yorkshire Police in regards to the Hillsborough evidence first gathered, which included alteration of some 116 out of 164 documents containing witness testimony

⁷³ ibid 192.

⁷⁴ ibid 194.

⁷⁵ [1999] 2 AC 455 (HL).

⁷⁶ Scraton (n 58) 194.

⁷⁷ ‘Hillsborough Disaster and its Aftermath’ (n 69).

⁷⁸ ibid.

⁷⁹ Simon Jenkins, ‘Hillsborough Shows it’s Time for Elected Police Commissioners’ *The Guardian* (13th September 2012)

<www.guardian.co.uk/commentisfree/2012/sept/13/hillsborough-scandal-last-23-years>
accessed 28th March 2013.

aimed at concealing the parts of it which was critical in relation to the South Yorkshire Police.⁸⁰

The report also included new findings connected with the Hillsborough events that dealt with different aspects of the disaster. Among them, new information concerning medical evidence was found which disproved the previously thought fact that in all the cases death occurred almost instantaneously and the cause of death was the same for all the victims. According to the report, some of the victims died only after a long period of time during which they were unconscious. The Panel suggested that these people could have potentially been saved if they had received proper medical attention on time; however, this conclusion could not be made with a hundred percent certainty.⁸¹

Apart from that, there was a clear desire on the part of South Yorkshire Police to twist the facts in such a way that part of the blame for what happened could be put on the fans at the stadium. This was done by repeatedly mentioning their hostile behavior towards the police officers, as well as stating that most of them were drunk.⁸² In addition to this, the Report has it that

[I]n the immediate aftermath of the disaster, SYP prioritised an internal investigation and the collection of self-taken, handwritten statements in preparation for the imminent external inquiries and investigations.⁸³

These statements were then read through by Hammond Suddards, the solicitors of South Yorkshire Police and altered by them with the help of other SYP policemen.⁸⁴

The issue of amended statements deserved a separate discussion due to its controversy.

It is common practice for solicitors to give advice about certain parts of witness statements that can be removed if, for example, they can be attributed to the hearsay evidence or opinion evidence.⁸⁵ However, some of the excluded statements in this case can hardly qualify as opinion evidence at all; the best example here can be the recollection of one of the police officers on duty at Hillsborough, who wrote: ‘I at no time heard any directions being given in terms of leadership’,⁸⁶ which was not

⁸⁰ ‘Hillsborough Police Officers may Face Manslaughter Inquiry’ (n 70).

⁸¹ Hillsborough Independent Panel (n 52) p 178.

⁸² Editorial, ‘Hillsborough Report: Key Findings’ BBC (13th September 2012) <www.bbc.co.uk/news/uk-england-merseyside-19577033> accessed 20th March 2013.

⁸³ Hillsborough Independent Panel (n 52) p 223.

⁸⁴ ‘Hillsborough Report: Key Findings’ (n 82).

⁸⁵ Moorhead (n 70).

⁸⁶ Hillsborough Independent Panel (n 52) para 2.11.57.

included in the final statement. Undoubtedly, this remark is not just an opinion; at the same time, some other statements can, from a certain perspective, be attributed as opinion evidence, like one of the officers observing that ‘The Control Room seemed to have been hit by some sort of paralysis’.⁸⁷ However, it is hard to argue that, along with personal opinion this statement, as well as many others that were deleted,⁸⁸ also contained important information on the manner in which the accident was handled by South Yorkshire Police.⁸⁹

The report caused intense response in the media, as well as apologies addressed to the victim’s families from the current Chief Constable of South Yorkshire Police David Crompton and David Cameron.⁹⁰ Apart from that, the report raised concern about the quality of the Stuart-Smith Scrutiny,⁹¹ which found that the documents disclosed back in 1997 added nothing to the current view on the Hillsborough events. However, certain parts of the Stuart-Smith Inquiry actually had something to do with the alteration of the police officers’ written testimony,⁹² with a statement from one of the policemen who drew the attention of Lord Stuart-Smith to the fact that some of his colleagues were made to alter their testimony.⁹³ Despite the fact that it was recognised that alterations took place, they were not considered to be significant by Lord Stuart-Smith.⁹⁴

The report is likely to generate further proceedings—criminal as well as civil—based on the new information from the disclosed documents.⁹⁵ There is also a possibility that South Yorkshire Police can be prosecuted in connection with a corporate manslaughter.⁹⁶

As it can be seen from the information presented in this chapter, from the very start South Yorkshire Police were trying to find ways to make the public think that the tragedy was at least partly the fault of the Liverpool supporters. The blood alcohol level measurements and the article in *The Sun*, as well as SYP’s efforts to

⁸⁷ ibid para 2.11.60.

⁸⁸ eg Hillsborough Independent Panel (n 52) paras 2.11.58 or 2.11.60 (8).

⁸⁹ Moorhead (n 70).

⁹⁰ Editorial, ‘Hillsborough Papers: Cameron Apology over ‘Double Injustice’ BBC (12th September 2012) <www.bbc.co.uk/news/uk-england-merseyside-19543964> accessed 28th March 2013.

⁹¹ ‘Hillsborough Police Officers may Face Manslaughter Inquiry’ (n 70).

⁹² Lord Stuart-Smith (n 61) p 77.

⁹³ ibid.

⁹⁴ ibid p 84.

⁹⁵ Editorial ‘Righting the Wrongs of Hillsborough’ *The Lawyer* (17th September 2012). <www.thelawyer.com/righting-the-wrongs-of-hillsborough/1014319.article> accessed 20th March 2013.

⁹⁶ ‘Hillsborough Police Officers may Face Manslaughter Inquiry’ (n 70).

portray the spectators as a drunk and aggressive crowd confirm this. Apart from that, the approach adopted by the judge during the prosecution against Duckenfield and Murray bears certain resemblance with Hillsborough civil litigation in terms of reliance of the judges on public policy arguments.⁹⁷

The recent Hillsborough Independent Panel Report, revealing the striking evidence about the cover-up with the help of which South Yorkshire Police attempted to keep back the actual scale of their responsibility for the disaster, became an enormous step forward in rendering justice towards those who suffered in this tragedy.

⁹⁷ n 259

3. Contemporary View on Police Civil Liability

In this chapter I will look into the core principles of police liability in tort. Due to the fact that the approach to police liability is, to a great extent, based on its status as a public body, it is important to also spend some time on analysing the way public bodies are treated in respect of their tort liability, not least because it differs substantially from the liability of individuals. The aim of this chapter is to contextualise the analysis of Hillsborough litigation further, in order to facilitate the understanding of the mechanisms, with the help of which public body cases are decided in courts.

3.1 The Status of Public Bodies in English Law

Public bodies can generally be defined as bodies that perform public functions.⁹⁸ As specified in s6 (3) of the Human Rights Act 1998, a body can be identified as a public authority if it falls within one of the following categories:

- (a) a court or tribunal
- (b) any person certain of whose functions are functions of a public nature⁹⁹

In English law, civil liability of public bodies is closely connected with the term ‘immunity’. Immunity is an ‘exemption from the duties imposed by law, generally on grounds of public policy.’¹⁰⁰

The notion of public body immunity against civil litigation can be said to go back to the concept of monarchical liability in the period of the Middle Ages to the late 18th century. The case that first held that the ‘King can do no wrong’,¹⁰¹ was *Russel v Men of Devon*,¹⁰² heard in 1788. Originally, however, this doctrine was formulated in a different way and proclaimed that ‘the king must not, was not allowed, not entitled

⁹⁸ Peter Cane, *Administrative Law* (4th edition, Oxford University Press 2004) 10; Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (2003-04, HL 39, HC 382) para 3.

⁹⁹ Human Rights Act s6 (3).

¹⁰⁰ Mandy Shircore, ‘Police Liability for Negligent Investigations: When Will a Duty of Care Arise?’(2006) 11(1) Deakin Law Review 33, 37.

¹⁰¹ Colleen F. Shepherd, ‘Why all the King’s Horses and All the King’s Men couldn’t Put Sovereign Immunity Back Together Again: an Analysis of the Test Created in *James v. Jane*’ (2007-2008) 11(1) Journal of Law and the Public Interest 1, 3.

¹⁰² (1788) 100 ER 359.

to do wrong'.¹⁰³ Effectively, this formula reflected the fact that the King could not be sued in the courts where he himself was a judge. By the 19th century the immunity of the Crown emerged as an inarguable doctrine.¹⁰⁴

Along with the sovereignty of the monarch, in the middle of the 19th century the notion that any public body can be held liable for its actions began to develop. In 1893, the Public Authorities Protection Act imposed restrictions on the scope of the possible litigation of the public bodies by two main means: firstly, introducing a short time limit on bringing an action against a public authority and secondly, the scope of the rewards in case of the successful claims being such as to discourage possible claimants. These restrictions were not abolished until the introduction of the Law Reform Act in 1954.¹⁰⁵

The adoption of the Human Rights Act (HRA) in 1998 brought about substantial changes to the area of the public body liability in two main aspects. Firstly, the extent to which public authorities' liability can be tested changed significantly. The most vivid example of this is perhaps the famous Human Rights case *Osman v United Kingdom*,¹⁰⁶ which originated as a case on police negligence, which will be discussed in more detail in the next chapter.¹⁰⁷ The claimants whose claim was struck out at the Court of Appeal brought their case to the European Court of Human Rights, where it was held that this decision of the Court of Appeal was made in breach of Article 6 of the Human Rights Act.¹⁰⁸ According to this article, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'¹⁰⁹

Despite the fact that the plaintiff in *Osman* was unsuccessful, it should have deterred the courts from widely applying policy considerations in negligence cases, though this was not what happened in reality. A more noticeable consequence of *Osman* was that English courts stopped using the struck-out procedure in cases which involved public bodies as freely as they had done previously.¹¹⁰

¹⁰³ Shepherd (n 101) 3 citing Louis L Jaffe, 'Suits Against Governments and Officers: Sovereign Immunity' (1963) 77 Harvard Law Review 1,4.

