Liability of police in negligence: A comparative analysis

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A recent decision of the United Kingdom Supreme Court confirms the general reluctance of the law to impose a duty of care on police officers. While confirming the status quo, two judges dissented in the result, suggesting that there might, over time, be a re-calibration of the existing approach which places serious obstacles in the path of those suffering injury through police action or inaction being able to claim compensation for their losses. This article will summarise the existing position regarding the liability of police officers to various kinds of plaintiff in the United Kingdom, Canada and Australia, before critically considering existing rationales for the reluctance to find that a duty of care exists, and ways in which the law in this area might develop. It concludes that the policy rationales for reluctance to find that police owe a duty of care are highly questionable, and that Canadian law in this area has often balanced various considerations better than the other jurisdictions studied.

INTRODUCTION

There is no doubt that police officers do a very difficult job. They are responsible for public safety, and place their lives on the line each day in this calling. They sometimes must deal with the least desirable members of society, and those who are irrational and/or violent. They may often be exposed to scenes of great sadness and distress. The vast majority of police are conscientious in carrying out these tasks, are honest and non-corrupt, and do not abuse the significant power and trust that the law reposes in them. This article is concerned with the very small number of occasions where a person may have a legitimate legal grievance with the way in which police have conducted themselves. Specifically for the purposes of this article, these are cases in which police are said to have acted (or failed to act) in a manner that the law regards as negligent. After acknowledging the key differences in legal principle in negligence amongst the jurisdictions of Europe, Australia and Canada, this article will summarise the existing state of play regarding the liability of police authorities in negligence in each of them. It will then critically consider the policy arguments often brought to bear to support an argument that police should not ordinarily be found to owe a duty of care. It finds these arguments to be unconvincing. Further, there are sound policy arguments for holding police to the same legal obligations as apply to anyone else.

The law in some jurisdictions continues to make it extremely difficult for those who claim to have suffered injury through the negligence of police officers to successfully claim compensation from police authorities. Several factors conspire to achieve this result. First, the Crown, of which police would be considered a part, has traditionally enjoyed immunity from suit.[1] While this immunity has progressively been abolished or modified by legislation,[2] apparent judicial reluctance to find public

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[1] "The King … cannot do a wrong": *Magdalen College Case* (1615) 77 ER 1235, 1243 (Lord Coke), adopted by Griffith CJ in *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 365 (Barton J to like effect at 370).

[2] See, eg, in the United Kingdom: *Petitions of Right Act 1860* (UK); *Crown Proceedings Act 1947* (UK); in Australia: *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) ss 8, 9; *Crown Proceedings Act 1992* (SA) s 5; *Crown Proceedings Act 1958* (Vic) s 23(1); in Canada: *Crown Liability and Proceedings Act*, RSC 1985, c. C-50, s 3; *Crown Proceeding Act*, RSBC 1996, c 89 s 2(c); *Proceedings Against the Crown Act*, RSO 1990, c P-27, s 13; William Holdsworth, "The History of Remedies Against the Crown" (1922) 38 *Law Quarterly Review* 141; Peter Hogg, Patrick Monahan and Wade Wright, *Liability of the Crown* (Carswell, 4th ed, 2011) 156–159.

authorities, including police, liable in negligence persists.[3] Second, courts have repeatedly affirmed the general principle that one person (or authority) is not generally liable to another for the consequences of actions or omissions of a third party.[4] This can have particular application in respect of cases against police authorities, as will be seen below. Third, the law has traditionally distinguished between actions and omissions, generally being slower to recognise liability in the case of the latter compared with the former.[5] Many actions against police authorities are based on omissions, so this distinction has historically contributed to the difficulties plaintiffs have when suing police authorities. Fourth, there is evident utilitarian concern with permitting negligence claims in areas which could compromise the performance of important public functions or have implications for the greater good, including (unproductive) diversion of resources. Fifth, the court is wary of recognising a duty of care at common law where this would, or could, conflict with the statutory responsibilities often owed by police. These policy concerns feature prominently in claims against police authorities, as we will see. And sixth, the concern about indeterminate liability is ever-present.[6] Explanations are not the same as justifications.

At one time, there developed a practice of judges[7] and scholars[8] applying principles of public law, particularly administrative law, to questions of common law liability of public authorities, which, to some extent, was designed to protect public authorities from liability for their actions or omissions.[9] This practice has received judicial[10] and academic criticism.[11] It is problematic to apply principles developed in the specific context of judicial review (assessing the legality of action and whether the authority has acted within power) to the different context of a private law negligence claim where the

[3] Richard Mullender, "Negligence, Public Bodies and Ruthlessness" (2009) 72(6) *Mod LR* 961, 961–962: "The judges have erected a number of barriers that make the pursuit of negligence claims against public bodies particularly difficult"; Claire McIvor, "Getting Defensive About Police Negligence: The *Hill* Principle, The *Human Rights Act 1998* and the House of Lords" (2010) 69(1) *Camb LJ* 133, 133: "as far as negligence liability is concerned, the English courts have always been very protective of the police."

[4] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61, 263–269 (Gleeson CJ), with whom Gaudron J (270) and Hayne J (288) agreed; and Callinan J to like effect (299); *Smith v Leurs* (1945) 70 CLR 256, 261–262 (Dixon J).

[5] In Australia, this distinction in the context of public authorities was abolished in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29.

[6] In other words, "liability in an indeterminate amount, for an indeterminate time to an indeterminate class": *Ultramares Corp v Touche*, 174 NE 441, 444 (Cardozo J) (NY, 1932); *Cooper v Hobart* [2001] 3 SCR 537, [37], [54]; compare empirical studies suggesting lack of success by plaintiffs in negligence cases in recent years; see for example Pamela Stewart and Anita Stuhmcke, "Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond" (2014) 38 *Melb Univ L Rev* 151, 182; Pam Stewart and Anita Stuhmke, "High Court Negligence Cases: 2000–2010" (2014) 36 *Syd L Rev* 585.

[7] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1067 (Lord Diplock); *Stovin v Wise* [1996] AC 923, 936 (Lord Nicholls, with whom Lord Slynn agreed), 953 (Lord Hoffmann, with whom Lords Goff and Jauncey agreed); *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; [1998] HCA 5, 443 (Brennan CJ).

[8] Tom Cornford, *Towards a Public Law of Tort* (Routledge, 2016) 142–151.

[9] For instance, this may be because a court is ill-equipped, in adversarial proceedings, to evaluate decisions made by a public authority involving a careful balancing of competing priorities and interests: John Doyle and Jonathon Redwood, "The Common Law Liability of Public Authorities: The Interface Between Public and Private Law" (1999) 7 *Tort L Rev* 30, 34; Cornford, n 8, 208: "public law concepts often seem to have been used to reduce the likelihood of liability"; *Stovin v Wise* [1996] AC 923, 931 (Lord Nicholls): "a coherent, principled control mechanism has to be found for limiting this area of potential liability (public authority liability). The powers conferred on public authorities permeate so many fields that a private law duty in all cases, sounding in damages, would be (un)acceptable."

[10] *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 571–572 (Lord Slynn, with whom Lords Nolan and Steyn agreed); *X v Bedfordshire County Council* [1995] 2 AC 633, 736 (Lord Browne-Wilkinson); *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 652–653 (Lord Slynn for the Court); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59, 18 [25] (Gaudron J), 35 [81]–[82] (McHugh J), 78 [216]–[217] (Kirby J).

[11] S H Bailey and M J Bowman, "Public Authority Negligence Revisited" (2000) 59(1) *Camb LJ* 85; M J Bowman and S H Bailey, "Negligence in the Realms of Public Law – A Positive Obligation to Rescue" [1984] *PL* 277; Donal Nolan, "Varying the Standard of Care in Negligence" (2013) 72(3) *Camb LJ* 651, 669; Mark Aronson, "Government Liability in Negligence" (2008) 32 *Melb Univ L Rev* 44, 80; Stephen Bailey, "Public Authority Liability in Negligence: The Continued Search for

remedy sought is typically damages.[12] The standards of behaviour expected, and the circumstances in which an "actionable wrong" might be found, differ.[13] A further consequence of applying judicial review principles to cases of negligence with respect to public authorities would be that the principles applied to these authorities would differ from those applied to other defendants. This offends the rule of law, in the egalitarian sense that the law should be applied equally.[14] Moreover, the legitimacy of a state's legal demands on its citizens may be questioned if the state is subject to different rules than its citizens.[15] Attempts by courts to identify "public functions", to which arguably special rules might be applied, have been abandoned due to the inherent difficulty in doing so.[16] Lastly, the idea of immunities,[17] special rules or presumptions applying where public authorities, including police, are sued in negligence,[18] seems inconsistent with the abandonment of a category-based approach[19] in this area of law in favour of a broad, generalised duty of care.[20]

Whilst courts have noted that generally, one person (A) is not legally responsible to another (B) for failing prevent a third party (C) from injuring B, there are exceptions. These may be based on arguments that A controlled C,[21] or that "the act of [C] could not have taken place but for … breach of [A's] duty".[22] While an occupier of premises was held not liable in negligence for criminal acts committed on the premises, judges have indicated that an exception to the general rule may apply if

Coherence" (2006) 26 *Legal Studies* 155, 156: "it seems increasingly to have been accepted that the ordinary principles of negligence normally provide sufficient flexibility to ensure that an appropriate balance is maintained between claimant and defendant public authority that takes proper account of the latter's responsibilities to act in the public interest."

[12] *Cornford*, n 8, 17; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59, 35 [82] (McHugh J): "I am unable to accept that determination of a duty of care should depend on public law concepts. Public law concepts of duty and private law notions of duty are informed by differing rationales. On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires"; John Doyle, "Tort Liability for the Exercise of Statutory Powers" in Paul Finn (ed), *Essays on Torts* (Law Book Co,1989) 203, 235–236: "there is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care."

[13] Peter Cane, "Damages in Public Law" (1999) 9(3) *Otago Law Review* 489, 507: "this sense of unreasonable (so-called *Wednesbury* unreasonableness, a public law doctrine) is stronger than that normally used in the law of tort"; Doyle and Redwood, "The Common Law Liability of Public Authorities: The Interface Between Public and Private Law" (1999) 7 *Tort Law Review* 30, 36: "public law concepts of ultra vires should not determine the liability of public authorities in common law negligence. The courts use the ultra vires test in judicial review, where the courts are concerned with the lawfulness of executive action. By contrast, common law proceedings for negligence germinate from an unrelated doctrinal base"; Roderick Bagshaw, "Monetary Remedies in Public Law – Misdiagnosis and Misprescription" (2006) 26 *Legal Studies* 4, 18–22.

[14] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund Inc, 8th rev ed, 2010) 110–114; Lord Bingham, "The Rule of Law" (2007) 66(1) *Camb LJ* 67, 73.

[15] *Cornford*, n 8, 11–13, states that in framing rules with respect to state liability in negligence, the principle that citizens must perceive the state's power over them as legitimate is important.

[16] *Coomber v Berkshire Justices* (1883) 9 App Cas 61.

[17] That word was used by Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 64; subsequent United Kingdom cases have preferred different language in light of arguments that an immunity would be contrary to the *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953): see *Osman v United Kingdom* [1998] ECHR 101. On immunities from negligence across the jurisdictions in the context of the legal profession, the High Court of Australia refused to overrule barristers' immunity for in-court work in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12; the United Kingdom House of Lords jettisoned the immunity in *Arthur J S Hall and Co v Simons and Barratt v Ansell* [2000] UKHL 38; while in Canada prosecutors enjoy an immunity against malicious prosecution claims: *Nelles v Ontario* [1989] 2 SCR 170.

[18] See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29, in which the High Court of Australia abandoned a past rule preventing a public highway authority being held liable for non-feasance.

[19] *Heaven v Pender* (1883) 11 QBD 503.

[20] *Donoghue v Stevenson* [1932] AC 562.

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

[22] *Smith v Leurs* (1945) 71 CLR 256, 262 (Dixon J).

the occupier had *specific knowledge* of threats or danger.[23] Assumption of responsibility – which in several cases has been held to be the basis of police liability to third parties[24] – might also be useful here, given an obligation on police to keep the peace.[25] It is conceded that, as the current authorities stand, the circumstances in which police (and other emergency workers) have been found to have assumed responsibility are relatively narrow.[26] The focus of this article lies elsewhere, but a conceptual basis for broader imposition of negligence liability on police could rest on a broader view of assumption of responsibility.

On the other hand, there are arguments for applying the same legal principles to police (and public authorities generally) as apply to others in society, *at least as a general starting principle*.[27] Most obviously there is the rule of law, in the egalitarian sense that the law should be applied equally to everyone.[28] Then there is the sentiment that "the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied".[29] Lastly, in the specific area of negligence, support for applying the same legal principles to police as apply to others can be found in the abandonment of a category-based approach[30] in favour of a broad, generalised duty of care.[31] This can seem inconsistent and incompatible with immunities,[32] special rules or presumptions apparently applying where public authorities, including police authorities, are being sued in negligence.[33]

After setting out the current authorities in this area in Europe, Australia and Canada, including a 2015 United Kingdom Supreme Court decision,[34] this article will critically consider whether the courts have been unduly restrictive of the ability of an injured claimant to successfully bring claims of negligence against police authorities, and whether re-consideration is called for in this area. This article will not consider the tort of misfeasance in public office; being an intention-based tort it is

[23] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61, 267 [30] (Gleeson CJ), 270 [43] (Gaudron J), 294 [117] (Hayne J).

[24] *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, 484–485; *An Informer v A Chief Constable* [2012] EWCA Civ 197, [113], [168]; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283, 289; *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421.