¹⁰⁴ Nicholas Bowen, 'Chipping away at Hill: The Liability of the Police in Negligence' (Doughty Street Chambers, London, 25th April 2012), para 19.

¹⁰⁵ Bowen (n 104) para 23.

¹⁰⁶ [1999] EHRR 101 (ECtHR).

¹⁰⁷ n 150

¹⁰⁸ Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (4th edition, Oxford University Press 2010) 151.

¹⁰⁹ Human Rights Act 1998.

¹¹⁰ Lunney, Oliphant (n 108) 153-154; Shircore (n 100) 44.

The second major change introduced by the Human Rights Act was classification of public authorities and arrangements regarding the scope of different public bodies' abidance with the relevant provisions of the Act. Prior to the HRA, the difference between 'public' and 'private' bodies was drawn mainly for the purposes of identifying whether a certain authority could be described as performing public functions and, therefore, whether its decisions would be subject to a judicial review. However, the term 'public functions' in relation to public body proved to be a subject of controversy: there is no clear guidance in the corresponding case law as to how one can determine whether a particular action of the public authority could be qualified as a 'public function'.¹¹¹

In the HRA, public bodies were divided into so-called 'pure' public bodies and 'functional' public bodies. The main distinction drawn between them is that whereas a 'pure' public body (an example of which can be the police) has to comply with the provisions of HRA regardless of its activity, a 'functional' public body has to do so only in the process of performing 'public functions'.¹¹²

Theoretically, any public authority in England can be sued just as any individual for the same torts.¹¹³ In practice, however, public bodies are subject to a special approach when it comes to their tort liability to the members of the community whose well-being they are concerned with. The current attitude to public authorities' liability in English law is best summarised by the statement of McCracken J. in *Beatty v the Rent Tribunal*:¹¹⁴

Where a public body, such as the [Tribunal], performs a function which is in the public interest, then in many cases, and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear or threat of action by individuals.¹¹⁵

As established in *X and Others v Bedfordshire CC*¹¹⁶ by Lord Browne-Wilkinson, there are several conditions which have to be fulfilled in order for the successful claim against a public body in the case where it performed public functions. Firstly,

¹¹¹ Ministry of Justice, *The Human Rights Act 1998: the Definition of "Public Authority"* (Cm 7726, 2009) para 17.

¹¹² Joint Committee on Human Rights (n 98) paras 3-7.

¹¹³ Cane (n 98) 273.

¹¹⁴ [2005] IESC 66 (SC).

¹¹⁵ *ibid* (McCracken J.).

¹¹⁶ [1995] 2 AC 633 (HL).

similar to any negligence case against an individual,¹¹⁷ the existence of the duty of care in respect of the plaintiff has to be found; as it was established in *Donohue v Stevenson*¹¹⁸ and developed in the latter cases such as *Caparo Industries Plc v Dickman*,¹¹⁹ there is a three-stage test to determine whether a duty of care is owed:

1. Foreseeability of harm
2. The relationship between the defendant and the claimant must be sufficiently proximate
3. Fairness, justice and reasonableness of imposing such a duty¹²⁰

It is mainly the second and third stages that are a potential difficulty in the imposition of a duty of care on a public authority, as both proximity and reasonableness requirements acquire certain specific features when applied in these sorts of claims.

The lack of proximity in civil cases against public authorities is normally based on the argument that a claimant is just one member of a large community for which the well-being of the public body in question is responsible.¹²¹ Therefore, it is assumed that in these circumstances it would be unfair to impose a duty of care on such an authority as, supposing it acts according to its statutory functions, its actions are aimed at serving the community.¹²²

As for the ‘fair, just and reasonable’ stage of the duty of care test, the following requirements should be met for the successful claim against a public body: firstly, the action in question was not ‘compatible with the provisions and purposes of the statute in action’ (same rules exist for non-statutory functions).¹²³ Secondly, if the action of a public body was unreasonable in a *Wednesbury* sense, that is it was ‘so unreasonable that no reasonable authority could have made it’,¹²⁴ and thirdly, the questions that arise in the course of the hearings cannot be attributed to non-justifiable ones. The latter term comprises a wide range of issues, including those that the court has no power to decide on, such as national economic policy. However,

¹¹⁷ Cane (n 98) 275.

¹¹⁸ [1932] AC 562 (HL).

¹¹⁹ [1990] 2 AC 605 (HL).

¹²⁰ Lunney and Oliphant (n 108) 122, 136-139.

¹²¹ Hanna Wilberg, ‘Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims’ (2010) 126 Law Quarterly Review 420, 420.

¹²² Lunney and Oliphant (n 108) 506.

¹²³ Cane (n 98) 275-276.

¹²⁴ ibid 274.

most importantly, for the purposes of this work, it includes public policy factors. It is necessary to point out that even if the first two questions of the duty of care test are answered in the affirmative, a public authority won't be held liable unless there are no relevant policy considerations which can prevent the court from doing so, and thus the final condition outweighs the first two.¹²⁵

The first requirement of compatibility is a source of a lot of controversy, as well as criticism, due to the fact that a distinction is drawn between 'policy' and 'operational' functions; the former can be a basement of the imposition of the liability on a public body only if the actions of the public body in question were *Wednesbury-unreasonable*, whereas if it is the latter, this requirement does not have to be fulfilled. However, there are no reliable criteria of putting a function in either category. Apart from that, this approach is also criticised on the basis that it is more concerned with the type of function that a public authority was performing than with the negligent act itself.¹²⁶ Therefore, in reality, the question of classifying a certain function as 'policy' or 'operational' may be answered differently depending upon whether a court wants to impose liability on a public body in this particular case.¹²⁷

It is important to point out that sometimes three conditions discussed above are not considered to be a part of 'fair, just and reasonable' stage and are referred to as a separate public law duty of care test;¹²⁸ as well as that, some works do not include policy considerations in the justiciability requirement, the former being singled out as a part of the standard private law duty of care test only.¹²⁹ Due to the fact that these distinctions are not crucial for this paper, for convenience purposes in further analysis I will refer to public law duty of care test as a part of 'fair, just and reasonable' requirement.

In practice, if the earlier mentioned three conditions are not fulfilled, it is very rare for a person who suffered from the negligence of a public authority to win a case against the latter, as judges normally establish that no duty of care exists in regard of the plaintiff.¹³⁰ Moreover, the fact that policy arguments constitute the most essential part of the test—at the same time arguably being the most controversial one—

¹²⁵ *ibid* 277-282.

¹²⁶ Swati Jhavery, 'Constructing a Framework for Assessing Public Authority Liability in Negligence: the Role of Public Law Norms, Private Law Norms and Policy Arguments' (2011) 19 *Tort Law Review* 3, 8

¹²⁷ Cane (n 98) 287-288.

¹²⁸ eg in Lunney and Oliphant (n 108) 506-518.

¹²⁹ eg in Jhavery (n 126) 9.

¹³⁰ eg *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR (HL) [35].

produces yet another difficulty which can be attributed to the specific nature of policy considerations.

Policy considerations in the case of public bodies liability is an umbrella term for a range of arguments that are aimed at protecting ‘public interest’.¹³¹ In this context, the protection of a public interest means the consideration of the needs of the community which benefits from the services delivered by public bodies as opposed to the separate individuals who suffered from these authorities’ negligence.¹³² The term ‘public interest’ and its use in this context can be said to be somewhat controversial due to the fact that various policy arguments are widely used to protect public bodies from the imposition of liability in tort in the cases brought by the members of the society. Apart from this, there are other problematic issues connected with different policy considerations¹³³ which will be discussed in the later chapters.

3.2 Police Negligence Case Law: the Legacy of *Hill*

Being a public authority, the police are subject to all the rules for the public body liability that were discussed in the previous chapter. The powers of the police are supported by the Police and Criminal Evidence Act 1984.¹³⁴ One of the main responsibilities of the police is to uphold and enforce the law as well as prevent crime and disorder. There are as many as 44 forces within England, Wales and Northern Ireland, each lead by a Chief Constable, who ‘directs and controls’ a particular force.¹³⁵ For the purposes of this work, it is important to point out that according to the Police Act 1996, the Chief Constable can be held liable in tort for any unlawful actions of his subordinates.¹³⁶

¹³¹ ‘Public Authority Decisions’ (*Public Interest in UK Courts*)

<<http://publicinterest.info/public-authority-decisions>> accessed 28th March 2013.

¹³² Desmond A. Butler, ‘An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence’ (2002) 10 Tort Law Journal 13, para 1

¹³³ Oliver Segal and John Melville Williams, ‘Psychiatric Injury, Policy and the House of Lords’ [1999] Journal of Personal Injury Litigation 102, 104.

¹³⁴ ‘Policy and Criminal Evidence Act 1984 (PACE) and Accompanying Codes of Practice’ ([gov.uk](http://www.gov.uk/government/publications/police-and-criminal-evidence-act-1984-pace-and-accompanying-codes-of-practice)) <www.gov.uk/government/publications/police-and-criminal-evidence-act-1984-pace-and-accompanying-codes-of-practice> accessed 28th March 2013.