[25] *Glasbrook v Glamorgan County Council* [1925] AC 270, 277, 285, 288, 292, 306; *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [180]–[181] (Lord Kerr).

[26] For example: circumstances of control, such as where police have an individual in custody (*Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283); police informants (where special policy rules may apply) (*An Informer v A Chief Constable* [2012] EWCA Civ 197); and where the loss arises from specific, positive acts of police (*Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242). Mere presence has not been deemed sufficient to create such an assumption (*Cowan v Chief Constable for Avon and Somerset Constabulary* [2001] EWCA Civ 1699, [42]), nor has the mere fact that a request was made to an emergency service provider (*Capital and Counties Plc v Hampshire County Council* [1997] QB 1004, 1036–1038; compare *Kent v Griffiths* [2001] QB 36 (although no mention of assumption of responsibility in that case)). There is debate regarding whether an express assurance by police is required to create such an assumption (yes, according to Lord Brown in *Chief Constable of Hertfordshire Police v Van Colle* [2008] UKHL 50, [135]; no, according to Lord Kerr in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [165]).

[27] Bailey and Bowman, n 11, 116–117.

[28] Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund Inc, 8th rev ed, 2010) 110–114; Lord Bingham, "The Rule of Law" (2007) 66(1) *Camb LJ* 67, 73.

[29] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [56] (Lord Bingham); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663 (Sir Thomas Bingham MR).

[30] *Heaven v Pender* (1883) 11 QBD 503.

[31] *Donoghue v Stevenson* [1932] AC 562.

[32] On the use of the word "immunity", see n 17.

[33] The High Court abandoned a past rule preventing a (public) highway authority being held liable for non-feasance in *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[34] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

considered to be beyond the scope of current discussion.[35] However, the very existence of the tort may call into question arguments that the role and nature of public authorities, including police, is somehow inconsistent with application of ordinary principles of tort liability.

EXISTING AUTHORITIES

Before considering the individual approach of the three chosen jurisdictions in relation to the extent to which police owe a duty of care to private individuals, some general comments are in order in relation to the general negligence principles applied in each of the jurisdictions studied, because there are differences. Each jurisdiction studied accepts and applies the generalised duty of care enshrined in *Donoghue v Stevenson*,[36] and each jurisdiction accepts that making one person liable to another for injuries caused by a third party is exceptional. However, five important differences between the jurisdictions in establishing the existence of a duty of care should be noted at this point.

First, jurisdictions differ on the use of the notion of "proximity" as a control mechanism in relation to the establishment of a duty of care. While the United Kingdom and Canada[37] continue to use proximity in considering whether a duty of care exists, and while at one time Australia followed this approach,[38] its use in Australia has since fallen into disfavour.[39] Second, both the United Kingdom and Canada will expressly consider questions of policy in establishing whether a duty of care exists; in the former case through the use of a three-stage test,[40] in the latter case through the use of a two-stage test.[41] In contrast, Australian courts have rejected the two- and three-stage tests, including express consideration of policy and fairness factors in establishing the existence of a duty of care,[42] although policy-type arguments are sometimes used.[43] Third, the Australian courts favour the so-called "salient features" incremental approach, taking into account numerous factors in establishing whether a duty of care exists, with their relative importance varying from case to case. Primary among them, typically, are questions of control, and questions of vulnerability.[44] Fourth, given that Australian law lacks the control mechanisms of proximity, policy and/or the notion of what is fair just and reasonable, Australian law has recognised a control mechanism[45] discounting the existence of a duty of care where such would be inconsistent with other duties or responsibilities owed by the defendant.[46] Fifth, Canadian law continues to distinguish between policy and operational matters, the

[35] Harry Wruck, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 *UBCLR* 69; Michael Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Courts" (2005) 42 *Alberta Law Review* 1061.

[36] *Donoghue v Stevenson* [1932] AC 562.

[37] See *Cooper v Hobart* [2001] 3 SCR 537 in relation to Canada: the Court will consider whether the current case is in a category where a duty of care has previously been recognised; an affirmative answer avoids a full scale duty analysis. With regard to the United Kingdom, see *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[38] *Gala v Preston* (1991) 172 CLR 243; *Jaensch v Coffey* (1984) 155 CLR 549.

[39] *Perre v Apand* (1999) 198 CLR 180; [1999] HCA 36.

[40] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[41] *Cooper v Hobart* [2001] 3 SCR 537, adopting and redefining the test established in *Anns v Merton London Borough Council* [1978] AC 728.

[42] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, overruled without disturbing the rejection of the two- and three-stage tests.

[43] For example, the question whether there were "any … reasons in policy" for denying the existence of a duty of care was stated to be relevant by McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59, 39 [93].

[44] See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54.

[45] Use of this control mechanism is not confined to Australian tort law.

[46] See *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44. Use of this control mechanism is not confined to Australian tort law.

former not being a source of legal obligation in this context.[47] This distinction was formerly recognised in Australia, but recent decisions have questioned its utility.[48]

It is an interesting question as to the extent to which these differences in approach have led to different outcomes in negligence cases, including in the specific context being discussed here.[49] Ironically, as a general observation in the current context, the discussion following evidences that Australian and United Kingdom outcomes tend to be broadly similar despite using different tests, while the Canadian approach, although similar to that in the United Kingdom, has typically yielded different results to that of the other two jurisdictions.

Prior to undertaking comparison of the relevant case law in Europe, Australia and Canada, it must be borne in mind that the cases reflect different factual scenarios, and questions of whether police owe a duty of care to individuals in a range of categories. We must not be too quick to automatically apply cases in one jurisdiction elsewhere, without bearing in mind these factual differences, as well as differences in law mentioned above.

United Kingdom – common law of tort

There are a myriad of circumstances in which a claim might be brought against a police authority. United Kingdom tort law has seen claims brought by victims of crime, family members of victims of crime, and suspects. Most, if not all, of these claims are surrounded by truly horrific facts. The leading modern case in this area is *Hill v Chief Constable of West Yorkshire*[50] (*Hill v West Yorkshire*). In this case, the mother of a victim of a mass murderer sued the police authorities, alleging defects in their investigation of crimes committed by the offender. Her daughter was the last victim. The plaintiff alleged defects in the investigation of the earlier crimes, suggesting that if more competent investigation had occurred, her daughter may not have been murdered. Relevant legislation made clear that the chief constable was liable in respect of torts committed by officers under his/her control in the course of their duties.[51] The House of Lords unanimously held that no duty of care existed in the circumstances.

Lord Keith[52] found that police could be liable in tort, including for negligence, to someone injured as a direct result of their acts or omissions.[53] The House of Lords applied the approach established in *Anns v Merton London Borough Council*[54] (*Anns*), then prevailing in the United Kingdom, based on a consideration of reasonable foreseeability and "proximity of relationship", subject to a public policy analysis. Lord Keith referred to the decision of *Home Office v Dorset Yacht Co Ltd*[55] (*Dorset*), where a public authority was held liable for the reasonably foreseeable injury caused when individuals detained by the public authority escaped, causing damage to yachts moored nearby. In that case, there were special factors to support the existence of a duty of care – specifically, the public authority had the escapees in its custody, and was aware of the precise risk to the plaintiff yacht owners that eventuated. That situation was distinguished from the facts before the House of Lords in *Hill v West Yorkshire*. In the latter, the offender had never been in police custody, and police

[47] *Holland v Government of Saskatchewan and Attorney-General of Canada* [2008] 2 SCR 551, [14] (McLachlin CJ).

[48] *Brodie v Singleton* (2001) 206 CLR 512; [2001] HCA 29, 560 (Gaudron, McHugh and Gummow JJ); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 358–359 [67]–[68] (Toohey J), 393–394 [181]–[182] (Gummow J). In *Stovin v Wise* [1996] AC 923, 951–952 Lord Hoffmann said the distinction was an "inadequate tool"; compare *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 673–674.

[49] Some argue that the difference between the proximity approach and the salient features approach is more apparent than real: *Hill v Van Erp* (1997) 188 CLR 159, 178 (Dawson J), 190 (Toohey J). Further consideration of this issue here is considered to be beyond the scope of the current discussion.

[50] *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53.

[51] *Police Act 1964* (UK) c 48, s 48(1).

[52] With whom Lords Brandon, Lord Oliver and Lord Goff agreed, out of the five Lords who heard the case.

[53] *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 59 [C].

[54] *Anns v Merton London Borough Council* [1978] AC 728.

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

did not know the identity of the offender until after the plaintiff's daughter had been murdered. Further, the victim was not known to the police, being a member of the general public, as opposed to the yacht owners in *Dorset*. Therefore, there was no proximity of relationship between the victim and the police in *Hill v West Yorkshire*.

Lord Keith also nominated various public policy arguments which in his view negated the existence of a duty of care on the part of police in circumstances such as the present. He denied that the public interest would be advanced by recognising that police generally owed families of victims of crime a duty of care. He said that though police made mistakes, they applied their best endeavours in the performance of their work, and he feared that imposition of a duty of care upon them would lead to them adopting a "detrimentally defensive" approach to their policing. Policing involved decisions as to which line of inquiry to pursue, and how to deploy limited resources most efficiently, decisions which it was not appropriate for courts to second guess. Police resources could be drained if such decisions might have to be defended in court. Lord Keith held that police had an immunity from the type of negligence action brought in that case.[56]

While aspects of the *Hill v West Yorkshire* principle were jettisoned,[57] its essence continued to be applied to cases against police, as we will see below. While the immunity might have been confined narrowly to cases where the victim was not known to police, in fact it was applied broadly, to include cases where police had had direct contact with the victim. Indeed, most of the occasions in which the Supreme Court has applied the *Hill v West Yorkshire* doctrine have been occasions where the specific plaintiff was known to police, quite unlike the actual factual scenario in *Hill v West Yorkshire* itself, and providing a court so minded with a means by which to escape application of the doctrine, if they so wished. That option has typically not been exercised.

So, for example, *Hill v West Yorkshire* was applied to deny a claim against police for the handling of a race-related murder in *Brooks v Commissioner of Police for the Metropolis*[58] (*Brooks*), even where an independent inquiry found major deficiencies in how police investigated the murder and treated the plaintiff, a friend of the murder victim who witnessed the violent incident. All members of the court denied that the police owed a duty of care to the plaintiff in such a situation, citing *Hill v West Yorkshire* and policy reasons why such a conclusion was needed.[59] Lord Steyn acknowledged, however, that the *Hill v West Yorkshire* limitation on liability might not apply to "outrageous negligence" by police.[60]

Hill v West Yorkshire was also applied in *Chief Constable of the Hertfordshire Police v Van Colle*.[61] The negligence aspect of this case[62] involved ongoing domestic violence. The offender assaulted the victim in December 2000 after the victim broke off the relationship. The assault was

[56] *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 63–64, with whom all other Lords agreed; McHugh J referred to these policy reasons in *Hill v West Yorkshire* with evident approval in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12, 17 [101]–[102].

[57] For example, in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, it was reconceptualised not as a blanket immunity from liability as suggested in *Hill v West Yorkshire*, but as evidence of a general rule that police did not owe a duty of care to private individuals with respect to their functions ([27] (Lord Steyn, with whom Lords Rodger and Brown agreed)). Further, the House of Lords in *Brooks* specifically rejected the unqualified statement in *Hill v West Yorkshire* to the effect that while police make mistakes, they were applying their best endeavours and should therefore not be held liable in negligence – arguing that a more sceptical approach to the carrying out of police functions was necessary: [28] (Lord Steyn, with whom Lords Rodger and Brown agreed).

[58] *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24.

[59] *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [30] (Lord Steyn, with whom Lords Rodger and Brown agreed), expressing fears that imposition of a duty of care on police would cause them to adopt an "unduly defensive approach to combating crime", with implications for time and resources, and inhibiting the ability of police to perform their functions in the interest of the community; compare Julia Tolmie, "Police Negligence in Domestic Violence Cases and the Canadian Case of *Mooney*: What Should Have Happened, and Could it Happen in New Zealand?" (2006) *New Zealand Law Review* 243, 270: "it is unclear why a freedom to operate in the community according to racist stereotypes serves the public interest in the management of crime."

[60] *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [34].

[61] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50.

reported to police. The police arrested the offender and detained him overnight, but he was not prosecuted. From January 2003 onwards, the offender sent the victim a stream of violent, abusive and threatening phone calls and text messages, including death threats. Sometimes there were 15 messages per day, and in one month 130 text messages were sent. Some of them indicated that the sender intended to kill the victim. In late February, the victim contacted police, explaining his past relationship with the offender, previous violence, and the threats to kill him. Police called around to the victim's residence where he offered to show them the text messages, but they declined. They did not take a statement from the victim, made no entry in their notebooks, and did not complete a crime form. They told the victim he would have to fill out a form to have the phone calls traced, which he did the next day, including details of the offender's home address and contact details. The victim was sufficiently concerned with the situation to move house. The threats continued, however, upon contacting the police on a few more occasions, the victim was told that the investigation was progressing well. On 10 March 2003, the offender attacked the victim at home with a claw hammer, fracturing his skull in three places and causing him brain damage and ongoing physical and psychological injury. He was convicted and sentenced to 10 years' imprisonment.

The victim's claim against the police for negligence was unsuccessful, based on *Hill v West Yorkshire* and policy reasons. A majority found it was up to the police to determine what action complaints of domestic violence warranted, if any. Lord Hope was of the view that police work could be impeded if a duty of care were imposed in such a case,[63] while Lord Brown, echoing Lord Keith in *Hill v West Yorkshire*, cautioned that police might adopt a "detrimentally defensive" frame of mind when carrying out their work, and that time and resources would be diverted from other tasks if such claims were permitted.[64] Lord Carswell admitted that though the current law conferring "freedom from liability" on police officers could leave claimants with legitimate grievances without a remedy, it was, in his view, "necessary that it should do so for the better performance of police work".[65]

Lord Bingham dissented. He expressed the relevant duty of care in the terms that if a member of the public (the plaintiff) provided police with apparently credible evidence that a third party, whose identity and whereabouts were known, presented a specific and imminent threat to the plaintiff's life or physical safety, police owe a duty of care to the plaintiff to take reasonable steps to assess such threat, and if appropriate, take reasonable steps to intervene.[66] Speaking of public policy, he indicated that the public policy consideration which should have first claim on the law is that the law should remedy wrongs, and "very potent considerations are required to override that policy".[67] Although Lord Phillips was "reluctantly unable" to agree with Lord Bingham, he did suggest that the kind of behaviour embraced by Lord Bingham in his test, and the actual behaviour of the police in this case, came close to the "outrageous negligence" which Lord Steyn said in *Brooks* would fall outside the protection to police given by the *Hill v West Yorkshire* principle.[68]

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[62] The case involved conjoined appeals involving both questions of the common law of negligence and relevant provisions of the *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights*), signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[63] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [76] (Lord Carswell ([108]) and Lord Phillips ([89]) agreeing).

[64] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [132]–[133] (Lord Phillips to like effect ([89]).

[65] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [106]: "[o]ne must acknowledge … that the price of … the freedom from liability afforded to police officers is that some citizens who have very good reason to complain of the police handling of matters affecting them will not have a remedy in negligence … One has to … decide whether in the wider public interest the law should allow that … in the interests of the wider community it is necessary that it should do so for the better performance of police work."

[66] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [44].

[67] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [56].

[68] *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [101]: "I have not, however, found any principled basis for placing this case outside the reach of that principle."

In its most recent decision earlier this year, *Michael v Chief Constable of South Wales Police*[69] (*Michael*), the United Kingdom Supreme Court maintained application of the *Hill v West Yorkshire* principle, denying by majority[70] a claim in negligence against the police on the basis that a duty of care was not owed. The victim had called an emergency hotline at 2:29 am, telling the call handler that her ex-boyfriend was acting in an aggressive manner, had turned up unexpectedly at that hour of the night at her house, and had hit her and bit her ear. The transcript of the call indicated that the victim had complained that her ex-boyfriend had taken her car to drive her new boyfriend home, and had indicated that when he got back to her house he was going to kill her. The call handler graded the call as a "G1" call, which meant that police had to respond immediately. There was a police station within five minutes' drive of the victim's home. Although the call was made in the South Wales Police district, the call handler who picked it up was in another district (Gwent), and told the victim that she (the call handler) would have to refer the matter to police in the South Wales district. The call handler immediately called them and summarised the nature of the complaint, but did not tell them that the victim's ex-boyfriend was threatening to kill her; instead, the handler advised that the victim's ex-boyfriend was threatening to "hit" her. The call handler explained that there was static and various noises during the initial conversation with the victim. Due to what the call handler told the South Wales police, they graded the matter as a "G2" call, which required a police response within 60 minutes.

Fourteen minutes after the first call, the victim called the emergency number again, and again the call went to the Gwent call handler. During the call, the victim was heard to scream, and the line went dead. She had been murdered by her ex-boyfriend. He pleaded guilty to murder and was sentenced to life imprisonment. An action was brought by the victim's mother and two dependent children, alleging the existence of a duty of care on the part of the police authority towards the victim, and breach of that duty by not responding quickly enough to the victim's call. Yet again, it was held that the police authority did not owe the plaintiffs a duty of care in the circumstances.

Lord Toulson delivered the judgment of the majority. He cited *Hill v West Yorkshire* to the effect that "the general duty of the police to enforce the law did not carry with it a private law duty towards individual members of the public".[71] He also cited the general principle that a person or authority (the defendant) was not, as a general rule, liable to compensate the plaintiff for acts or omissions of a third party.[72] Although this rule was subject to exceptions at common law – namely, where the defendant is in a position of control over the third party,[73] or where the defendant has assumed a positive responsibility to protect the plaintiff[74] (or victim, where plaintiff and victim are not one and the same, as in *Michael*) – neither was held to be the case here.[75] Lord Toulson referred to the familiar policy arguments against recognising a duty of care in such cases, as well as the potentially significant financial implications for both the police service and the general public, if a liability to compensate plaintiffs were imposed on police.[76]

Two strong dissents were written by Lord Kerr and Lady Hale. Lord Kerr, with whom Lady Hale agreed,[77] emphasised the three-stage test set out in *Caparo Industries Plc v Dickman*[78] (*Caparo*) as the approach to determining whether a duty of care exists, including consideration of reasonable

[69] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

[70] Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson and Lord Hodge; Lady Hale and Lord Kerr dissenting.

[71] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [37].

[72] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [97].

[73] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [99].

[74] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [100].

[75] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [99], [138].

[76] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [122].

[77] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [197].

[78] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

foreseeability, proximity, and whether it was fair and reasonable to apply a duty of care.[79] While the notion of proximity had been criticised for its supposedly vague and uncertain nature, Lord Kerr re-asserted its importance in helping to establish whether a duty of care existed, assisting in avoiding the spectre of indeterminate liability which figured so prominently in deliberations over the proper contours of negligence law. He found that in this case, there was a closeness in association between the victim and the defendant, in that details of specific, imminent threats against the victim had been communicated to the defendant. The defendant was therefore in a position to prevent the threats from being carried out and protect the victim.[80] It failed to do so.

Lord Kerr acknowledged that any police liability principle would need to strike a balance between the effective administration of justice on the one hand, and the need to protect vulnerable individuals on the other. Although some could see arbitrary decisions as a result, Lord Kerr insisted that this "should not prevent the law from recognising that liability should attach to glaring omissions where grievous but avoidable consequences ensue".[81] He questioned the repeated suggestion in the United Kingdom case law that policy considerations ought to preclude recognition of a general duty of care owed by police to the public,[82] and queried why police should be an exception to the entrenched common law rule requiring professional persons to carry out their functions with a reasonable level of care and skill.[83] Lord Kerr made clear that:

> [T]he time has come to recognise the legal duty of the police force to take action to protect a particular individual whose life or safety is, to the knowledge of the police, threatened by someone whose actions the police are able to restrain.[84]

In terms of public policy, he questioned the validity of policy arguments that recognition of a duty of care by police to members of the general public would lead to undesirable diversion of resources,[85] and pointed to empirical evidence suggesting that the availability of litigation against public authorities might lead to an improvement in the quality of services provided.[86] In summary, the United Kingdom case law post-*Hill v West Yorkshire* reflects a dogged adherence to the policy decision in that case, despite the fact that it was decided in the context of a plaintiff unknown to the police and where the fear of indeterminate liability was real. In contrast, the cases which have applied the *Hill v West Yorkshire* precedent have typically involved occasions where the victim/plaintiff was known to the police, such that fears of indeterminate liability are misplaced. There appear to be growing misgivings among members of the Supreme Court and academia[87] about the results derived by application of the *Hill v West Yorkshire* approach in particular cases, but at present, only a minority are prepared to take a different path. As we will see shortly, the position has differed where claims against police have been

[79] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [157].

[80] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [168], [173] (Lord Kerr; Lady Hale expressed agreement with this observation ([197])).

[81] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [171].

[82] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [177]: "It is at least questionable that it is particularly valuable to the freedom of a public authority that it should be permitted to negligently fail to assist an identified individual who is at serious risk of physical injury."

[83] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [178]–[179].

[84] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [175].

[85] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [185].

[86] In "Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales" (2010) 20(2) *Journal of Public Administration Research* 243, Lucinda Platt, Maurice Sunkin and Kerman Calvo concluded that litigation could act as a "modest driver to improvements in the quality of local government services". The Law Commission has also reflected on the potential positive benefits to litigation, in the context of recommendations to streamline the law with respect to public authority liability in private law: see *Administrative Redress: Public Bodies and the Citizen*, Law Com No 322 (2010) 42 [4.25]–[4.27]. This discussion is elaborated upon below.

[87] McIvor, n 3; Mullender, n 3; Hanna Wilberg, "Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims" (2010) 126 *LQR* 420; Laura Hoyano, "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62 *Mod LR* 912, 932.

made under human rights legislation, rather than the common law of negligence. Arguments that the common law of negligence in this context should be harmonised with the human rights decisions have generally not been accepted.[88]

European Convention on Human Rights/Human Rights Act

The European Court of Human Rights case of *Osman v United Kingdom*[89] (*Osman*) first canvassed the possible application, through the *Human Rights Act 1998* (UK), of the *Convention for the Protection of Human Rights and Fundamental Freedoms*[90] (*European Convention on Human Rights*) to litigation against police. One advantage for claimants proceeding under the *European Convention of Human Rights* rather than the common law is that the Convention is a positive source of rights,[91] overcoming the common law's traditional ambivalence towards claims based on omissions. *Osman* considered the application of Art 2 of the Convention protecting the right to life. Although it was held that on the facts of the case, the police had not breached Art 2, the Court made clear that it may find a breach of the provision where it could be shown that the police were aware of a "real and immediate risk" to the life of a specified individual from the criminal acts of a third party. The failure of police in such circumstances to take reasonable measures to avoid that risk could amount to a breach of Art 2.[92]

Subsequent actions against police for allegedly negligent investigation have often concerned Art 3 of the *European Convention on Human Rights*, forbidding torture or inhuman or degrading treatment or punishment. As well as endorsing the principles in *Osman* above, these cases have emphasised the need to bear in mind difficulties in policing, unpredictability of human behaviour, and operational decisions in terms of resources and priorities. The scope of the positive duty under Art 3 must respond to these limits, and not place a disproportionate or impossible burden on authorities.[93] The European Court of Human Rights has also confirmed that the obligation imposed by Art 3 on State parties is not limited to cases of wrongdoing committed directly by States;[94] it also extends to official investigations of activities conducted by State authorities.[95] The obligation includes promptness of investigation, and the relationship between that, and public confidence in the maintenance of the rule of law has been emphasised.[96] Investigations must be "effective",[97] as well as independent, impartial and diligent.[98]

In a recent example, English police were found to have breached the requirements of Art 3 of the Convention in relation to investigation of criminal activity, in particular for failing to train staff, failure

[88] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [126]–[127] (Lord Toulson, with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed); Francois du Bois, "Human Rights and the Tort Liability of Public Authorities" (2011) 127 *LQR* 589. It is an interesting, though ultimately unanswerable question, as to whether there would have been more likelihood of development of United Kingdom common law tort principles in this area away from *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 if the option to bring action under the *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights*), signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) was not available, given the relative success of plaintiffs in this context in that jurisdiction. Obviously, that "escape valve" is not available to Australian plaintiffs.

[89] *Osman v United Kingdom* [1998] ECHR 101.

[90] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights*), signed 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[91] Francois du Bois, "Human Rights and the Tort Liability of Public Authorities" (2011) 127 *LQR* 589, 593–594.

[92] *Osman v United Kingdom* [1998] ECHR 101, [116]. The need for police to pay regard to due process in making their investigation would be relevant, but proof of "gross negligence" or "wilful disregard of the duty to protect life" was unnecessary: *Osman*, [116]. See also *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50.

[93] *Milanovic v Serbia* [2010] ECHR 2029, [84].

[94] *Milanovic v Serbia* [2010] ECHR 2029, [85].

[95] *C.A.S. and C.S. v Romania* [2012] ECHR 512, [64]–[65].

[96] *Milanovic v Serbia* [2010] ECHR 2029, [86]; *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436, [212].

[97] *C.A.S. and C.S. v Romania* [2012] ECHR 512, [65] – "effective" meaning that the investigation is capable in principle of establishing the factual scenario, and the identity and subsequent punishment of the perpetrators; see also *Case of Chinez v Romania* [2015] ECHR 274, [44], [47].

[98] *Koky v Slovakia* [2012] ECHR 994, [209].

of senior staff to supervise more junior staff, lack of implementation of guidelines, serious failures in the collection and use of intelligence, failing to maintain the confidence of victims of crime in the integrity of the investigation process, and failing to devote sufficient resources to investigation of complaints of sexual violence.[99] The position thus arises that a claim against police for alleged negligence will have a much stronger chance of success if brought under the human rights legislation and the *European Convention on Human Rights* than the common law, even if the remedy will be reduced. Five members of the Supreme Court in *Michael* rejected an argument that the common law of negligence in this area should be adapted to reflect decisions under the Convention.[100] One of the dissenting judges in that case stated, however, that where the claim against police is a human rights claim, in effect the policy arguments constructed to avoid the general imposition of a duty of care on police in negligence "largely ceased to apply".[101] However, as discussed, these policy arguments remain very real in the common law context in the United Kingdom.