¹³⁵ Association of Chief Police Officers, ‘Policing in the UK: A Brief Guide’ (ACPO 23rd October 2012), 2-3

<www.acpo.police.uk/documents/reports/2012/201210PolicingintheUKFinal.pdf> accessed 29th March 2013.

¹³⁶ Jack English and Richard Card, *Police law* (9th edition, Oxford University Press 2005) 257.

Police duties are not regarded as purely statutory; it can be said instead that they dwell on both statutory and common law grounds.¹³⁷ Perhaps it is this ‘mixed’ nature of the duties that results in confusion in certain areas when identifying which of them can be regarded as truly important when breached, that is, in which case that the police was acting contrary to a core duty. For example, according to *Brooks v Commissioner of the Police for Metropolis*,¹³⁸ the prime function of the police is ‘preservation of the Queen’s peace’.¹³⁹ It is further mentioned that in connection with it the police should focus on ‘preventing the commission of crime’ and ‘apprehending criminals’.¹⁴⁰ However, in the earlier case *Hill v Chief Constable of South Yorkshire Police*¹⁴¹ the failure to catch a criminal before he had a chance to murder his victim was not considered as a sufficient base for imposing liability on the police and was outbalanced by policy considerations.¹⁴²

Despite the fact that apparently some of the functions are more important than others in the eyes of the judges, it can arguably be said that, in regards to the police, it is difficult to talk about acting in conflict with a core duty which is bound to result in the imposition of the liability due to the specific nature of the police duties with a reference to the relevant case law. However, as it will be shown below, this question turns out to play but a minor role in the police negligence cases due to the fact that, in reality, the first two stages of the ‘fair, just and reasonable’ test for public authorities’ actions seem to be, to a great extent, omitted in the judgments, with a lot of attention paid to policy considerations instead.

As the analysis below will show, the courts’ approach to the tort law cases involving police negligence has always been profoundly restrictive.¹⁴³ Arguably, this restrictiveness is to a certain extent ‘broad-brush’,¹⁴⁴ as its prominent feature is the reluctance to hold the police liable regardless of the facts of the case, which may be highly unfavourable for the Force.¹⁴⁵ This rigid approach can be said to have originated in the well-known ‘Yorkshire Ripper’ case *Hill v Chief Constable of West*

¹³⁷ Wilberg (n 121) 429-430.

¹³⁸ [2005] 1 WLR 1495 (HL).

¹³⁹ *ibid* [30].

¹⁴⁰ *ibid*.

¹⁴¹ [1989] AC 53.

¹⁴² Lunney and Oliphant (n 108) 143-144.

¹⁴³ Claire McIvor, ‘Getting Defensive about Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords’ (2010) 69(1) Cambridge Law Journal 133.

¹⁴⁴ *ibid* 134.

¹⁴⁵ eg in *Brooks v Commissioner of Police for Metropolis* (n 130).

Yorkshire Police, which laid the foundation for the principle that has been governing almost all the like cases in England ever since.¹⁴⁶

In *Hill*, the mother of a victim of a serial killer known as the ‘Yorkshire Ripper’ sued the police for their failure to arrest the murderer before he killed her daughter. In 1989, this claim failed in the House of Lords on the basis of two main arguments: firstly, it was found that the proximity between the defendant and the claimant was not sufficient to impose a duty of care, and secondly due to the relevant public policy considerations. In the *Hill* case, the judges expressed concerns over the defensive approach that the police might adopt if the case was decided in favour of the victim’s mother, making them unduly cautious in performing their duties, which in turn would lead to a waste of resources in the attempt to minimise the number of claims that they might face. The second issue of concern in *Hill* was the diversion of resources, which might occur due to the fact that defending a case in court can be very costly, and this burden will inevitably lie on the taxpayer.¹⁴⁷

It is also quite important to point out how the perception to the police and their duties seems to change with time. Whilst giving a judgment on *Hill*, Lord Keith commented on his attitude to the police performing its duties in the following way: ‘From time to time they make mistakes in the exercise of that function [investigation and suppression of crime], but it is not to be doubted that they apply their best endeavours to the performance of it.’¹⁴⁸ However, it is to be shown that this idealistic perception of the police force was to undergo a serious change in later cases such as *Brooks v Commissioner of Police for Metropolis*.

The reasoning used in *Hill* seems to be quite logical; so does the principle which emerged from the case, if applied sensibly. It is arguably excessive to impose a duty of care on the police in cases where the relationship between them and the claimant was not sufficiently proximate from the objective point of view, as the killer could have likewise chosen any other young woman in the neighborhood who would not be in any way connected with Mrs. Hill. Nevertheless, it will be shown in the following examples that this case turned out to produce a precedent which led to some obscure court decisions in the cases where proximity between the police and the claimant was

¹⁴⁶ McIvor ‘Getting Defensive’ (n 143) 133.

¹⁴⁷ ibid 134-136.

¹⁴⁸ *Hill* (n 141) 63.

obvious and, more importantly, to the virtually unlimited police immunity. The *Hill* principle came to be widely applied in all cases dealing with police negligence.¹⁴⁹

Perhaps one of the most infamous cases connected with police negligence is *Osman v Ferguson*.¹⁵⁰ In this case, the defendant was harassing his student, the act of which the police were informed of on several occasions. In spite of this, they failed to take any action and the defendant attacked the student and his father, the latter being killed as a result. It was held that the police were nevertheless immune from the liability regardless of the proximity between them and the victims.¹⁵¹

In *Brooks v Commissioner of Police for Metropolis*, a case was brought forth by a witness of murder who suffered a psychiatric injury as a result of the police mistreating him during the investigation. It was found in the course of the public inquiry that Mr. Brooks was ‘stereotyped as a young black man exhibiting unpleasant hostility and agitation, who could not be expected to help, and whose condition and status simply did not need further examination or understanding’.¹⁵² This claim was also dismissed on the basis of the *Hill* principle.¹⁵³

In *Smith v Chief Constable of Sussex Police*,¹⁵⁴ the claimant’s ex-partner had been threatening him for a long period of time and the local police were aware of this fact; the claimant having provided both the address and the phone number from which the text messages with threats were being sent. The complaints on the part of the claimant were numerous, but the police did not take any action and as a result, the ex-partner attacked the claimant and injured him severely.¹⁵⁵

This case in the House of Lords was distinguished from *Hill* on the basis that the proximity between the police officer who was in charge of the case and the claimant was considered to be sufficient. The case was decided for the claimant in the Court of Appeal, as it was stated that in this particular case the public policy argument can be successfully outbalanced by the degree of proximity between the parties and therefore, a duty of care can be imposed. However, in the House of Lords the decision was reversed in favour of the defendant on application of the *Hill* principle.¹⁵⁶

¹⁴⁹ McIvor ‘Getting Defensive’ (n 143) 133.

¹⁵⁰ [1993] 4 All ER 344 (CA).

¹⁵¹ Lunney and Oliphant (n 108) 144, 151.

¹⁵² *Brooks* (n 130) [8].

¹⁵³ Lunney and Oliphant (n 108) 144.

¹⁵⁴ [2009] AC 225 (HL).

¹⁵⁵ McIvor ‘Getting Defensive’ (n 143) 138-140.

¹⁵⁶ *ibid.*

In contrast to *Hill*, the judges in this case were not referring to the police as ‘applying their best endeavours’¹⁵⁷ to the task of investigating crimes; Lord Philips stated that what happened could be considered as an ‘outrageous negligence’,¹⁵⁸ while Lord Cashwell admitted that *Smith* ‘tests the principle severely’.¹⁵⁹ Most importantly, Lord Phillips expressed an opinion that the complicated policy questions that were addressed in *Smith* were a matter that should be dealt with by the Parliament; effectively, this was equivalent to accepting the fact that the present position on the police immunity should be reconsidered.¹⁶⁰

Despite this, it would be an exaggeration to say that the police enjoy blanket immunity in every civil case. On several occasions, the police were actually held liable for negligence in respect of some of their duties. For instance, in *Kirkham v Chief Constable of the Greater Manchester police*¹⁶¹ it was established that the police was negligent in not notifying the prison authorities of the fact that there was a possibility that a particular detainee could commit suicide. Another example is *The Chief Constable of Northumbria v Costello*¹⁶², where a failure of a senior officer to help a junior one attacked by a person in custody was found to be sufficient ground for imposition of a duty of care.¹⁶³

As it is obvious from the overview of the cases above, police immunity came to be applied so widely that courts started covering the cases where all the facts were indicating the existence of the duty of care owed by the police. Despite the fact that there are several exceptions to this rule, they are few in number and the fact that policy considerations tend to outbalance all the other arguments certainly creates an impression that the decisions in these cases are based on a principle which can be comfortably altered according to the wishes of the courts, which in combination with the tendency not to impose the duty of care potentially has a negative effect on the image of the Force in the eyes of an ordinary citizen.

¹⁵⁷ n 148.

¹⁵⁸ *Smith* (n 154) [101].

¹⁵⁹ *ibid* [107].

¹⁶⁰ McIvor ‘Getting Defensive’ (n 143) 140.

¹⁶¹ [1990] 2 QB 282 (CA).

¹⁶² [1998] EWCA Civ 1898 (CA).

¹⁶³ *Shircore* (n 100) 45.

4. Hillsborough Litigation: the Analysis

The following chapter is concerned with the analysis of the civil litigation against the Chief Constable of South Yorkshire Police that took place after the Hillsborough Disaster. The litigation will be examined from the perspective of the case law as it stood at the moment of the hearings, with special attention being paid to the peculiarities of these cases as compared with similar ones that had been decided previously.