Canada

In *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*[102] (*Jane Doe*), the Ontario Court of Appeal was satisfied that police investigating a serial rapist owed a duty of care to possible victims, including the plaintiff, as it was foreseeable that he would commit further crimes. The rapist committed the attacks within a restricted geographic area, and there were strong similarities in the housing arrangements and personal profiles of victims. The victim in this case fit all of these criteria. The Court agreed that a duty of care was owed: harm to the victim was foreseeable, and the factors above led to the conclusion that there was sufficient proximity between the defendants (Chief of Police, investigating police officers, and the Board of Police Commissioners) and the victim.[103]

The question of the liability of police in negligence arose for the Supreme Court of Canada in a slightly different type of case in *Hill v Hamilton-Wentworth Regional Police Services Board*[104] (*Hill v Hamilton-Wentworth*). This case involved a person (the plaintiff) convicted of committing robberies after a police investigation, the upshot being that he spent about 20 months in jail for crimes he did not commit. Concerning aspects of the investigation included the police releasing the plaintiff's photo to the media prior to the case being heard, placing the plaintiff (an Aboriginal person) in a line-up with 11 non-Aboriginal persons, failing to follow up leads suggesting that other individuals were responsible for the crimes being investigated rather than the plaintiff, and continuing with a prosecution against the plaintiff, despite the fact that he was in police custody at the time of the occurrence of some robberies with very similar features to the ones with which he was charged. By a majority of 6-3, the Supreme Court of Canada found that police officers owed a duty of care to those whom they investigated.[105]

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[99] *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436, [13].

[100] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [126]–[127] (Lord Toulson, with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed); Francois du Bois, "Human Rights and the Tort Liability of Public Authorities" (2011) 127 *LQR* 589.

[101] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [196] (Lady Hale); similar reasoning appears in *JD v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151 where the Court of Appeal (Lord Phillips MR, Lady Justice Hale, Latham LJ) noted the potential remedial work of the *European Convention on Human Rights* to permit negligence claims that would not be permitted under existing United Kingdom tort law, there involving questions of child abuse and duties of care to victims: "the reasons of policy that led the House of Lords to hold that no duty of care towards a child arises … will largely cease to apply … [i]n so far as the position of a child is concerned … the decision in *Bedfordshire* cannot survive the *Human Rights Act*": [81]–[83]. The *Bedfordshire* case had denied that a public authority owed a duty of care to children who had been abused: *Bedfordshire County Council and M v Newham London Borough Council* [1995] 2 AC 633.

[102] *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1990] 74 OR (2d) 225; CanLII 6611 ONSC.

[103] See *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1990] 74 OR (2d) 225; CanLII 6611 ONSC, 10–12. Alleged breaches of duty by the defendants included failure to warn about the rapist, failure to devote sufficient resources to the investigation, and failure to protect. None of these claims were struck out by the Court of Appeal. Contrast the recent decision in *Patrong v Wayne Banks* [2013] ONSC 5746.

[104] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129.

[105] McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ; Charron, Bastarache and Rothstein JJ dissenting.

In reaching this decision, the majority in *Hill v Hamilton-Wentworth* showed that Canada continues to apply the *Anns* approach to liability in negligence as redefined in *Cooper v Hobart*[106] (*Cooper*). At stage one of the *Anns-Cooper* test, the question is whether the relationship between the plaintiff and defendant featured sufficient foreseeability and proximity[107] to establish that a duty of care was prima facie owed. At stage two, the question is whether any relevant policy considerations negated the existence of a duty of care.

Applying the first limb of the test, the majority found there was sufficient proximity between police and a suspect. The relationship between them was "close and direct". The plaintiff had a critical personal interest in the conduct of the investigation, with his liberty, reputation and future at grave risk.[108] If it were denied that the police owed a duty of care in such circumstances, someone affected by police negligence would not have adequate alternative avenues of redress, with the torts of false arrest, false imprisonment and malicious prosecution providing little reparation. And poor performance of important police duties would go unremedied.[109]

Applying the second limb of the test, the majority rejected policy arguments against the existence of a duty of care. There was no conflict between the duty of a police officer to prevent crime, and their duty to a suspect.[110] It was not enough to speculate that a conflict might occur; there had to be evidence of a real potential of conflict.[111] The Court rejected suggestions that the police might make different decisions regarding limited resources, if they were aware that they owed a duty of care. The majority found that the duty of care simply expected a police officer to do what a reasonable officer would do in the circumstances. Courts would not second guess reasonable exercise of discretion.[112] In determining what a reasonable police officer would have done in the circumstances, limitations on resources would be considered.[113] The Court was not convinced of arguments about the practical implications of holding that a duty of care existed:

> In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other … [t]he record does not support the conclusion that recognizing potential liability in tort significantly changes the behaviour of police … some of the evidence suggests that tort liability has no adverse effect on the capacity of police to investigate crime … the "'chilling effect' scenario" remains speculative and … concern about preventing a "chilling effect" on the investigation of crime is not … a convincing policy rationale for negating a duty of care.[114]

The majority also noted that most police officers would be indemnified against any finding of negligence via the principle of vicarious liability,[115] and that floodgates concerns with respect to indeterminate liability were not real here, because the pool of possible plaintiffs (in this context, suspects) was relatively small.[116]

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[106] See *Cooper v Hobart* [2001] 3 SCR 537, [25].

[107] Proximity depends on closeness, and includes factors such as "expectations, representations, reliance and property or other interests involved": *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [23]–[24].

[108] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [34].

[109] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [35]; further, McLachlin CJ noted the "unfortunate reality … that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada": [36].

[110] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [40].

[111] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [43].

[112] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [54].

[113] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [44].

[114] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [56]–[57].

[115] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [59].

[116] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [60]; the dissenting judgment referred to similar reasons as those given by the United Kingdom judges in declining to recognise that police generally owed a duty of

It should be emphasised that although the Supreme Court of Canada in *Hill v Hamilton-Wentworth* found that there was a tort of negligent police investigation and that police did not enjoy an immunity from suit, the Court was dealing with an unusual case involving the existence of a duty of care owed by police *to suspects*. It was not a case involving the existence of a duty of care owed by police *to victims of crime*. The Court itself made clear that its decision did not automatically apply to other contexts, and when those other contexts arose, full argument would need to be held in terms of application of the *Anns-Cooper* test.[117]

Since *Hill v Hamilton-Wentworth*, it has been suggested by lower courts that the rationale of its decision would *likely* be extended to support the existence of a duty of care owed by police to victims, and not just to suspects.[118] However, this view remains untested as yet in the Supreme Court of Canada, and has been resisted by other precedents.

There is another line of cases, however, where courts have denied liability in the context of allegedly negligent investigations. For example, recently in *Wellington v Ontario*,[119] the Court of Appeal for Ontario rejected a claim in negligence against the Special Investigations Unit (SIU) of the Ministry of the Attorney-General. The SIU was empowered to investigate cases where police had killed individuals in the course of duties. The plaintiffs were family members of a 15 year old shot and killed by police officers. The question was whether the SIU owed the plaintiffs a duty of care with respect to this investigation.

The Court of Appeal for Ontario found that the SIU did not owe the plaintiffs a duty of care. The Court found that the SIU's duties were primarily public in nature. All members of society had an interest in the efficient and effective investigation of alleged police wrongdoing, and those charged with making decisions in the public interest, such as the SIU, should not be subject to a private law duty to individual citizens. The Court agreed with a submission from the Ontario Association of Chiefs of Police concerning an "inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation … [t]o impose a private law duty of care would … introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest".[120] Other cases also appear to have taken this stricter line.[121] Further clarification from the Supreme Court of Canada is needed on the specific question of whether, and to what extent, police owe a duty of care to victims of crime, like the facts in *Michael*.

In other cases, Canadian courts have been prepared to make findings of negligence against public authorities charged with investigation of activities and corrective action, where it was said that the investigation was inadequate.[122] In *Adams v Borrel*,[123] Robertson JA for the Court, in finding that an

care, including conflict between the police duty in investigating crime and the posited duty to suspects ([140]), the essential need for police discretion ([150]), and the possibility of defensive policing ([152]) (Charron J, with whom Bastarache and Rothstein JJ agreed).

[117] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, [27].

[118] *Traversy v Smith* [2007] OJ 4505 (Ontario Superior Court of Justice), [21] (Power J: "there exists, in my opinion, a strong likelihood that the decision in *Hill* will be extended to include victims"); in *Odhavji Estate v Woodhouse* [2003] 3 SCR 263, the Canadian Supreme Court found it was possible that a police chief could be held liable in negligence to the family members of victims of a police shooting for failing to ensure that police complied with an investigation. The Court found there was an extremely close causal connection between negligent supervision and the plaintiff's injuries, that members of the public reasonably expected that the chief would be mindful of the injuries that may arise from his/her officers' behaviour: [56]–[57]; Erika Chamberlain, "Negligent Investigation: A New Remedy for the Wrongly Accused: *Hill v Hamilton-Wentworth Regional Police Services Board*" (2008) 45(4) *Alta LR* 1089, 1098: "as a result of the majority's decision in *Hill*, police now owe a duty of care to both potential victims and suspects."

[119] *Wellington v Ontario* (2011) 105 OR (3d) 81 (ONCA).

[120] *Wellington v Ontario* (2011) 105 OR (3d) 81 (ONCA), [45].

[121] *Thompson v Saanich (District) Police Department* [2010] BCCA 308; *Project 360 Investments Limited (Sound Emporium Nightclub) v Toronto Police Services Board* [2009] OJ No 2473 (MacDonnell J); *Norris v Gatien* (2001) 56 OR (3d) 441 (ONCA); *Fockler v Toronto* (City) (2007) 43 MPLR (4th) 141 (ONSC).

[122] See *Adams v Borrel* [2008] NBCA 62. The Court concluded that a duty of care was owed with respect to an investigation, in the context of arguments about the policy/operational decision distinction, by concluding that "once [the authority] decided to

investigative body had been negligent for an insufficient investigation, found that inspectors in a range of contexts who performed their obligations negligently would normally be found liable in negligence. This was a category of relationship, in terms of the *Anns-Cooper* approach, that the courts had recognised as giving rise to a duty of care.[124]

Australia

Australian negligence law has followed a different path from that of the United Kingdom and Canada. Specifically, after initially accepting and applying the two-stage *Anns* approach, the High Court turned against it,[125] and a majority has not returned to it, or to the similar three-stage *Caparo* approach.[126] Further, after initially accepting and applying the concept of proximity,[127] as United Kingdom and Canadian courts continue to do, the use of this control mechanism fell out of favour in the High Court.[128] As a result, proximity is not available to limit the extent of successful claims in negligence. One principle that Australia has accepted, however, consistently with the United Kingdom and Canadian jurisdictions, is the general principle that one individual is not usually liable for injury or loss caused to another by the acts or omissions of a third party.[129]

The High Court prefers a salient features approach to questions of duty of care, considering a range of factors, the relative importance of which will differ in different contexts.[130] Issues of control by the defendant and the vulnerability of the plaintiff are typically critical.[131] Applying these first principles to police vis-a-vis ordinary citizens, one might think that in many situations, police would have a high degree of control, bearing in mind their statutory and common powers, such as the power to arrest, investigate events, gather evidence, and provide others with a reasonable direction that must be followed.[132] And one might think that someone under the control of police – for instance, someone who has been arrested, someone who is being investigated, someone being searched, or someone whose premises were being raided and searched by police – would be in a highly vulnerable[133] situation given the extent of police power and the limited extent to which an individual can resist such

conduct an investigation into the identity and source of the … virus, it owed the [plaintiffs] a duty of care to pursue its investigation in a way that did not breach the standard of care required of an investigative virologist in possession of known facts": [33].

[123] *Adams v Borrel* [2008] NBCA 62.

[124] *Adams v Borrel* [2008] NBCA 62, [44]; in *Haggerty v Rogers* (2011) 89 CCLT (3d) 256; [2011] ONSC 5312, Turnbull J denied there was an immunity of police officers from claims for tortious actions (76); in *Markovic v Abbott* [2010] ONSC 26, Master Dash permitted the amendment of a claim against Toronto police for punitive, aggravated and exemplary damages on the basis that such a claim was tenable. Space does not permit this article to deal with possible claims against police based on the *Canada Act 1982* (UK) c 11, sch B pt I ("*Canadian Charter of Rights and Freedoms*"): see *Vancouver (City) v Ward* [2010] 2 SCR 28; nor are questions of agency relevant: *R v Campbell* [1999] 1 SCR 565.

[125] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, overruled without disturbing the rejection of the *Anns* test.

[126] The High Court rejected the *Caparo* approach in *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; Kirby J continued to apply the *Caparo* approach until *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, 624–626.

[127] *Gala v Preston* (1991) 172 CLR 243.

[128] *Hill v Van Erp* (1997) 188 CLR 159, 193 (Gaudron J), 210 (McHugh J), 237 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36, 209–211 (McHugh J).

[129] *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J): "[i]t is … exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third."

[130] *Perre v Apand* (1999) 198 CLR 180; [1999] HCA 36, 194 (Gleeson CJ), 254 (Gummow J).

[131] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, 597 [149] (Gummow and Hayne JJ, with whom Gaudron J agreed (570)), 577 [84] (McHugh J), 664 [321] (Callinan J); Gleeson CJ and Kirby J emphasised questions of control: 559, 630 respectively.

[132] Carol Harlow notes this of the Australian emphasis on control, commenting on "the fluid notion of 'control', especially perilous for public authorities which, unlike private actors, possess so many statutory powers to control third parties": Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 18.

[133] In *Odhavji Estate v Woodhouse* [2003] 3 SCR 263, [57], Iacobucci J for the Court noted that "members of the public [were] vulnerable to the consequences of police misconduct", a fact that supported in that case the recognition that the Chief owed a duty of care with respect to his/her officers' conduct.

measures, as well as possible ignorance of their legal rights in such circumstances.[134] As we will see below, however, Australian courts have often concluded otherwise.