The aim of this analysis is, firstly, to outline the extent to which the decisions in the cases under study were either departing from the previous case law in relevant areas or creating new restrictive mechanisms. This, aside from revealing the degree to which the judges were driven by policy considerations when dealing with these cases, will help to estimate how big a role the defensive approach towards the police liability actually played in the verdicts. Secondly, based on this analysis and taking into consideration the facts of the Hillsborough disaster, conclusions will be made about the adequacy and efficacy of the defensive approach from a number of perspectives.

There are three main cases that are necessary to discuss in this chapter: *Hicks v Chief Constable of South Yorkshire Police*,¹⁶⁴ *Alcock v Chief Constable of South Yorkshire Police*¹⁶⁵ and *White v Chief Constable of South Yorkshire Police*.¹⁶⁶ The first two cases were brought forward by the relatives of the victims, whereas the latter was from the police officers involved in the rescue of the people caught in the pens.

It is certainly the latter case that presents the biggest interest for the purposes of this work as, in contrast with *Hicks* or *Alcock*, the claim originated within the police. This compared with the claims from members of the public is a relatively rare precedent; one example of such a claim being *The Chief Constable of Northumbria v Costello*,¹⁶⁷ already discussed earlier.¹⁶⁸ The nature of *White* in fact was that the reasoning and the verdict reflected the very attitude to police liability in the House of Lords.

¹⁶⁴ [1992] 2 All ER 65 (HL).

¹⁶⁵ [1992] 1 AC 310 (HL).

¹⁶⁶ [1999] 2 AC 455 (HL).

¹⁶⁷ *Costello* (n 162).

¹⁶⁸ n 162

However, it is also important to analyse the decisions in *Alcock* and *Hicks* due to several reasons. As it will be shown later, the outcome of *Alcock* turned out to have a significant influence on the House of Lords' decision in *White*. As to *Hicks*, the medical evidence on which the reasoning was based turned out to be inaccurate according to the recent Hillsborough Independent Panel Report, and the blame for it also lies on South Yorkshire Police. This case is the best illustration of how the cover-up turned out to work to the advantage of SYP in civil litigation on Hillsborough.

4.1 Attempts to Settle

Shortly after the incident, the first claims demanding compensation were brought by the relatives of the victims against the police. For the purposes of the hearings, South Yorkshire Police admitted their responsibility for the tragedy.¹⁶⁹ However, none of the cases were actually heard in court before the Taylor Report was published, which happened on the 4th of August, 1989.¹⁷⁰

In the course of the pre-trial period, South Yorkshire Police were trying to postpone civil litigation on the basis that at that moment it was awaiting for the verdict from the Director of Public Prosecutions on the possible criminal proceedings connected with the disaster. According to SYP's solicitors, it was a complicated task for the Chief Constable to get ready for the hearings 'when Officers, rightly or wrongly, believe that they may be under investigation and, hence, are unwilling to co-operate in providing further statements'. This request, however, was not considered to be solid grounds for putting off the hearings, which started on the 11th of June, 1990.¹⁷¹

In November 1990, a press-release was published in which the Chief Constable, emphasising the improbity of the situation where the injured and the victim's relatives had to wait for the judges' verdicts in time-consuming trials to obtain compensation to which they are entitled, agreed to the out-of-court settlement. This decision was justified by the fact that, being under civil and criminal trial simultaneously, the officers would be reluctant to testify in civil hearings due to their fear of self-incrimination. It was thought that this fear might result in the officers'

¹⁶⁹ Phil Scraton 'Death on the Terraces: The Contexts and Injustices of the 1989 Hillsborough Disaster' (2004) 5(2) Soccer and Society 183, 189.

¹⁷⁰ Hillsborough Independent Panel, *Hillsborough: The Report of the Hillsborough Independent Panel* (2012-13, HC 581) para 2.7.11.

¹⁷¹ ibid paras 2.7.15-16.

testimony not being as full as they might have been under different circumstances, which could potentially have had a negative impact on the image of South Yorkshire Police.¹⁷²

According to the arrangements agreed between the lawyers of South Yorkshire Police and the Hillsborough Steering Committee, compensation was given only to a limited group of claimants. They included firstly those who were in pens 3 or 4 during the crush and consequently sustained physical and/or psychological injury. Secondly, those spectators who sustained nervous shock but were not in either pen 3 or 4 were entitled to damages only in those cases where their child or spouse was in the crush and they either witnessed the child or spouse's death or injury, or saw their spouse or child dead or injured after the tragedy. In the latter case, the compensation would have been awarded even if the claimant's relatives were actually not in the pens, but were believed to have been there by the claimant. Apart from that, those taking part in rescue operations, but had not been in the crush were compensated as well. It was also stated that if the agreement as to the amount of money to be paid was not reached between the sides, this becomes a matter to be settled in court.¹⁷³

It is important to note that in all of the cases the compensation (on condition it was to be paid) was given 'without making any admission of liability'.¹⁷⁴ The reasons for this decision were, firstly, to protect the officers who were being questioned in the framework of the criminal investigation and, secondly, the fact that, in perspective, SYP wanted to recover the money from third parties who could also be found guilty of the disaster.¹⁷⁵ Effectively the restrictions introduced by SYP corresponded with the control mechanisms which emerged from *McLoughlin v O'Brian*,¹⁷⁶ the psychiatric injury case which was the main authority prior to the decision in *Alcock v Chief Constable of South Yorkshire Police*.

Some of the claims were not meeting the requirements specified by SYP and they were subsequently taken to court.¹⁷⁷

¹⁷² ibid paras 2.7.18-21.

¹⁷³ ibid paras 2.7.22-23.

¹⁷⁴ ibid para 2.7.24.

¹⁷⁵ ibid para 2.7.25.

¹⁷⁶ [1983] 1 AC 410 (HL).

¹⁷⁷ Hillsborough Independent Panel (n 170) para 2.7.28.

4.2. *Hicks v Chief Constable of South Yorkshire Police*

In *Hicks v Chief Constable of South Yorkshire Police*, the parents of two teenage girls who died in the crush in one of the pens brought an action against the police for ‘pain and suffering’¹⁷⁸ of their daughters before death. The case reached the House of Lords on appeal on the 5th of March, 1992, with both the High Court and the Court of Appeal deciding in favour of the defendant.¹⁷⁹ The House of Lords subsequently returned the same verdict. The reasoning behind the decision was explained by Lord Bridge of Harwich in his speech, in which he observed that the death of both girls was a result of traumatic asphyxia, which meant that they lost consciousness within seconds after a fatal crash occurred and therefore, their death was swift and they experienced almost or no pain.¹⁸⁰ This conclusion rested upon the medical evidence that was available to the court at that moment in time. As for the fear that the girls undoubtedly experienced being caught in the crowd, Lord Bridge noted that fear ‘is a normal human emotion for which no damages can be awarded’.¹⁸¹

However, a detailed scrutiny of the post-mortem reports, undertaken within the framework of the Hillsborough Independent Panel Report, revealed new evidence concerning the actual cause of death of some of the victims. According to these reports, the fact that none of the victims could have been saved after a 3:15pm cut-off point, imposed by the Coroner could be argued against. Firstly, in the case of some victims, their blood circulation had not in fact stopped after the crush which had led to asphyxia. Therefore there was a chance that these victims could have been saved afterwards by being relieved from the pressure they had been experiencing.¹⁸² Secondly, several victims had signs of cerebral oedema, which essentially indicates that there was no immediate blood circulation arrest and these people also stood a chance of survival under certain circumstances.¹⁸³

In the light of this evidence, the decision in *Hicks* might well be disputed.¹⁸⁴ However, it would perhaps be somewhat far-fetched to conclude that taking into account this evidence the verdict could have been reversed, as far as medical evidence is concerned, the Hillsborough Independent Panel Report does not state that

¹⁷⁸ ibid para 2.7.35.

¹⁷⁹ ibid para 2.7.36.

¹⁸⁰ ibid para 2.7.36.

¹⁸¹ *Hicks* (n 164) 69.

¹⁸² Hillsborough Independent Panel (n 170) paras 2.5.36-37.

¹⁸³ ibid paras 2.5.43, 2.5.51-52.

¹⁸⁴ ibid para 2.7.37.

the evidence presented suggests that the victims did not lose consciousness as fast as it was presumed and actually experienced pain and suffering before they expired.

4.3 ‘Child’s Blood Too Dry to Found an Action’¹⁸⁵: Control Mechanisms in *Alcock*.

In *Alcock v Chief Constable of South Yorkshire Police*, relatives of some of the victims brought a case against SYP on the basis that they suffered a psychiatric shock¹⁸⁶ as they watched the crush in pens 3 and 4. There were in total 16 claimants, some of which were present at the stadium when the accident occurred and were watching it unfold from other parts of the grounds; others were watching a real-life report on the television and one of the claimants was right outside of the stadium and saw the disaster unfolding on the television. The remaining plaintiffs learnt about the tragedy from the radio or recorded TV reports.¹⁸⁷

Before reaching the House of Lords, the case went through the High Court and the Court of Appeal. In the former, Hidden J. found the duty of care to be owed to some of the plaintiffs,¹⁸⁸ and a similar situation occurred in the Court of Appeal, but the reasoning was somewhat different.¹⁸⁹ The case was heard in the House of Lords on the 28th of November, 1991, where in the final end none of the plaintiffs succeeded.¹⁹⁰

As established in *McLoughlin v O’Brian*, one of the most important landmark cases for claims for psychiatric injury, apart from the question of foreseeability of harm, there should be three more requirements that the plaintiff has to fulfill in order for the defendant to be found liable. Firstly, the relationship between the primary victim and the secondary victim should be sufficiently proximate (the examples of a sufficiently proximate relationship according to *McLoughlin* in this context would be

¹⁸⁵ Hoffman LJ in *White* (n 166), citing Peter Birks (ed.), *The Frontiers of Liability* (Oxford University Press 1994) vol 2, 84.

¹⁸⁶ In the majority of psychiatric illness cases brought to court the plaintiffs claimed to be suffering psychiatric disease in the form of PTSD (post-traumatic stress disorder), which develops as a result of a person’s exposure to a traumatic experience. Its symptoms include prolonged distress and constant reexperiencing of the stressful event (see Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) paras 3.2, 3.4, 3.7)

¹⁸⁷ Harvey Teff, ‘Liability for Psychiatric Illness after Hillsborough’ (1992) 12(3) Oxford Journal of Legal Studies 440, 443.

¹⁸⁸ John Cooke , ‘One Step Forward, Two Steps Back?-Nervous Shock and the Hillsborough Disaster’ (1991) 8(2) The Liverpool Law Review 201, 206.

¹⁸⁹ *ibid* 208.

¹⁹⁰ Hillsborough Independent Panel (n 170) para 2.7.31.

a parent-child relationship or the relationship between spouses). Secondly, there should be both temporal and geographical proximity to the accident in which the primary victim suffered, but witnessing it is not required as long as the secondary victim sees ‘immediate aftermath’ of the accident. And finally, the accident or aftermath should be seen or heard with unaided senses; however, it was also pointed out by Lord Wilberforce that under certain circumstances seeing the events on television might satisfy the test. Live news report was given as an example.¹⁹¹

The judges in *Alcock* approached each of the groups of claimants separately when it came to applying the criteria above, owing to the fact that the plaintiffs, as it was specified earlier, were not on equal footing when it came to proximate relationships with the victims or witnessing the immediate aftermath of the tragedy. Following *McLoughlin*, in *Alcock* the question of proximity was to be examined in three different aspects: firstly, there should be proximity between the primary victim and the claimant, and secondly, there should also be geographical and temporal proximity to the accident in which the primary victim suffered.¹⁹²

As already mentioned earlier, under the authority of *McLoughlin*, there were two types of relationship which were widely perceived as satisfying the proximity test: firstly, parents and children and secondly, spouses.¹⁹³ In *Alcock*, it was held that ties of love and affection must be established between the claimant and the primary victim; apart from spouses and parents-children, relationships between siblings and fiancées were considered to be proximate enough. Proximity can also be established in other cases where the claimant provides the court with a proof that his love and affection for the primary victim can be equaled to the one that exists between parents and children or spouses.¹⁹⁴

Geographical and temporal proximity to the accident in *Alcock* became a subject of controversy: not being at the stadium but arriving to the mortuary eight hours after the accident to identify the body of a deceased relative was not considered to be a sufficient aftermath proximate.¹⁹⁵

The question of the means of communication by which the secondary victim sees or hears an accident or its aftermath was similarly decided to be not in favour of the

¹⁹¹ Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (4th edition, Oxford University Press 2010) 339-340.

¹⁹² Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) para 2.21.

¹⁹³ Teff (n 187) 445.

¹⁹⁴ Law Commission (n 192) para 2.25.

¹⁹⁵ Teff (n 187) 448.

plaintiffs in general, as it was held that there was a significant difference between watching the event with an unaided eye (like in the case of the claimants who were present at the stadium) and seeing it on the television, even though it was a live report, contrary to Lord Wilberforce's remark in *McLoughlin*.¹⁹⁶ The distinction was made on the basis of the principle that when watching any news report it is foreseeable that the scenes that are being showed are censored with a view of the relevant provisions of the broadcasting policy. It was stated that, in case a third party interferes in a process of delivering the information, the claimant cannot recover.¹⁹⁷

On the outcome of *Alcock*, significant restrictions were imposed on the future claimants who would seek to recover for psychiatric injury. The control mechanisms which were introduced in *McLoughlin* were interpreted in such a way that it denied recovery to large groups of plaintiffs.

The verdict in *Alcock* came to be widely criticised by the researchers due to its rigidness and the dubiousness nature of the reasoning behind it.¹⁹⁸ Its unpopularity was also admitted by Lord Hoffman in his judgment on *White v Chief Constable of South Yorkshire Police*.¹⁹⁹

4.4 *White v Chief Constable of South Yorkshire Police*

From all the Hillsborough cases, *White* can arguably be put ahead of the others as the most controversial. Being, effectively, the case regarding as employer's liability for the psychiatric injury sustained by an employee, as well as the status of a rescuer suffering from psychiatric injury as a result of his involvement in the rescue activities—the areas in which the law has been more or less unambiguous at the moment of time specifically that is being discussed—it returned an outcome that was clearly at odds with the relevant case law.

The aim of this sub-chapter is to analyse the case in question from both the perspective of employer's liability and rescuer's status, closely examining all the controversial points in the judgments as well as the public policy considerations used to justify the verdict.

¹⁹⁶ Law Commission (n 192) para 2.30.

¹⁹⁷ ibid paras 2.30-2.33.

¹⁹⁸ Claire McIvor, 'Liability for Psychiatric Harm' (2007) 23(4) Professional Negligence 249, 3.

¹⁹⁹ *White* (n 166) 504.

4.4.1 The State of Law Before *White*: Employer's Liability for Psychiatric Injury and Rescuers

For the purposes of the analysis that follows, I will give a brief overview of, firstly, the law on employer's liability as it stood in 1999 and, secondly, the case law about status of rescuers for the same time period.

The view on employer's liability started shaping in the nineteenth century: during that time period, the courts, aiming to relieve the industry from the claims brought by the employees, adopted the approach which resulted in the situation where no employee could recover for the injury that he sustained as a result of his employer's negligence. The essence of this approach was the paradigm of common employment, which meant that the employer could not be held liable for the action of his employee which caused the injury of his other employees. This principle was later changed by introducing so-called non-delegable duties, the breach of which by the employer automatically leads to the imposition of the duty of care on the latter.²⁰⁰

The case that is the cornerstone of the modern view of employer's liability is *Wilsons and Clyde Coal Co Ltd v English*.²⁰¹ Following this case, the duties that the employer is required to fulfill as to the well-being of his employee are 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision',²⁰² to which the duty to ensure that the workplace of the employee is safe is often added. These duties can effectively be combined in the single concept that the employer ought to take 'reasonable care for the safety of his men'.²⁰³ In regards to psychiatric injury, employer's liability rests on the principle that the employers owes their employees a duty of care 'not to expose them to the risk of psychiatric injury'.²⁰⁴

In *Walker v. Northumberland County Council*,²⁰⁵ the plaintiff, who was a manager, suffered from a psychiatric disease owing to excessive workload. It was held that in the case of the first breakdown there was no duty of care owed by the employer as, despite Mr. Walker's complaints regarding the workload and his requests for help, it was not reasonably foreseeable that he was going to sustain a psychiatric injury. However, the plaintiff, after returning to work, had a second

²⁰⁰ Lunney and Oliphant (n 191) 545.

²⁰¹ [1938] AC 57 (HL).

²⁰² *Wilsons and Clyde* (n 201) 78.

²⁰³ Lunney and Oliphant (n 191) 550.

²⁰⁴ Law Commission, (n 192) para 2.41.

²⁰⁵ [1995] All ER 737 (QB).

breakdown due to the same reasons, even though reassured by his employer that he would be provided with additional help. In the latter case, the employer was liable as the second breakdown could have been foreseen and prevented.²⁰⁶

The legal status of the rescuers is equivalent to that of a primary victim: this concept goes back to the rescue case *Chadwick v British Railways Board*,²⁰⁷ where the plaintiff suffered nervous shock due to the fact that he was providing aid to those injured as a result of a major railway accident, which lead to the death of a large number of people. His widow was awarded damages on the basis of foreseeability of the psychiatric injury in this case. Even though in the course of the hearing the judges established that there was a potential physical danger for the rescuer in this case, it was argued that the physical hazard was not the genuine cause of the nervous shock suffered by the defendant, but rather the fact that what he had to undergo was horrendous and traumatising.²⁰⁸ Therefore, it was not established in *Chadwick* that physical hazard for a rescuer is a necessary condition for successfully recovering.²⁰⁹

In contrast to the USA, there is no ‘fireman’s rule’ in England which prevents professional rescuers (including police officers) from recovering damages in case they are injured in the course of performing their duties where the defendant’s negligence was the reason why the danger occurred.²¹⁰ This was established in the House of Lords in *Ogwo v Taylor*.²¹¹

4.4.2 The Reasoning behind *White*: Controversies

In *White v Chief Constable of South Yorkshire Police*, police officers who were involved in the rescue operations at the place of the disaster brought a case against the Chief Constable for the psychiatric injury that they sustained while dealing with the consequences of the tragedy. All the officers were suffering from post-traumatic stress disorder.²¹²

The case reached the House of Lords on appeal and was heard on the 3rd of December, 1998. Prior to this hearing, the decisions on the case by different courts

²⁰⁶ *Hutton v Sutherland* [2002] EWCA Civ 76 [27].

²⁰⁷ [1967] 1 WLR 912 (QB).

²⁰⁸ *Chadwick* (n 207).

²⁰⁹ Law Commission (n 192) para 7.3.