The High Court is sensitive to claims that acceptance of a common law duty of care for police would be inconsistent with other legal duties owed by them.[135] The Court is also less likely to use, at least expressly, notions of policy to reject or limit a suggested duty of care.[136]

The question of the extent, if any, of a police officer's duty to those investigated was considered in the case of *Tame v New South Wales*[137] (*Tame*). There, a police officer investigating a traffic accident in which the plaintiff was involved incorrectly noted her blood alcohol reading on a police report. This report was made available to the plaintiff's insurer, and the plaintiff was informed of the content of the report. Athough the police officer acknowledged the mistake and apologised, the plaintiff became obsessed with the error and developed a psychiatric illness, for which she claimed compensation against the employer of the police officer. Her case was unanimously dismissed by the High Court of Australia.[138]

On the question of whether police owed a duty of care to those whom they investigated, six members of the Court found that they did not.[139] The general sentiment was that any duty owed to those whom were investigated would be inconsistent and incompatible with the duty of police to make an honest and frank report on their observations, inquiries and tests.[140] McHugh J said it would be "preposterous" to suggest that an officer had a duty of care with respect to statements from witnesses and informants. Gathering and recording intelligence regarding activities, potential activities and character of members of the "criminal class" was central to the efficient functioning of a modern police force. Imposing a duty to take reasonable care to see that such information was correct would impose "either an intolerable burden or a meaningless ritual", usually defeating the whole purpose of intelligence recording.[141]

The issue of police liability was also raised in *Stuart and Another v Kirkland-Veenstra*[142] (*Stuart*) where police were alleged to be negligent in not acting when they encountered a person who was apparently contemplating suicide. The police did not exercise their statutory power to "apprehend" the person involuntarily under mental health legislation, pursuant to which the person would have been

[134] One might think that a victim of crime is equally vulnerable – perhaps not aware of the risk, not aware of the identity of the perpetrator or how they typically operate, in the case of a serial offender as in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1990] 74 OR (2d) 225.

[135] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44.

[136] The High Court criticised the use of "policy" considerations in the three-step *Caparo* approach: *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59, 579: "[t]he question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle". However, in other cases, reasons given for denying a duty of care can sometimes sound like "policy" is being used. For example, in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54, Gleeson CJ referred to the "far-reaching implications" of recognising that a duty of care was owed in the particular case (559 [21]); McHugh J included the issue of whether there was "any supervening policy reason that denies the existence of a duty of care" as one criterion (578 [84]); Kirby J had favoured explicit use of policy until feeling obliged to fall into line with his colleagues (624–626); and Callinan J referred to the need of a public authority to make decisions about resources (664) (what is arguably a policy consideration). The High Court has been criticised for its abandonment of the *Caparo* approach: see Christian Witting, "The Three-Stage Test Abandoned in Australia – Or Not?" (2002) 118 *LQR* 214, 220–221.

[137] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

[138] One of the reasons given by the judges was that it was not foreseeable that someone about whom a mistake was made in a police report would develop a psychiatric illness as a result. This was an important part of the reasoning in the case, but is not relevant for the purposes of present discussion.

[139] Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, Callinan J not deciding.

[140] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 335 (Gleeson CJ). Gaudron J said it would be "incongruous" (342), Gummow and Kirby JJ agreed it would be inconsistent (396); Hayne J agreed, claiming that imposition of a duty of care in such cases would constrain police in the proper performance of their duties: (418). Callinan J left the question open (431), deciding the case on other grounds.

[141] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 361–362.

[142] *Stuart and Another v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15.

medically assessed. The person committed suicide later that day, and his family argued that police owed, and breached, a duty of care to the man and his family.

Most of the discussion in *Stuart* centred around the interpretation of the statutory provisions conferring the apprehension power on police, discussion not directly relevant here. There was some discussion of whether police could owe a duty of care to prevent another from harming themselves. Members of the court who discussed this issue referred to the oft-cited general view of Dixon J in *Smith v Leurs* that one person was not usually liable to another for injury they suffered caused by a third party.[143] Nothing on the facts indicated that this general position should not apply. The police did not control the "source of the risk of harm" to the deceased;[144] further, the claim concerned a failure to exercise a power, rather than the allegedly negligent exercise of a power.[145] There was no general duty to rescue.[146]

Many cases have been brought against police and police authorities at lower court level. In many instances, such claims have been rejected on the basis of *Hill v West Yorkshire*-type policy reasoning and express reference to the English cases discussed above,[147] together with conclusions that the existence of such a duty of care would be inconsistent with police statutory functions.[148] In a small number of cases, claims have been successful. In *Victoria v Horvath*[149] (*Horvath*), the Victorian Court of Appeal accepted that a police supervisor could be liable in negligence in relation to an ill-conceived and poorly executed raid on premises in which excessive force was utilised:

> The officer will frequently be placed in a situation where he or she has to make "on the spot" decisions which will have ramifications for citizens who are affected by that decision. The decision might be such that more time and calmer reflection will, with hindsight, suggest it was wrong or even unreasonable, *and give rise to a claim in damages for negligence*.[150]

In *Ogden v Bells Hotel Pty Ltd*, [151] the Supreme Court of Victoria considered a police raid on an employee of the defendant. Police suspected the employee of involvement in a robbery at the defendant's premises, although this was not correct. The Court noted the threatening, aggressive and bullying nature of the police raid on her house, and treatment at the police station.[152] As a result of the

[143] *Smith v Leurs* (1945) 70 CLR 256, 262: "The general rule is that one man is under no duty of controlling another man to prevent him doing damage to a third."

[144] *Stuart and Another v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15, 254 [114] (Gummow, Hayne and Heydon JJ). The judges made clear that the situation might have been different if the deceased had been a prisoner in custody: 255 [116].

[145] *Stuart and Another v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15, 256 [118] (Gummow, Hayne and Heydon JJ).

[146] *Stuart and Another v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15, 255 [116] (Gummow, Hayne and Heydon JJ). Another case concerning police and negligence was *New South Wales v Fahy* (2007) 232 CLR 486; [2007] HCA 20, involving a police officer suing her employer in negligence. However as the existence of a duty of care was admitted in that case, it is not considered worthy of fuller discussion here.

[147] For example, *Cran v New South Wales* (2004) 62 NSWLR 95; [2004] NSWCA 92, [48] (Santow JA, with whom Ipp and McColl JJA agreed); *Australian Capital Territory v Crowley* (2012) 7 ACTLR 142; [2012] ACTCA 52, [274] (Lander, Besanko and Katzmann JJ).

[148] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268; [2007] NSWCA 370, [129] (Beazley JA, with whom Mason P and Young CJ in Eq. agreed); *Halech v State of South Australia* (2006) 93 SASR 427; [2006] SASC 29, [43] (Duggan J), [110] (Besanko J).

[149] *Victoria v Horvath* (2002) 6 VR 326; [2002] VSCA 177.

[150] *Victoria v Horvath* (2002) 6 VR 326; [2002] VSCA 177, [60] (Winneke P, Chernov and Vincent JJA). The Victorian Court of Appeal did allow the appeal against the trial judge's findings against the police officers and police authority in relation to damages, but did not disturb the finding of negligence against the police supervisor. The plaintiff Horvath successfully took her case to the United Nations Human Rights Committee after complaining of the lack of enforcement of the court judgment she had obtained against the State of Victoria: see United Nations Human Rights Committee, *Adoption of Views: Communication No.1885/2009* UN Doc CCPR/C/110/D/1885/2009 (27 March 2014) ("*Horvath v Australia*"). The Committee found that Victorian law had failed to provide Horvath with an effective remedy, and noted that her complaint to an internal disciplinary proceeding within Victoria Police had not been upheld, and that criminal charges had not been laid against police officers involved, despite their use of excessive force during the raid.

[151] *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219.

[152] *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219, [112]–[115] (Williams J).

robbery and police conduct, the employee suffered a serious mental condition. The Court attributed 20% of the employee's mental condition to the effects of the police raid.[153] In total she received $825,000 in compensation. In *Zalewski v Turcarolo*,[154] the Victorian Court of Appeal refused to overturn a jury's verdict that police officers had been negligent in their response to an incident.[155] In Batchelor v Tasmania,[156] a member of the Supreme Court of Tasmania found a viable claim against police on the basis that they had not acted in accordance with their training.[157]

In summary, upon first principles of Australian negligence law, where concepts such as control and vulnerability are typically of prime importance, one might have thought that it would be easier to establish that police owe a duty of care to those affected by their actions or omissions. However, on most occasions, Australian courts have used *Hill v West Yorkshire*-like policy arguments, and arguments that the existence of a duty of care would be inconsistent with other responsibilities of police, to deny that a duty of care is owed. However, in a small number of cases at sub-national level, a duty of care has been recognised.

CRITIQUE OF REASONING DENYING POLICE GENERALLY OWE A DUTY OF CARE TO THE PUBLIC

We must critically question the reasoning that is being used to deny that police generally owe a duty of care to members of the public, primarily in the United Kingdom and Australian common law, and sometimes in the Canadian common law. This reasoning manifests itself in various ways in the jurisdictions studied: as a general rule stating that police are not liable on policy grounds, subject to exceptions; a two-stage *Anns* approach, knocking out the claim at the second stage for policy reasons; or in the case of Australia, use of the inconsistency principle to deny that recognition of a duty of care is consistent with other duties owed by police. Whether the High Court of Australia wishes to use the word "policy" to describe this position or not,[158] in essence, policy arguments are used in each of the three jurisdictions examined to deny (or seek to deny) that police owe a general duty of care to the public. Let us examine them in more detail, to determine whether they withstand scrutiny.

The practical impacts of recognising the existence of a duty of care

A common argument against police being found to generally owe a duty of care to others is its (negative) impact on the way in which police conduct their work. This concern was expressed in *Hill v West Yorkshire*, and largely continues to underpin the attitude of the United Kingdom courts to recognition of a common law duty of care owed by police. The essence of this argument is that general recognition of such a duty will cause police to adopt a "detrimentally defensive" approach to their work, that it will inhibit performance of their functions, that it will not lead to better performance of police work, or will have negative resource implications.[159] At least some Australian courts appear

[153] *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219, [184] (Williams J); to be clear, neither the individual police officers involved, nor the police authority, were named as a defendant in the case.

[154] *Zalewski v Turcarolo* [1995] 2 VR 562.

[155] *Zalewski v Turcarolo* [1995] 2 VR 562, 578–579 (Hansen J, with whom Brooking and Phillips JJ agreed): "[t]his is a case of an experienced police officer who it was open to the jury to find acted impetuously, without due inquiry and reflection, in disregard of police instructions, in the face of a risk of provoking a situation involving a person with a psychiatric or psychological condition." In *Batchelor v Tasmania* (2005) 13 Tas R 403; [2005] TASSC 11, the Supreme Court of Tasmania refused a strike out motion respecting an action against the police authority in negligence; see also *Gillett v New South Wales* [2009] NSWSC 421. In some cases, judges have assumed, without deciding, that police owed a relevant duty of care to the plaintiff: *New South Wales v Tyszyk* [2008] NSWCA 107, [3] (Giles JA, with whom Mason P agreed); *Halech v South Australia* (2006) 93 SASR 427; [2006] SASC 29, [75] (Debelle J).

[156] *Batchelor v Tasmania* (2005) 13 Tas R 403; [2005] TASSC 11.

[157] *Batchelor v Tasmania* (2005) 13 Tas R 403; [2005] TASSC 11, [26] (Blow J).

[158] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180; [1999] HCA 36, 286 (Kirby J).

[159] *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 63–64 (Lord Keith, with whom Lords Brandon, Oliver and Goff agreed); *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [30] (Lord Steyn, with whom Lords Rodger and

to accept these sentiments,[160] however, in the different context of advocates' immunity, members of the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*[161] have dismissed as "not of determinative significance" arguments about the supposedly chilling effect of the imposition of a duty of care and the way it might change practice, in deciding whether such a duty should exist.[162] And of course, this argument has not meant that those in other professions or trades, such as doctors, architects or builders, are immune from negligence actions, lest they begin practising "defensive medicine", "defensive designing" or "defensive building" respectively.[163]

If a court is to make decisions regarding whether or not to impose a duty of care on police based on policy considerations, something to which the author does not object, it must ensure that its decisions are based on available evidence. Decisions should not and cannot be based on mere supposition or assumption.[164] In this light, it is disappointing that the decisions denying the existence of a general duty of care owed by police to the public have largely been based on supposition. There is no reference in *Hill v West Yorkshire* or its progeny to research that would actually support assumptions made about the deleterious effects on policing of such a duty.[165] One will search in vain in the judgments of *Hill v West Yorkshire*, *Brooks*, *Van Colle*, or the majority judgment in *Michael*, to support the assertions of policy reasons for denying the existence of a duty of care. So whilst open articulation of policy factors is supported in determining whether a duty of care exists, it is essential that consideration of policy be conducted in an informed manner, upon a consideration of actual evidence, if available. This will reduce the risk, often expressed by opponents of the use of policy considerations, that their use can mask individualised and idiosyncratic policy preferences and positions of judges.[166]

Having made that point, let us consider what evidence is available on the practical consequences for policing of finding that police owe the general public a duty of care.

Arthur Garrison has conducted a small study of law enforcement officials.[167] Of those surveyed, half disagreed with a statement that civil suits against police officers was an impediment to law

Brown agreed); *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50, [76] (Lord Hope, with whom Lords Carswell, Phillips and Brown agreed); *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [122] (Lord Toulson, for Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge).

[160] *Cran v New South Wales* (2004) 62 NSWLR 95; [2004] NSWCA 92, [48]–[51] (Santow JA, with whom Ipp and McColl JJA agreed); *Australian Capital Territory v Crowley* (2012) 7 ACTLR 142; [2012] ACTCA 52, [274]–[285] (Lander, Besanko and Katzmann JJ); *Halech v South Australia* (2006) 93 SASR 427; [2006] SASC 29, [35] (Duggan J) and [110] (Besanko J).

[161] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12.