²¹⁰ Alastair Mullis and Ken Oliphant, *Torts* (4th edition, Palgrave Macmillan 2011), 88.

²¹¹ [1998] AC 448 (HL).

²¹² Hillsborough Independent Panel (n 170) para 2.7.71.

were contradicting each other: when examined by Waller J in High Court,²¹³ it was decided for the defendants as firstly, according to Waller J, the claimants could not qualify as primary victims and, secondly, police officers should be regarded as professional rescuers and consequently are not entitled to sue for the psychiatric injury in this case. He also spoke in favour of introducing the analogue of the ‘fireman’s rule’ existing in the USA, according to which professional rescuers cannot recover for the injury resulting from negligence.²¹⁴

Later, the Court of Appeal held that some of the plaintiffs were entitled to compensation on the basis that there was a breach of duty of care on the part of their employer, namely the Chief Constable of South Yorkshire Police.²¹⁵ In the House of Lords, however, the decision was reversed by a bare majority with two judges out of five dissenting.²¹⁶

This claim apparently caused a sharp, negative attitude within SYP. There were concerns expressed by senior officers as to the situation regarding one police officer trying to attempt to sue the other one.²¹⁷ The disclosed to the Hillsborough Independent Panel documents show that some of the claims were apparently dropped due to the fact that the policemen were experiencing pressure from their senior officers to do this.²¹⁸ The prospects of a successful outcome from the case were also perceived as somewhat unlikely by SYP itself.²¹⁹ It was noted that potentially settling the claim would be a more sensible line of action as, providing the case is lost by SYP, it will create an unwanted precedent for the Force, as opposed to out-of-court settlement, awarded with a view of ‘exceptional’ circumstances of Hillsborough.²²⁰ In the final end, however, it was decided that the claim would be defended.

The police officers in *White* were regarded from two main positions: on the one hand they were seen as rescuers who had to deal with the immediate aftermath of an

²¹³ *ibid* paras 2.7.70, 2.7.75.

²¹⁴ *White* (n 166).

²¹⁵ Oliver Segal and John Melville Williams, ‘Psychiatric Injury, Policy and the House of Lords’ [1999] *Journal of Personal Injury Litigation* 102,109.

²¹⁶ Hillsborough Independent Panel (n 170) para 2.7.73.

²¹⁷ *ibid* paras 2.7.49-50.

²¹⁸ Russel Jones & Walker Solicitors, ‘Re-Hillsborough Claims-Police Officers-15.4.89’ (document available on <<http://hillsborough.independent.gov.uk/>> SYP00016013000 pp 21-22, 22nd November 1991).

²¹⁹ Deputy Chief Constable, ‘Note for File:Meeting with Peter Metcalf (Hammond Suddards)-Claims by South Yorkshire Police Officers’ (document available on <<http://hillsborough.independent.gov.uk/>> SYP00016013000 p 20, 12th November 1991).

²²⁰ Peter Metcalf, ‘Attendance note’ (document available on <<http://hillsborough.independent.gov.uk/>> SYP00016013000 pp 25-27, 20th November 1992).

accident involving casualties and, on the basis of this, were therefore exposed to traumatising experiences but, on the other hand, were also seen as employees who suffered psychiatric injury as a result of their employer's negligence, namely the Chief Constable of South Yorkshire Police.²²¹

Some of the plaintiffs were involved in transporting the dead and the injured, some were trying to revive those lying on the pitch and others were working in a temporary mortuary, set up in a gymnasium at the stadium.²²²

The policemen claimed that the employer-employee relationship in this case was a guarantee of a duty of care that the Chief Constable owed them and, due to the fact that they were involved in the rescue operation, they fell within the category of the rescuers.²²³ It was held by the House of Lords that, in this case, the employer-employee relationship and the psychological nature of the trauma were solid grounds for considering the officers as secondary victims. Therefore, the control mechanisms that were established in *Alcock* came into play and the claimants subsequently failed the *Alcock* test owing to the fact that they naturally had no relationship of love and affection with primary victims at Hillsborough.²²⁴

As rescuers, the officers in *White* were entitled to recover for the psychiatric injury they suffered in the course of performing the rescue operations. There were, however, several issues that were raised by the judges in connection with this point. Firstly, Lord Steyn, interpreting the decision in *Page v Smith*,²²⁵ expressed an opinion that, as the officers were not under threat of physical injury themselves, they therefore had to be regarded as secondary victims.²²⁶ This decision was taken into account despite the fact that, according to the long-running case law, rescuers normally qualified as primary victims. Secondly, Lord Hoffman, not regarding the decision in *Page* as a relevant one for the same reasoning in *White*, mentioned that if the police officers are prioritised, in future cases it will lead to a blurring in the difference between a rescuer and a mere bystander.²²⁷

²²¹ Segal and Williams (n 215) 109.

²²² Hillsborough Independent Panel (n 170) paras 2.7.47-48

²²³ Segal and Williams (n 215) 109.

²²⁴ *ibid* 109-110.

²²⁵ [1996] AC 155 (HL)

²²⁶ Stephen Bailey and Donal Nolan, 'The *Page v Smith* Saga: a Tale of Inauspicious Origins and Unintended Consequences' (2010) 69(3) Cambridge Law Journal 495, 516-517.

²²⁷ Bailey and Nolan (n 226) 516-517; Segal and Williams (n 215) 110.

This reasoning by all means has several aspects that potentially constitute a discrepancy between it and the position of law on the employer's liability and rescuer's status as it stood at the time described.

Firstly, it was already mentioned in the chapter 4, section 4.4.1, 'The State of Law before *White*: Employer's Liability for Psychiatric Injury and Rescuers',²²⁸ that the employer-employee relationship between the defendant and the plaintiff is a strong basis for the imposition of the duty of care. It is true that it does not automatically give rise to the duty of care in all the claims;²²⁹ however, in similar cases prior to *White*, the only test that was applied to the employees suffering psychiatric disease as a result of their employer's negligence was whether it was reasonably foreseeable that this negligence might result in the employee's injury.²³⁰ Moreover, Lord Goff in his speech in *White* pointed out that there was a similar case *Mount Isa Mines Ltd v Pusey*²³¹ in Australia in which the plaintiff succeeded. The defendant in this case was held liable for the psychiatric injury of his employee, who was aiding his severely injured co-worker, whose injury occurred as a consequence of the defendant not providing him with relevant instructions.²³² The only substantial differences between these claims were that the defendant was not a public body and the event that triggered psychiatric injury was not a major tragedy like Hillsborough.

As a result of *White*, employer's liability for his employee's nervous shock came to be subject to the restrictions that made it stand out against the background of psychiatric illnesses resulting from other causes, e.g. stress.²³³

There is one especially interesting peculiarity about the paradigm on the psychiatric illness of an employee adopted by the House of Lords in *White*. This peculiarity has to do with its viability: since the decision in *Hatton v Sutherland*,²³⁴ only some 3 years following *White*, there were no references to the distinction between primary and secondary victims in relation to psychiatric illness of an employee, at least prior to 2007.²³⁵ This fact creates an impression that, while this distinction was for some reason made important in *White*, there was no genuine need for it in future cases, and that apparently its adoption is based more on the fugitive

²²⁸ n 200.

²²⁹ Lunney and Oliphant (n 191) 551.

²³⁰ Law Commission (n 192) para 2.44.

²³¹ (1970) 125 CLR 383 (HCA).

²³² *White* (n 166) (Goff LJ).

²³³ Mathew Boyle, 'Employer's Liability at Common Law: Two Competing Paradigms' (2008) 12(2) Edinburgh Law Review 231, 248.

²³⁴ [2002] EWCA Civ 76 (CA).

²³⁵ McIvor 'Liability for Psychiatric Harm' (n 198) 253.

need (or alternatively on the need to restrict this particular employer's liability) than on the actual necessity.

As for the status of rescuers, Lord Steyn's reasoning and interpretation of *Page* looks bizarre due to several facts; firstly, previously there were cases in which the plaintiffs were awarded damages despite the fact that they were not under threat of any physical danger (e.g. *Hambrook v Stokes Brothers*,²³⁶). Even though in several cases the authority of *Page* was used in order to put limitations on potential plaintiffs, it was never before interpreted as imposing a restriction on those rescuers who were not in fear of their own safety.²³⁷ Secondly, this kind of reasoning effectively reflects that some of their Lordships seemed to believe that psychiatric injury can only arise when there is a possibility of a physical injury, which in fact contradicts the whole concept of the existence of secondary victims.²³⁸ And, thirdly, in *Alcock* Lord Oliver, as a part of obiter, mentioned that people coming 'to the aid of others injured and threatened should be looked at as primary victims and entitled to recover'.²³⁹

In his dissenting speech, Lord Goff of Chieverly vividly illustrated his point of artificiality of the control mechanisms imposed on the recovery of rescuers by giving an example of two men who, like Mr. Chadwick in *Chadwick*, are helping those injured in a railway accident. One of them is in the front part of the train, where the conditions are such that there is a threat to the rescuer's health, the other one in the rear part, where there is no threat to his physical health. If the control mechanisms apply the way they are supposed to, the rescuer working in the front part of the train will be compensated in case he suffers a psychiatric illness, whereas the other one will not.²⁴⁰ This certainly creates a distinction that has no logical justification. The premise that only those rescuers who were in physical danger while performing rescue operations should be awarded damages was rejected by the Law Commission a year prior to *White* being decided.²⁴¹ Later, the verdict in *White* was announced by the Scottish Law Commission to be 'hard to justify'.²⁴²

²³⁶ [1925] 1 KB 141 (CA).