[162] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12, 15–16 [29] (Gleeson CJ Gummow Hayne and Heydon JJ). And in *Rogers v Whitaker* (1992) 175 CLR 479, the High Court was evidently satisfied that the fact that a decision might change current practice did not mean the decision ought not be made, and the corollary proposition that a decision about whether a duty of care had been breached should not be based merely on current practice in a particular field.

[163] Ryan Manton, "Good Cop, Bad Cop, Reasonable Cop? Whether Police Officers Should Owe a Duty of Care to Suspects" (2009) 15 *Canterbury Law Review* 101, 119–120; Erika Chamberlain, "Negligent Investigation: A New Remedy for the Wrongly Accused: *Hill v Hamilton-Wentworth Regional Police Services Board*" (2008) 45(4) *Alberta Law Review* 1089, 1099: "police are not the only professionals who are required to balance competing interests and make discretionary decisions".

[164] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, 156 (McLachlin CJ, Binnie, Le Bel, Deschamps, Fish and Abella JJ); Mullender, n 3, 980, refers to the "sonorous, but quite possibly empty declarations about floodgates, defensive practice or blame culture"; Richard Mullender, "Negligence, Human Rights and Public Bodies" (2009) 125 *Law Quarterly Review* 384, 387, states that "defendants … pursue the theme that a finding for the claimant will be (or is likely to be) a source of social dislocation. However they do not adduce empirical evidence for the claims they make"; Lord Bingham, "The Uses of Tort" (2010) 1 *Journal of European Tort Law* 3, 12. It might also be observed that courts have generally not required such evidence, in order to accept the policy premise.

[165] Claire McIvor describes the view of the court here as "wholly conjectural": McIvor, n 3, 135.

[166] JA Smillie, "The Foundation of the Duty of Care in Negligence" (1989) 15 *Monash University Law Review* 302, 305–307. For instance, in the context of private international law and tort, the Supreme Court of Canada stated that policy arguments simply meant that "the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt": *Tolofson v Jensen* [1994] 3 SCR 1022, 1058 (La Forest J, for the Court).

[167] Arthur Garrison, "Law Enforcement Civil Liability under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers" (1995) 18(3/4) *Police Studies* 19.

enforcement.[168] He found that 62% of those surveyed agreed that the possibility of civil action deterred a police officer from violating an individual's civil rights.[169] A much bigger and more recent survey was conducted by Daniel Hall, Lois Ventura, Yung Lee and Eric Lambert.[170] Their research provided many interesting conclusions. It found that 48% of those surveyed agreed that the threat of civil liability deters misconduct among police.[171] More than 6 in 10 respondents (62%) disagreed that the threat of civil liability hindered their ability to perform their duties, and only 27% agreed that it did.[172] About half indicated that the threat of civil liability was among the top ten factors they took into account when performing emergency functions.[173] About 6 in 10 agreed that police authorities had given them adequate training regarding civil liability,[174] and most thought that their employer would support them if they were sued.[175]

Australian research has also been carried out in this field. One example is research conducted in relation to Queensland police following the Fitzgerald Inquiry into police corruption. Fears had been expressed that police would, as a result of accountability reforms introduced, be less willing to do their job. The Criminal Justice Commission found that these fears were ill-founded: "[t]he increased focus on police integrity and accountability ... has not had an adverse impact on police operational effectiveness."[176] Interviews with police themselves have suggested that they see civil litigation as an aspect of police accountability.[177] The same report found that other mechanisms of police accountability, for instance, internal inquiries, were often lacking.[178]

These studies do not provide strong evidence to justify the policy-based arguments used in *Hill v West Yorkshire* to deny that police should generally owe a duty of care.[179] There is little actual evidence that the recognition of such a duty would, or has, greatly affected actual police behaviour.[180] Police themselves often see the possibility of litigation as a positive in terms of their behaviour.

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[168] Garrison, n 167, 25.

[169] Garrison, n 167, 26.

[170] Daniel Hall, Lois Ventura, Yung Lee and Eric Lambert, "Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability" (2003) 26(4) *Policing: An International Journal of Police Strategies and Management* 529.

[171] Hall, Ventura, Lee and Lambert, n 170, 541; large support for civil liability of officers was reported amongst police chiefs in Vaughan MS, Cooper T and Del Carmen R, "Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views" (2001) 47 *Crime and Delinquency* 3.

[172] Hall, Ventura, Lee and Lambert, n 170, 542 and 544. In "Police Officers and Civil Liability: The Ties That Bind" (2001) 24(2) *Policing: An International Journal of Police Strategies and Management* 240, 254–255, Tom Hughes reported that about 57% of respondents agreed that police should be civilly accountable for their actions, and about 56% of respondents believed that civil liability was a barrier to law enforcement. Reflecting on these surveys, Ryan Manton argued that "the empirical research does not provide a solid basis for the defensive practice argument, which is therefore of a merely speculative nature": Manton, n 163, 120.

[173] Hall, Ventura, Lee and Lambert, n 170, 542.

[174] Hall, Ventura, Lee and Lambert, n 170, 540.

[175] Hall, Ventura, Lee and Lambert, n 170, 539.

[176] Criminal Justice Commission, Research and Prevention Division, *Integrity in the Queensland Police Service: QPS Reform Update* (2001) Vol 1, iv; see also David Brereton "Monitoring Integrity" in Tim Prenzler and Janet Ransley eds *Police Reform: Building Integrity* (Federation Press, 2002) 112.

[177] Dr Jude McCullough and Darren Palmer, Report to the Criminology Research Council, *Civil Litigation by Citizens Against Australian Police Between 1994 and 2002*, 88.

[178] McCullough and Palmer, n 177, 90.

[179] Hanna Wilberg, "Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims" (2010) 126 *Law Quarterly Review* 420, 438: "The most common objections to the defensive practice concern are, first, that there is little empirical evidence showing the feared effect to be likely"; Mandy Shircore, "Police Liability for Negligent Investigations: When Will a Duty of Care Arise?" (2006) 11(1) *Deakin Law Review* 33, 59: "[t]here is no suggestion that law enforcement, in jurisdictions where *Hill* public policy grounds have not been imposed to deny a duty, has been detrimentally affected."

[180] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, 159–160 (McLachlin CJ, Binnie, Le Bel, Deschamps, Fish and Abella JJ).

One of the factors that might give rise to the consistent claim that a police duty of care to the public would be unworkable in practice is that sometimes police must make quick decisions. Of course, this is conceded, though certainly it is not a factor peculiar to the police context, and has not led to denial of a duty of care elsewhere.[181] Does this fact mean that it is imprudent to place a duty of care on those decisions?

One of the studies referred to above, a report prepared by Dr Jude McCullough and Darren Palmer,[182] presents an interesting finding for present purposes. This is the observation, in relation to civil action against police, that the vast majority of complaints concerned police activity involving planned responses, such as a response to protests, or incidents at police stations or private homes. These researchers have therefore found inaccurate the common perception that civil claims against police involved police making spur-of-the-moment decisions. As well as placing on shaky ground the concern that imposing a duty of care on police might make them liable for split-second decisions, this finding has implications for the practical ability of police to reduce their exposure to civil litigation, in terms of workable legal principle. The researchers concluded that:

> The conclusion that civil litigation appears to result rarely from heat of the moment or split-second decisions is good news in terms of risk management. While it might be difficult to plan to reduce exposure to risks that can't be predicted and arise suddenly, it should be easier to reduce risks that occur because of poor planning and systemic or routine problems.[183]

There are other factors in Australian, English and Canadian law which tend to discount the policy factors taken into account, in particular, by the English judges in denying that police generally owe a duty of care to members of the public. If there is concern that establishment of a duty of care owed by police in at least some circumstances would change police practice detrimentally, aspects of the existing regulatory frameworks in each of the jurisdictions tend to minimise the likely real impact of such change.

Specifically, legislation in various Australian jurisdictions: (i) makes police authorities vicariously liable for the actions of their police officers acting in the course of their employment;[184] and (ii) provides that police officers are not personally liable in tort, provided that the officer has acted in good faith[185] and/or has not committed serious or wilful misconduct.[186] Exceptions sometimes apply where punitive or exemplary damages have been awarded.[187] United Kingdom legislation provides that the

[181] The immunity from suit continued to be granted to advocates for in-court work might be seen as an exception to this statement, however, preservation of this immunity has been justified by considerations of public confidence in the administration of justice, and finality of litigation (see *D'Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12, 16–18 (Gleeson CJ Gummow Hayne and Heydon JJ)), rather than on the grounds of the necessity of quick decision-making to the advocate's role. In fact, members of the High Court specifically rejected as irrelevant an argument that such immunity was justified on the basis that advocates are sometimes required to make split-second decisions in court: *D'Orta-Ekenaike*, 15 [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 101 [321] (Kirby J: "[w]hatever special problems arise, calling for instantaneous judgment inside the courtroom doors, they seem no more demanding than the instantaneous decisions expected of a surgeon or of a pilot of a large passenger aircraft. Neither of the latter may claim an immunity from suit for negligence.").

[182] McCullough and Palmer, n 177.

[183] McCullough and Palmer, n 177, 113.

[184] *Australian Federal Police Act 1979* (Cth) s 64B; *Law Reform (Vicarious Liability) Act 1983* (NSW) s 8; *Police Administration Act* (NT) s 148C; *Police Service Administration Act 1990* (Qld) s 10.5.3; *Police Act 1998* (SA) s 65(2); *Police Service Act 2003* (Tas) s 84(2); *Victoria Police Act 2013* (Vic) s 74(1); ; *Police Act 1892* (WA) s 137(5); . See also *Insurance Contracts Act 1984* (Cth) s 66, preventing an insurer from exercising subrogation rights against an officer personally, provided that the officer was acting within the course of their employment, and was not guilty of serious or wilful misconduct. A Canadian equivalent is *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17, s 59.

[185] *Police Act 1990* (NSW) s 213; *Police Administration Act* (NT) s 148B(2); *Police Service Administration Act 1990* (Qld) s 10.5(2), (4) (these provisions require lack of good faith and gross negligence to make the police officer personally liable); *Police Service Act 2003* (Tas) s 84(1); South Australia and Western Australia use differing terminology, but in a similar vein: *Police Act 1998* (SA) s 65(1) protects the police officer from liability for any "honest" acts or omissions, and *Police Act 1892* (WA) s 137(3) protects the police officer from liability for anything done in the absence of "corruption or malice."

[186] *Victoria Police Act 2013* (Vic) s 74(2).

[187] For example, *Australian Federal Police Act 1979* (Cth) s 64B(3); *Police Act 1892* (WA) s 137(6).

chief officer of police for a given area is liable with respect to torts committed by constables "under his direction and control" in the course of performance of their functions.[188] In Canada, police officers are similarly exempt from personal liability for torts committed in the course of their employment,[189] sometimes subject to an obligation of good faith,[190] and sometimes excluding actions amounting to gross negligence, malicious or wilful misconduct, or libel/slander.[191]

It should be borne in mind that in the past, Australian law[192], English law[193] and Canadian law[194] had denied that the Crown was liable for actions of police officers, primarily on the basis that the officer was not relevantly under the "control" of the Crown, and was exercising statutory duties, not acting at the direction of the Crown. This common law position was overturned by various legislation referred to above in each jurisdiction. Given legislation of this nature, it is harder to justify exempting police from a general duty of care on the basis that fear of being personally sued will lead them to unduly defensive policing. The overwhelming majority of civil liability cases in this area have been brought against the police authority, rather than individual officers, given the strong protection given to officers in the legislation referred to above, and acceptance by the government of vicarious liability for most of their acts or omissions.

Another reason given in the decisions for not recognising that police owe a duty of care involves the issue of resources. For instance, in *Hill v West Yorkshire*, Lord Keith emphasised that police decisions regarding the efficient allocation of scarce resources should not be second guessed. If such actions were permitted, it would drain police resources to defend them, and further drain them if compensation were ordered. He argued that police are using public money, which is scarce, and this funding should not be diverted into defending litigation and paying compensation, and away from other, more pressing, priorities.[195] Such concerns were reiterated in *Brooks*, *Van Colle* and *Michael*.[196]

Even if those concerns are important in the United Kingdom, they are lessened in Canada given that country's acceptance of the policy/operational decision dichotomy, and legal protection for the former.[197] While the precise parameters are uncertain, clearly decisions regarding allocation of scarce resources would belong in the policy realm, and beyond the remit of a court considering questions of negligence. They are also of marginal relevance in Australia. Civil liability legislation operative in most jurisdictions in Australia makes clear that in determining whether a public authority has breached its duty of care (or whether a duty is owed at all), the court should take into account that the authority has limited resources at its disposal, and that decisions that it has taken regarding the allocation of those limited resources are not challengeable.[198] The submission is that such factors should be weighed in the balance in determining whether or not a duty of care has been breached by the police authority, not used to deny the existence of a duty of care.

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[188] *Police Act 1996* (UK) s 88.

[189] *Crown Liability and Proceedings Act*, RSC, 1985, c C-50, s 3; *Police Act*, RSA 2000, c P-17, s 39(2); *The Police Services Act*, CCSM 2009, c P 94.5, s 40(1); *Police Act*, SNB, 1977 c P-9.2, s 17(1); *Police Act*, SNS 2004, c 31, s 43(2); *Police Services Act*, RSO 1990, c P–15, s 50; *Police Act*, 1990, SS 1990-1991, c P-15.01, s 32; *Auxiliary Police Act*, RSY 2002, c 14.

[190] *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17, ss 58(2), 59; *Police Act*, RSPEI, 1988, c P-11.1, s 15.

[191] *Police Act*, RSBC 1996, c 367, s 21(3).