²³⁷ Bailey and Nolan (n 226) 516-517.

²³⁸ Segal and Williams (n 215) 110.

²³⁹ *Alcock* (n 165) [407E].

²⁴⁰ *White* (n 166) (Goff LJ).

²⁴¹ Bailey and Nolan (n 226) 518.

²⁴² Scottish Law Commission, *Damages for Psychiatric Injury* (Scot Law Com No 196, 2004) 3.52 (b), para 2.18.

All the efforts of the House of Lords in *White* were aimed at recognising the plaintiffs as secondary victims, in which case they were automatically subject to the *Alcock* restrictions, which they could never fulfill owing to the lack of proximity between them and the primary victims. In fact, there was no way in which they could successfully qualify as secondary victims within the framework of the Hillsborough scenario, as it is plain that the whole situation quite simply did not correspond with the *Alcock*-type claim.²⁴³ The persistence of the judges to fit *White* in it looks bizarre, at least prior to the moment when Lord Steyn passes on to discussing policy considerations relevant for this particular case.

From the analysis above it is clear that *White* was examined with the view of the private law principles rather than the public law ones: there were no references whatsoever to the questions of *Wednesbury* unreasonableness or breach of statutory duty. On the contrary, the reasoning was based on establishing the degree of proximity between the parties, which is a clear indicator of a private law approach. There are two possible explanations for this fact.

Firstly, the Chief Constable never in fact denied the existence of the duty of care in respect of the primary victims,²⁴⁴ which means that there was apparently no practical sense in applying the public law duty of care test.

Secondly, the courts have used both the private law and the public law mechanisms in dealing with the cases against public bodies; however, apparently the approach of the courts differs depending whether the act of negligence was ‘discrete’ or ‘systemic’.²⁴⁵ In *White*, the failure to prevent the crush by South Yorkshire Police was a discrete act of negligence, the main distinguishing feature of which is that it is usually a result of a particular decision which is not related with either the authority’s general activities as a public body or with the functions that it exercises in the framework of these activities. Swati Jhavery in his article ‘Constructing a Framework for Assessing Public Authority Liability in Negligence: (...)’ pointed out that these cases are more likely to be decided on the private law basis.²⁴⁶ Apart from that, he argued that if the negligent act was ‘discrete’, policy considerations are unlikely to be widely *discussed* in the course of the hearing. However, they can still play a major

²⁴³ McIvor ‘Liability for Psychiatric Harm’ (n 198) 251-252.

²⁴⁴ Swati Jhavery, ‘Constructing a Framework for Assessing Public Authority Liability in Negligence: the Role of Public Law Norms, Private Law Norms and Policy Arguments’ (2011) 19 Tort Law Review 3, 10.

²⁴⁵ *ibid* 3.

²⁴⁶ *ibid* 9-10.

role in the decision not to impose liability on a public body, as it indeed happened in *White*.²⁴⁷

4.4.3 Policy Arguments

In his leading judgment for the appellants, Lord Steyn paid significant attention to the policy arguments that, in his view, could hinder the court from awarding damages to the plaintiffs.²⁴⁸ For the purposes of the analysis to follow, these arguments can be divided into two main groups: the first one comprises those that have to do with imposition of liability for pure psychiatric harm in general, regardless of the facts of the case; and as for the second one, it includes policy considerations that followed specifically from the peculiarities of *White*; the aim of this classification is to separate those arguments that might potentially be connected with the liability of police as a public body.

The first group included three main policy considerations: medical difficulties in diagnosing psychiatric injury, the ‘floodgates’ argument and the burden of liability which is likely to lie on the defendants in future.²⁴⁹

In respect to the first factor, Lord Steyn himself admitted that it in fact did not play a decisive role in the judgment. The question of certainty with which it can be said that a person is suffering from psychiatric illness according to Lord Steyn’s judgment should not prevent the recovery to the people who are genuinely affected by the horrifying events which they had to go through.²⁵⁰ The diagnostic uncertainty argument was also rejected by the Law Commission on the basis that the difficulties in comparing expert opinions on psychiatric disease are no less challenging than those that the judges encountered in a number of other areas.²⁵¹

The ‘floodgates’ argument in *White* can be pointed out as one of the most important. It is based on the fear of excessive litigation that might occur in case one particular claim is allowed; supposedly in this situation a vast number of similar

²⁴⁷ *ibid* 10.

²⁴⁸ *White* (n 166) (Steyn LJ).

²⁴⁹ *ibid*.

²⁵⁰ *ibid*.

²⁵¹ Michael A. Jones, ‘Liability for Psychiatric Illness-More Principle, Less Subtlety?’ (1995) 4 Web Journal of Current Legal Issues <<http://webjcli.ncl.ac.uk/articles4/jones4.html>> accessed 28th March 2013.

cases will be brought to courts following the successfull claimant.²⁵² It was applied by the judges in several cases which had to do with problematic areas in tort like the liability of public bodies and claims for psychiatric injury.²⁵³

What should be emphasised here among the difficulties of applying the ‘floodgates’ argument, however, is its purely theoretic nature. There is no evidence that can be given to uphold it solely because there can be no determinacy about what happens to the number of claims in case the liability is imposed.²⁵⁴ Also, as Lord Wilberforce mentioned in *McLoughlin v O'Brian*, as the number of claims for psychiatric injury so far has been quite small, the courts’ concerns about the potentially wide scope of litigation in case the floodgates open seem to lack grounds.²⁵⁵ In addition to that, there is actually some evidence that speaks in favour of the fact that in case the courts recognise a wider group of claimants who are entitled to damages for psychiatric injury, the floodgates might not in fact open; this, for example, was the case in New South Wales, California and Hawaii.²⁵⁶ This once again supports the view that, by using policy arguments, the courts might in fact be suppressing a natural social process, the scale of which in reality is not big enough to bring about a wave of litigation.

If we examine the ‘floodgates’ argument in the context of Hillsborough, the supposition that it would be unfair to impose restrictions on the plaintiffs simply because the number of potential claimants could be large lacks grounds if examined in the context of the relevant case law: Des Butler in his work ‘An Assessment of Competing Policy Considerations in cases of Psychiatric Injury Resulting from Negligence’ rightly observed that although in some cases defective goods were a result of a large number of claimants who suffered as a consequence, there was apparently no urge on the part of the courts to limit the number of claims in these cases.²⁵⁷ This fact brings us to a conclusion that, in the eye of the House of Lords, the Hillsborough cases were considered to be somehow different from these types of claims.

The burden of liability argument tends to be applied in cases that deal with events like Hillsborough that include a vast number of potential victims. The problem with

²⁵² Desmond A. Butler, ‘An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence’ (2002) 10 Tort Law Journal 13, para 3.3.

²⁵³ Segal and Williams (n 215) 104.

²⁵⁴ Butler (n 252), para 3.3

²⁵⁵ *McLoughlin* (n 176) 433.

²⁵⁶ Butler (n 252) para 3.3.

²⁵⁷ *ibid.*

this argument is that it can be effectively applied to a considerable number of tort law cases in general: it is a common situation when a minor negligence by one person causes major consequences that affect another person—which can actually be the case of Hillsborough—when a failure to close off a tunnel in the final end lead to 96 casualties. However, such disproportion can hardly be a justification not to award damages on its basis.²⁵⁸

The second group of arguments which can, in my view, be attributed to a certain extent to public policy was addressed by Lord Steyn specifically in respect of the fact that the cases were brought forward by the members of the police force: firstly, he mentioned that police officers were not recognised as a group of claimants who can recover for psychiatric shock and such an extension is likely to result in many more similar claims, giving an example of doctors who suffered psychiatric injury while treating a patient. Secondly, Lord Steyn observed that police officers as a group of claimants can benefit from the compensations awarded to them within the framework of relevant statutory schemes.²⁵⁹

Due to the fact that the first argument was addressed in the context of employer's liability, it is hard to see how a substantial number of claims can arise in this particular situation, as, in respect of doctors, the scenario where employer's negligence results in the employee's psychiatric injury cannot, in my view, be more frequent than in case of any other employee. However, the emphasis in this argument was apparently laid specifically on public bodies, which arguably allows the classification of this statement as a sort of defensive approach towards public body liability in terms of employer-employee relationship.

The second argument bears much resemblance to the views of the SYP senior officers, already discussed in the previous chapters, which can be described by the belief that, when compensation can be issued within the police, bringing the case to court seems to be unnecessary. On one hand, there certainly is a kernel of good sense in this reasoning. On the other hand though, if this rule is strictly followed, it results in a situation where the actions of the police in terms of compensation are not questioned by an external authority, which can constitute a problem with the view of the present knowledge of what was happening within South Yorkshire Police when the police officers decided to claim damages through court.

²⁵⁸ Jones (n 251).

²⁵⁹ White (n 166) 498.