[192] *Enever v The King* (1906) 3 CLR 969.

[193] *Stanbury v Exeter Corporation* (1905) 2 KB 838, 842 (Wills J): "nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties" (applied by the High Court in *Enever v The King* (1906) 3 CLR 969).

[194] *McCleave v City of Moncton* (1902) 32 SCR 106.

[195] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63–64.

[196] See *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [122].

[197] *Brown v British Columbia Minister of Transportation and Highways* [1994] 1 SCR 420, [38]; *R v Imperial Tobacco Ltd* [2011] SCC 42.

[198] *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2003* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Wrongs Act 1958* (Vic) s 83 (this provision does not state that resource allocation decisions are unchallengeable); *Civil Liability Act 2002* (WA) s 5W.

Policy factors favouring the existence of a duty of care

There is logic in the suggestion that those charged with enforcing the law should be subject to it themselves. The rule of law would support such an approach.[199] Public confidence in the police, which is critical, is surely enhanced when citizens can feel confident that police are subject to, and compliant with, the same standards expected of others.[200] Incompetent police work can indirectly undermine public confidence in the legal system more generally,[201] given that courts rely heavily on allegations by police of criminal behaviour, and the evidence used to support such assertions. Courts jealously guard the principle of public confidence in the legal system for good reason.[202]

Most would agree that it is important that police officers are accountable for their actions or inactions.[203] Civil liability has an important role to play in this space,[204] particularly in light of research suggesting that alternative means of police accountability, for example internal review mechanisms, are not always effective.[205] Researchers have pointed out the positive benefits that the possibility of legal action can have in terms of ensuring high standards of performance,[206] evidence accepted by the Canadian Supreme Court.[207] Police themselves in surveys have noted that the spectre of civil liability increases the chances that they will act in a lawful manner sensitive to the human rights of those with whom they engage. Recognition that a duty of care exists can have positive

[199] Eugene McLaughlin, "Forcing the Issue: New Labour, New Localism and the Democratic Renewal of Police Accountability" (2005) 44(5) *Howard Journal of Criminal Justice* 471, 471; *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93, 110 (Blackburn J): "the proper rule of construction of … statutes is that, in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things"; Hogg, Monahan and Wright, n 2, 3: "the application of the ordinary laws by the ordinary courts to the activities of government conforms to a widely held political ideal"; JA Smillie, "Liability of Public Authorities for Negligence" (1985) 23 *University of Western Ontario Law Review* 213, 224: "there is a strong presumption that parliament intends government agencies and officials to be subject to the same private law obligations as ordinary citizens"; Craig Brannagan, "Police Misconduct and Public Accountability: A Commentary on Recent Trends in the Canadian Justice System" (2011) 30 *Windsor Review of Legal and Social Issues* 61, 89.

[200] Steve Herbert, "Tangled up in Blue: Conflicting Paths to Police Legitimacy" (2006) 10(4) *Theoretical Criminology* 481, 482; Graham Smith, "Police Complaints and Criminal Prosecutions" (2001) 64(3) *Modern Law Review* 372, 375.

[201] In "Wrongful Convictions in Canada" (2012) 80 *U Cin LR* 1465, 1502–1508, Kent Roach has written that police are sometimes responsible for wrongful convictions, which can undermine public confidence in our legal system. He cites reasons, including "tunnel vision", that police determine the identity of the guilty party, and look for evidence to substantiate their "hunch", sometimes turning a blind eye (consciously or unconsciously) to evidence that does not fit their hunch. He also discusses the belief of some police that noble ends justify any means, and problems with identification processes and interrogation processes.

[202] *R v Mack* [1988] 2 SCR 903, [77] (Lamer J, for the Court); *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 116 (McHugh J); Frederick Schumann, "The Appearance of Justice: Public Justification in the Legal Relation" (2008) 66(2) *UTFLR* 189, 193: "when the courts acquiesce to misconduct, it can appear to the public that they are aiding or condoning it. This causes the public to lose respect for the courts".

[203] Elizabeth Brownhill, "Police Duty of Care and the Application of *Hill* Immunity in Australian Tort Law" (2013) 21(3) *Torts Law Journal* 152, 167; Laura Hoyano, "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62 *Modern Law Review* 912, 933.

[204] Herbert, n 200, 485.

[205] Smith, n 200, 391–392; Graham Smith "Actions for Damages against Police and the Attitudes of Claimants" (2003) 13(4) *Policing and Society* 413, 419–420; McCullough and Palmer, n 177, 90 (McCullough's and Palmer's survey found three occasions where an internal investigation had dismissed a person's complaint against police, only for that person to successfully bring a civil claim against police (94)). Serious concern with internal police review mechanisms was expressed by the United Nations Human Rights Committee in *Adoption of Views: Communication No.1885/2009*, UN Doc CCPR/C/110/D/1885/2009 (27 March 2014) ('Horvath v Australia'), where an individual's complaints to an internal body about excessive use of police force were apparently dismissed, before being upheld in Australian courts and, subsequently, by the Committee. New internal review mechanisms were recently introduced in Ontario: see, for discussion, Brannagan, n 199.

[206] Mullender, n 3, 975–976.

[207] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, 155 (McLachlin CJ, Binnie, Le Bel, Deschamps, Fish and Abella JJ).

benefits in terms of encouraging high standards and appropriate care within a particular field;[208] the opposite also holds. In the more general context of whether public authorities should owe a duty of care to those to whom services are provided, this point has been the subject of a quantitative study.[209] As another scholar put it succinctly: "nothing more effectively focuses the mind and hence improves the quality of decisions by a police officer than the knowledge that the decision may be subject to scrutiny by a court of law."[210] In sharp contrast is the (unsubstantiated) claim of Lord Carswell in *Van Colle* that denial of a duty of care by police to plaintiffs was necessary "for the better performance of police work".[211] Surely, it is intuitively correct that the existence of a duty of care would lead to better performance of police work.

The question of inconsistency of obligations

Another way in which courts limit the ability of claimants against police to obtain a remedy is to find that there is an inconsistency between the suggested common law duty of care, and other police obligations, owed under statute or common law. A finding of inconsistency is fatal to the existence of a common law duty of care claim in negligence. These findings of "inconsistency" are particularly common in the Australian case law on the liability of public authorities generally,[212] and the liability of police officers and/or police authorities specifically.[213] In Canada, the inconsistency argument was

[208] Janet Ransley, "Civil Litigation Against Police in Australia: Exploring its Extent, Nature and Implications for Accountability" (2007) 40(2) *Australian and New Zealand Journal of Criminology* 143, 157.

[209] See Platt, Sunkin, Calvo, n 86, who concluded that litigation could act as a "modest driver to improvements in local government services". The Law Commission also reflected on the potential positive benefits to litigation, in the context of recommendations to streamline the law with respect to public authority liability in private law: see Law Commission, n 86, 42 [4.27]. In the context of denial of a duty of care owed by mental health professionals to victims of someone previously detained under such a regime, to like effect Ian Freckelton has commented, "protection from liability in negligence extended to psychiatrists and hospitals … has gone beyond what is defensible in terms of legal principle, creates a category of lack of accountability that is not conceptually or clinically justified, and may well have undesirable counter-therapeutic consequences": "Liability of Psychiatrists for Failure to Certify: *Presland v Hunter Area Health Service and Dr Nazarian* [2003] NSWSC 754" (2003) 10(2) *Psychiatry Psychol & L* 397, 403.

[210] Marcus Tregilgas-Davey "*Osman v Metropolitan Police Commissioner*: The Cost of Police Protectionism" (1993) 56(5) *Modern Law Review* 732, 735.

[211] *Chief Constable of Hertfordshire Police v Van Colle* [2008] UKHL 50, [106]. As Julia Tolmie counters, in the context of *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, where police were found not to have owed a duty of care to a victim of crime, notwithstanding a very poor police investigation and evidence that the victim was the subject of racist police attitudes, "it is unclear why a freedom to operate in the community according to racist stereotypes serves the public interest in the management of crime. Such incompetent policing will, as illustrated by the case, in fact undercut the public interest in resolving crime": see Tolmie, n 59, 270–271.

[212] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54; *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44.

[213] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 335 (Gleeson CJ: "[t]he primary duty of a police officer filling out (an accident) report is to make available to his or her superiors, honestly and frankly, the results of the observations, inquiries and tests that were made. It would be inconsistent with such a duty to require the police officer to take care to protect from emotional disturbance and possible psychiatric illness a person whose conduct was the subject of investigation and report"), 342 (Gaudron J: "[i]t would be incongruous and, perhaps, give rise to incompatible duties if a person charged with the investigation of a possible offence were to owe a duty of care to the person whose conduct is the subject of that investigation"), 361 (McHugh J: "police officers are frequently obliged to record and use statements from witnesses and informants, statements that frequently damage the reputation of others. It seems preposterous to suggest that an officer has a duty of care in respect of such statements"), 396 (Gummow and Kirby JJ: "it is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer's duty (based on statute and common law) by which the (service) is established, fully to investigate the conduct in question"), 418 (Hayne J: "police officers investigating possible contravention of the law do not owe a common law duty to take reasonable care in preventing psychiatric injury to those whose conduct they are investigating. Their duties lie elsewhere and to find a duty of care to those whom they investigate would conflict with those other duties"). Callinan J did not think it necessary to decide this issue (431). No judge cited a specific section of legislation relating to police which was alleged to create an inconsistency.

raised in a recent decision of the Court of Appeal for Ontario.[214] Again, as the Supreme Court of Canada said in *Hill v Hamilton-Wentworth*, scepticism is in order.[215]

It is suggested that those asserting the inconsistency of a common law duty of care with the obligations of police, statutory and/or at common law, should be precise in their delineation of exactly what inconsistency there is. In the *Tame* decision, none of the six members of the High Court who concluded that there was such an inconsistency cited any relevant police legislation to demonstrate same.[216] A detailed consideration of the statutory and common law responsibilities of a police officer in New South Wales led Campbell JA in *New South Wales v Tyszyk*[217] to conclude that none of it indicated some kind of blanket immunity was to be enjoyed by police with respect to negligence actions.[218] Similarly, in *Victoria v Richards*,[219] Redlich JA, with whom Nettle JA and Hansen AJA agreed, found that:

> [T]he law does not call for a stark choice between an unfettered discharge of law enforcement responsibilities and the protection of members of the public from unnecessary harm. Police do not enjoy blanket immunity from suits in negligence.[220]

The author's reading of the relevant police legislation does not provide an impression that recognition that police owe a duty of care to others would necessarily conflict with other obligations owed by them. Legislation in various Australian States and Territories sets out in some detail various powers and responsibilities of police. Typically, these include the power to enter premises, to conduct searches without warrants, to require someone to provide their name and address, to direct someone to move on, to respond to a breach of the peace, to make enquiries, and to arrest. These powers are usually conditioned upon "reasonableness" in some form or another, for instance, "reasonably necessary inquir[ies]",[221] "reasonable suspicion" for search powers or for arrests,[222] or staying on premises to investigate matters only for a "reasonable time".[223]

Clearly, this indicates parliament's intention that police use of power against individuals ought to be limited, consistent with the rule of law. It indicates that if police act outside these parameters, their actions might be challenged in some forum, and found to be wrong. For instance, a police officer who stayed at premises beyond a reasonable time might be committing the tort of trespass. A police officer who used excessive force and thereby damaged the goods of another might be committing trespass to goods. A police officer who arrested someone without a reasonable basis might have committed the tort of false imprisonment, and a police officer who used excessive force against an individual might

[214] *Wellington v Ontario* (2011) 105 OR (3d) 81 (ONCA), [45] (Sharpe JA, for the Court): "I agree with the submission of the Ontario Association of Chiefs of Police that there is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation … to impose a private law duty of care would … introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest"; likewise *Project 360 Investments Limited (Sound Emporium Nightclub) v Toronto Police Services Board* [2009] Can LII 36380 (ONSC), [19] (MacDonnell J).

[215] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129, 153 (McLachlin CJ, Binnie, Le Bel, Deschamps, Fish and Abella JJ): "It is argued that recognition of liability for negligent investigation would produce a conflict between the duty of care that a police officer owes to a suspect and the police officer's duty to the public. I do not agree." The Court insisted on evidence of "real potential" of conflict, not mere hypothetical argument.

[216] Carol Harlow says that those courts that have assumed that legislation which does not specifically exclude the common law implicitly intends that public authorities be exempted from liability, have taken a "wrong fork": see Harlow, n 132, 37.

[217] *New South Wales v Tyszyk* [2008] NSWCA 107.

[218] *New South Wales v Tyszyk* [2008] NSWCA 107, [52]–[128]. More specifically, Campbell JA found that every case had to be considered on its merits ([120]–[124]), and that there was no essential incompatibility: [130].

[219] *Victoria v Richards* (2010) 27 VR 343; [2010] VSCA 113

[220] *Victoria v Richards* (2010) 27 VR 343; [2010] VSCA 113, [20].

[221] See, eg, *Police Powers and Responsibilities Act 2000* (Qld) s 54.

[222] See *Crimes Act 1914* (Cth) ss 3W, 3T; *Crimes Act 1900* (ACT) ss 207, 212; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 21, 31, 36, 99; *Police Administration Act* (NT) ss 117, 119, 123; *Police Powers and Responsibilities Act 2000* (Qld) ss 29, 365; *Summary Offences Act 1953* (SA) ss 67(4)(a), 68, 75.

[223] See *Police Powers and Responsibilities Act 2000* (Qld) s 19(3), and with use of "minimal force".

have committed the tort of assault. And, in fact, police have been found to have committed these torts in various cases,[224] including a recent Australian High Court decision.[225]

The capacity of police officers' acts or omissions to be actionable in tort is also implicit in the previously discussed Australian, English and Canadian legislation which purports to strictly limit officers' personal liability for torts committed in the course of employment,[226] and to make the state vicariously liable for same.[227] If police officers' acts or omissions were not capable of giving rise to an action in tort, there would be no need for the legislation.

So one must greatly doubt the conclusion that the statutory framework is apparently inconsistent with the recognition of a duty of care in tort.

It is also necessary to respond to the specific finding of the High Court of Australia in *Tame* denying that police owe a duty of care with respect to investigations. It will be recalled that in that case, the litigation resulted after police had made an incorrect recording of the blood alcohol content of a person involved in an accident, an error which was claimed to have resulted in psychiatric injury to that person. Members of the High Court who denied that police owed a duty of care with respect to such investigations noted the honesty and frankness required of police investigations of events, their role in the gathering and reporting of intelligence, and how this would apparently be compromised by a duty of care finding.[228] McHugh J went so far as to call such a suggestion "preposterous".[229]

These comments might reflect, with respect, something of a smokescreen and the setting up of a "straw person" argument. The conduct complained of in *Tame* did not concern frankness of expression or honesty or otherwise – it was the making of a factual error. It is hard to see how the frankness of expression by police would be compromised by imposing a duty of care that might encompass making

[224] Examples include: negligence (*Knightley v Johns* [1981] EWCA Civ 6; *Rigby v Chief Constable of Northhamptonshire* [1985] 1 WLR 1242; *Zalewski v Turcarolo* [1995] 2 VR 562); negligence, assault, unlawful arrest, false imprisonment and malicious prosecution (*Victoria v Horvath* (2002) 6 VR 326; [2002] VSCA 177); and assault and trespass to land: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57. In *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, the Court of Appeal denied an application to strike out claims against police for negligence and breach of confidence.

[225] *New South Wales v Ibbett* [2006] HCA 57, where the High Court dealt with a case involving police who were found to have committed the torts of assault and trespass to land, findings not challenged on appeal.

[226] *Police Act 1990* (NSW) s 213; *Police Administration Act* (NT) s 148B(2); *Police Service Administration Act 1990* (Qld) ss 10.5(2), (4); *Police Act 1998* (SA) 65(1); *Police Service Act 2003* (Tas) s 84(1); *Victoria Police Act 2013* (Vic) s 74(2); *Police Act 1892* (WA) s 137(3); *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 3; *Police Act*, RSA 2000, c P-17 s 39(2); *Police Act*, RSBC 1996, c 367, s 21(3); *The Police Services Act*, CCSM 2009, c P 94.5, s 40(1); *Police Act*, SNB 1977, c P-9.2, s 17(1); *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17, ss 58(2), 59; *Police Act*, SNS 2004, c 31; *Police Services Act*, RSO 1990, c P-15, s 50; *Police Act*, RSPEI 1988, c P-11.1, s 15; *Police Act*, 1990, SS 1990-1991, c P-15.01, s 32; *Auxiliary Police Act*, RSY 2002, c 14.

[227] *Australian Federal Police Act 1979* (Cth) s 64B; *Law Reform (Vicarious Liability) Act 1983* (NSW) s 8; *Police Administration Act* (NT) s 148C; *Police Service Administration Act 1990* (Qld) s 10.5(3); *Police Act 1998* (SA) s 65(2); *Police Service Act 2003* (Tas) s 84(2); *Victoria Police Act 2013* (Vic) s 74(1); *Police Act 1892* (WA) s 137(5); *Police Act 1996* (UK) s 88.

[228] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 335 [26] (Gleeson CJ: "[i]t would be inconsistent with [the duty of a police officer to fill out an investigatory report setting out honestly and frankly the results of their observations, inquiries and tests] to require the police officer to take care to protect from [injury] a person whose conduct was the subject of investigation and report"), 342 [57] (Gaudron J: "[i]t would be incongruous and, perhaps, give rise to incompatible duties ... if a person charged with the investigation of a possible offence were to owe a duty of care to the person whose conduct is the subject of that investigation"), 396 [231] (Gummow and Kirby JJ: "[i]t is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation"), 418 (Hayne J); Callinan J declined to answer (431). With respect, it did not appear "preposterous" or "incongruous" to the Supreme Court of Canada, which recognised a duty of care in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129.

[229] *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 361–362 [125]: "Police officers are frequently obliged to record and use statements from witnesses and informants, statements that frequently damage the reputation of others. It seems preposterous to suggest that an officer has a duty of care in respect of such situations. Gathering and recording intelligence concerning the activities, potential activities and character of members of the criminal class is also central to the efficient functioning of a modern police force. Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering. To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual".

sure that things stated as fact were accurate, particularly where the "fact" was something tested by police themselves. Of course, one could well imagine cases where it was not consistent with the obligations of police to find a duty of care. For instance, police would not owe a duty of care with respect to recording what eyewitnesses claim to have seen, by ensuring that that information was correct. Inconsistency between the obligation of police to faithfully record eyewitness statements, and any duty of care owed to suspects, could be readily imagined. No one is suggesting that the police would be responsible for the accuracy of an eyewitness report prepared by them, based on observations of another, that was later found to be inaccurate or incomplete. That is something beyond the police officer's control and it would not be sensible to make them liable for that error, nor would it be consistent with the obligation of police to investigate crime.

It is a different situation where the error concerns something which the police themselves did, where control is certainly present. As such, it is submitted to be simplistic to deny that police ever owe a duty of care with respect to investigation of an incident, in relation to those who might be impacted by the investigation. This is, of course, not to say that the duty of care would be breached on all occasions, or that the plaintiff could show that the injuries they claim to have suffered were caused by whatever breach is found. In other words, existing negligence principles are quite capable of "doing their work" in terms of distinguishing meritorious from unmeritorious claims, without blanket refusals to recognise a duty of care being applied.

For instance, say the police conduct a grossly careless investigation. Perhaps they charge a person who is in fact innocent, because the tests they conduct on the evidence are incompetently done. The person charged is wrongfully convicted primarily because of the police negligence in handling the evidence. Why should the person so affected not have an action against police in such cases? What public policy is there in protecting incompetent police and investigations, and, in extreme cases, imprisoning the innocent? Where in the legislation authorising the exercise of police power, or the common law duties of police, does it permit or protect clearly incompetent investigation? It is dangerous to do as the High Court did in *Tame*, and conclude that police would *never* owe a duty of care to those being investigated,[230] because of the supposed conflict. While on occasions such a conflict could arise, due to the broad range of different situations in which the competence of a police investigation might be questioned, it should not be applied as a blanket rule to all situations relating to police.

In terms of conduct in the course of searching premises, police have been found to have committed torts[231] where they have acted with excessive and/or unnecessary force in carrying out a search. The existence of a legal action against police in such cases was not found to be inconsistent with their obligation to investigate a crime. Nor should a duty of care in the current context. There is no coherent distinction here between intentional torts such as trespass, and unintentional torts such as negligence. Indeed, the Victorian Court of Appeal accepted findings of negligence against supervisory police officers in *Horvath* in relation to the specific context of investigation of crime.[232]

It is also necessary to respond to the finding of the Court of Appeal for Ontario in *Wellington* that:

> [T]here is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation, which includes seeking to ground a viable civil action against the alleged perpetrators. To impose a private law duty of care would … introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest.[233]

With respect, the author takes a different view, characterising the private individual's interest somewhat differently than did the Court of Appeal in that case. The author would not call the individual's interest "seeking to ground a viable civil action", but rather a legitimate interest in

[230] To be fair, Gummow and Kirby JJ merely said that it was "unlikely" that such a duty of care would be recognised (396 [231]), and Callinan J declined to answer.

[231] *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57.

[232] *Victoria v Horvath* (2002) 6 VR 326; [2002] VSCA 177, [14]–[16], [60] (the Court).

[233] *Wellington v Ontario* (2011) 105 OR (3d) 81 (ONCA), [45] (Sharpe JA for the Court).

ensuring thorough and competent investigation of the circumstances of their family member's death at the hands of police. This is consistent with the public interest. It is in no one's interest that negligent conduct (or worse) is not thoroughly investigated. So posited, in the author's view, the conflict claimed by the Court of Appeal in *Wellington* disappears.

Concept of "immunity" inappropriate in this context

As previously indicated, in some of the cases in this area the judges have expressed their views in terms of police and police authorities possessing an "immunity" from liability.[234] The position of police with respect to civil liability should not be conceived in terms of an "immunity". Such language runs counter to the rule of law. It represents a regrettable regression to earlier times where the Crown enjoyed special rules and privileges with respect to application of the common law. If someone wishes to argue that this privileged position ought to be resurrected, for instance, because of the special functions (sometimes) carried out by governments, they should make their arguments.[235] However, for many years this special treatment has been abolished, *by governments (parliaments) themselves*.[236] Further, the delineation of public versus private functions is essentially a contested issue, making it very difficult, if not impossible, to clearly prescribe the bodies and functions which would be entitled to the benefit of any such special rules, even if they were to be resurrected in some form.[237]

CONCLUSION

This article has demonstrated that those alleging police negligence continue to have a very difficult time overcoming their first legal hurdle, establishing that police owe them a duty of care at common law. The United Kingdom has made clear its position against action of that kind in *Hill v West Yorkshire*, and has so far has steadfastly maintained that position, even in cases quite different in nature from their precedent decision. Australian courts have largely followed suit, using *Hill v West Yorkshire*-type reasoning and the argument that, in the vast majority of cases, recognition of a duty of care would be inconsistent with the duties of police. Plaintiffs have had more success in Canada, but it is unclear at this point whether the sensible *Hill v Hamilton-Wentworth* decision will be expanded to include plaintiffs who are not suspects in a police investigation.

This article has challenged the policy arguments used to deny plaintiffs a remedy in these kinds of cases. Any such arguments must be based on actual evidence, rather than surmise. The available evidence does not justify assertions that establishment of a duty of care would have, or has had, deleterious effects on policing, something noted by the Supreme Court of Canada, and which the English and Australian courts would do well to also recognise. The fact that legislation already strongly protects police from the possibility of personal liability tends to further undercut suggestions that recognition of a duty of care would have a drastic impact on policing practice. To the extent that policy is relevant in this area, acceptance that police owe a duty of care to others can have many positive impacts on policing and society more generally, and would be consistent with the rule of law. Of course, any litigant would still need to show breach and causation. As such, it is unlikely that a change in the law would result in a flood of successful claims.

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[234] *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 64 (Lord Keith, with whom Lords Brandon, Oliver and Goff agreed); *Cran v New South Wales* (2004) 62 NSWLR 95; [2004] NSWCA 92, [63]: "[the] efficient performance [of the police] may be put at risk by the very prospect of civil action designed to provide sanctions against inefficiency; that, any rate, is the policy consideration reinforcing the *immunity*" (Santow JA, with whom Ipp and McColl JJA agreed) (emphasis added). Use of the concept of "immunity" fell into disuse in the United Kingdom after *Osman v United Kingdom* [1998] ECHR 101.

[235] See, eg, The Law Commission, n 86, Ch 3.

[236] In the United Kingdom: *Petitions of Right Act 1860* (UK); *Crown Proceedings Act 1947* (UK); in Australia: *Judiciary Act 1903* (Cth) s 64; *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) ss 8, 9; *Crown Proceedings Act 1972* (SA) s 5; *Crown Proceedings Act 1958* (Vic) s 23(1); *Crown Suits Act 1947* (WA) s 5; in Canada: *Crown Proceeding Act* RSBC 1996, c 89; *Proceedings Against the Crown Act* RSO 1990, c P.27, s 13.

[237] See *Coomber v Berkshire Justices* (1883) 9 App.Cas. 61; Harlow, n 132, 39: "why should collective political responsibility somehow preclude legal liability to individuals? This is simply to breathe life into the antiquated folklore of a Crown that can do no wrong" (drawing upon the classic statement of Lord Coke in the *Magdalen College Case* (1615) 77 ER 1235, 1243 that "[t]he King ... cannot do a wrong"); Hogg, Monahan and Wright, n 2, 3: "the parts of the law that seem ... to be most unsatisfactory are those where the courts have refused to apply the ordinary law to the Crown".

The argument that the existence of a duty of care by police to individuals would be inconsistent with police duties is also challenged. Mere assertion that this is the case is insufficient. A reading of the actual legislation under which police operate does not give the impression that police are, or are intended to be, above the law, or that their actions or omissions should be immune to legal challenge. Legislation in every Australian jurisdiction, in the United Kingdom, and throughout Canada, contemplates legal action against police, and deals with it by allocating responsibility to police authorities and, to a very limited extent, police themselves. It is hard to reconcile this with a denial that police owe a duty of care with respect to their functions. This is not to deny that there could never be a conflict between the duties of police and the existence of a common law duty of care. Rather, it is to deny the utility of a blanket rule that police do not owe a duty of care to those affected by their actions or omissions because to do so would be contrary to their other duties. It is in the interests of all that police are competent at their job. If "the standard you walk past is the standard you accept",[238] the law should not "walk past" negligent performance of responsibilities, no matter who the culprit.

[238] Lieutenant General David Morrison, AO, Chief of the Australian Army "Message from the Chief of Army" (address to the Australian Army following the announcement on 13 June 2013 of civilian police and Defence Force investigations into allegations of unacceptable behaviour by Army members towards some of its women, available at: http://www.army.gov.au/our-work/speeches-and-transcripts/message-from-the-chief-of-army). The Defence Force is another instance of an organisation where in the past special legal rules have been applied.