There was one more argument that was mentioned in Lord Hoffman's speech that cannot be included with any confidence into either group. The essence of it was that it would be unfair from the point of view of an ordinary person for the police officers to be, for several reasons, in a more beneficial position than the bereaved relatives of the victims, who could not recover for their condition caused by the loss of their loved ones,²⁶⁰ whereas the police officers would be able to receive compensation for their injury. This argument apparently had a significant weight in the decision; however, it is important to point out that presuming that an ordinary person would feel that the bereaved families were disadvantaged in comparison with the police officer, the Law Lords did not make any attempts to analyse how the society would react to a claim brought by a voluntary rescuer who suffered psychological injury as a result of his attempts to rescue the people in the pens. It is hard to see how ordinary people would think that this rescuer should not be entitled to compensation merely because he did not lose a loved one at Hillsborough. Arguably, there is a different fact that might make these police officers not deserving compensation in the eyes of the society: the impression that they are to a certain degree 'tainted by the actions'²⁶¹ of the South Yorkshire Police officers responsible for the disaster.²⁶²

The influence that policy factors had on the outcome of *White* is indicated clearly in the final part of Lord Steyn's speech: in it, he expresses his concern over the possibility of recognising new groups of claimants, thus justifying his decision not to award damages to the police officers. As well as that, he specifically mentions that the question of the extent to which psychiatric injury can be recoverable should be dealt with in Parliament.²⁶³

4.4.4. The Issue of Police Liability in *White*

The overview of the policy considerations discussed in the framework of *White* shows that there is one particular feature that distinguishes this case from the cases described in the chapter 'Police Negligence Case Law: the Legacy of *Hill*'.²⁶⁴ There is actually no direct reference to the question of protective approach towards police liability anywhere within the case, apart from some policy arguments discussed in the previous chapter that indirectly point to it. With the main focus of the judgments

²⁶⁰ *White* (n 166) 508-511.

²⁶¹ Segal and Williams (n 215) 110.

²⁶² *ibid.*

²⁶³ *White* (n 166) 500.

²⁶⁴ n 134.

being the problem of the extent to which pure psychiatric injury should be compensated in respect of rescuers and employees, there is no mentioning of the police immunity argument that appeared in the majority of the claims against the police which reached the House of Lords.

It might be suitable at this point to ask to what extent this case is actually connected with police liability. Seemingly it does not at all, but, at the same time, some of the peculiarities already described in this work point at the fact that Law Lords were arguably more concerned with police liability than they perhaps wanted to show.

Having discussed public policy considerations in *White*, it is important to mention that a considerable number of them (mainly those connected with psychiatric injury of secondary victims) were by no means unique for this particular claim: in the problematic cases connected with psychiatric injury prior to *White*, almost the same set of policy arguments can be found, which can be opposed by the same counter-arguments. The only substantial difference is that in other cases they were never used to actually restrict liability for psychiatric injury.²⁶⁵ It was Hillsborough itself where the case law was interpreted in the most rigid way that brought about the major change. The question here is: what was so different about Hillsborough, apart from the fact that it was a large-scale disaster with a potential of opening the ‘floodgates’ so feared by Lord Steyn (which was mentioned, but never fully relied on in the previous similar judgments)? At the same time, when analysing the outcomes of police negligence cases decided in the House of Lords,²⁶⁶ this pattern of basing the decisions on policy considerations almost solely can be easily traced. If these two observations are combined, it can be argued with some degree of certainty that, in reality, police immunity was a factor that potentially did play its role in the outcome of *White* with the Law Lords probably being reluctant to mention it due to, firstly, obvious unpopularity of the *Hill* principle²⁶⁷ and, secondly, the negative image of South Yorkshire Police in connection with the events at Hillsborough.

The latter consideration can, to an even greater extent, provide a reason explaining the absence of police immunity issue in *Alcock*. Whereas it could probably have saved the judges from all the attempts to justify their decision from other

²⁶⁵ Segal and Williams (n 215) 108.

²⁶⁶ n 147-155.

²⁶⁷ McIvor, ‘Getting Defensive about Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords’ (2010) 69(1) Cambridge Law Journal 133, 133-134.

perspectives, it is hard to pinpoint a case on police negligence where the police would be under so much criticism in respect of their negligent act. It is easy to see how police immunity applied in these circumstances would have caused a wave of public outrage about the courts protecting the guilty ones by using limitations that undoubtedly look artificial in the eyes of an ordinary citizen.

To conclude this chapter, I find it necessary to once again cite the definition of the term ‘immunity’ given at some point in this work: it is an ‘exemption of the duties imposed by law, generally on grounds of public policy’.²⁶⁸ In my opinion, this definition describes with a high degree of accuracy the outcome of *White* (and *Alcock* to a certain degree), even though in this case policy considerations were not connected directly with police immunity.

²⁶⁸ n 100.

The Lessons of Hillsborough: Should Civil Liability of the Police be Expanded?

The recent findings of the Hillsborough Independent Panel Report brought about a wave of public discontent with the police force in general and the concern that the Hillsborough Disaster is not an exceptional precedent where just one particular police department was covering up important facts which could have changed the whole perception of the events, but one case out of many.²⁶⁹ Against this background, the alarming pattern that can be traced in the cases like *White* shows us that it is perhaps wiser to stop treating the police with so much caution when it comes to their civil liability. In conclusion of this paper, I would like to mention several reasons why, in my opinion, the current approach to police liability might need to be reviewed.

Firstly, as the example of *White v Chief Constable of South Yorkshire Police* clearly illustrates, the desire to leave the ‘floodgates’ closed and therefore protect the police from possible future difficulties connected with a large number of claims is bound to create uncertainties in the areas of law that seemed to have a relatively clear principle upon which the decisions had been based before. The new principle that was established in *White* in the field of the rescuer’s status was in fact abandoned within three years from the actual decision in *White*, which brings about a fair question of whether there actually was such an overwhelming need to introduce it when its ambiguity was apparent from the very beginning. This question, regardless of the answer to it, leads us to another one: on balance, is good law more important than closed ‘floodgates’ or vice versa? If we take an example of Hillsborough litigation, we can clearly see that the House of Lords seemed to be repeatedly deciding in favour of the latter. However, it can by all means be argued that the potential impact of a case being decided only on the basis of the public policy can bring almost as much harm for future claimants who are going to be ordinary members of society as, for example, the growth of the number of claims against the police (being, as it has been shown before, a purely theoretical proposition with some evidence testifying for and against it).²⁷⁰ It would be unwise to argue that this can be said with a hundred percent certainty, but just to the same extent no one can be

²⁶⁹ Andrew Rawnsley ‘The Police must no Longer be Immune from Radical Reform’ *The Guardian* (16th September 2012)

<www.guardian.co.uk/commentisfree/2012/sep/16/andrew-rawnsley-police-reform> accessed 16th March 2013

²⁷⁰ n 254.

certain about the opening of the ‘floodgates’. Therefore, the question of priorities in fact has no simple answer, which was admitted by Lord Hoffman in his remark on public police factors in his speech in *White*: ‘These are questions on which it is difficult to offer any concrete evidence and I am simply not in a position to form a view one way or the other.’²⁷¹

Secondly, the response which *White* caused within the South Yorkshire Police was alarming to say the least. It was mentioned earlier that the possibility of claims from his own subordinates was seen as something extraordinary by the Chief Constable, not to mention the pressure that some of the policemen faced from their senior officers.²⁷² If we take the example of the employer’s liability in *White*, it is obvious that, for some reason, the policemen, being the employees of the Chief Constable, turned out to be in a more disadvantaged position than all the other employees, as bringing a claim against their employer was apparently regarded as a sort of impudence. In my view, what the House of Lords did by using the public policy arguments in *White* basically confirmed this opinion. Apart from the fact that the police obviously needs to be reformed as an institution,²⁷³ it also apparently needs to enjoy its immunity to the extent where it would not turn into impunity. It is also important to mention that, under certain circumstances, the actions of the senior officers aimed at preventing the officers from bringing their claims to court can arguably be considered as a breach of the Article 6 of the Human Rights Act. As was already discussed in the chapter ‘The Status of Public Bodies in English Law’, police is a co-called ‘pure’ public body that is under the obligation to comply with HRA in all its activities.²⁷⁴

Another point connected with the issue of the cover-up that South Yorkshire Police attempted is more specifically to do with the alteration of the evidence.²⁷⁵ One major problem of bringing a case against the police at the moment when *Alcock* was decided was the fact that the solicitors on the side of the police could have access to

²⁷¹ *White* (n 166) 510-511.

²⁷² n 218.

²⁷³ John Cooper, ‘The Outcry over Hillsborough won’t Stop This Happening Again’ *The Independent* (13th September 2012) <www.independent.co.uk/voices/comment/the-outcry-over-hillsborough-wont-stop-this-happening-again-8135657.html> accessed 29th March 2013.

²⁷⁴ n 112.

²⁷⁵ n 80.

the documents that were not available to the person who was suing them.²⁷⁶ If we take Hillsborough as an example, it is obvious that, in this case, the claim of the bereaved was based on the evidence that was disclosed by South Yorkshire Police; however, as in this case the evidence was altered, the plaintiffs based their claims on false facts, whereas the solicitors of the police were fully aware of the alterations. This example shows clearly how easy it can be for the police to turn any facts to their advantage if they choose to: if Hillsborough was not the only example of such a cover up, it is a big question as to how ethical in reality the concept of police immunity is in the light of this evidence.

It is hard to tell whether the new evidence connected with Hillsborough disaster is going to result in any substantial developments in the approach towards civil liability of the police. In my view, there is little possibility of this happening as, apart from the police, there are many more public authorities that are treated similarly in this sense and any changes initiated in respect of one are inevitable going to affect all the rest. However, one change that the recent Hillsborough-related events are more than likely to bring about is closer attention that is going to be given to the work of the police in general, as well as considering the extent to which this work is reviewed by an independent body.²⁷⁷

²⁷⁶ Editorial, ‘Immunity Changes Leave Police Open to Two-Pronged Actions’ *The Lawyer* (9th May 1995) <<http://www.thelawyer.com/immunity-changes-leave-police-open-to-two-pronged-actions/84352.article>> accessed 16th March 2013.

²⁷⁷ Rawnsey (n 269).

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