

ResearchOnline@JCU

This is the **Accepted Version** of a paper published in the
Journal of the Australasian Law Teachers Association:

Shircore, Mandy (2012) *Shoot first establish liability later: the duty of care
owed to mentally ill persons*. Journal of the Australasian Law Teachers
Association, 5 (1-2). pp. 255-263.

Available Here: [http://alta.mycms.com.au/2012-
jalta.aspx?backToCMSUrl=%2fmyCMS%2fCMS%2fWebPages.aspx%3fsid%3
d3d934070-cb09-483a-ad95-14c7cc92185c](http://alta.mycms.com.au/2012-jalta.aspx?backToCMSUrl=%2fmyCMS%2fCMS%2fWebPages.aspx%3fsid%3d3d934070-cb09-483a-ad95-14c7cc92185c)

SHOOT FIRST ESTABLISH LIABILITY LATER: THE DUTY OF CARE OWED TO MENTALLY ILL PERSONS

MANDY SHIRCORE*

ABSTRACT

The vulnerability of mentally ill persons to serious or fatal harm in confrontations with police is compounded by over-stretched mental health services in Australia and an inadequately trained police force. Despite criticism by some commentators, lawyers and human rights groups, to the use of guns and other potentially lethal devices by police to restrain mentally ill persons, there is little tangible evidence that the landscape for the mentally ill is improving. The ability of tort law to provide any justice for mentally ill people and their families harmed by the system is complicated by the uncertain boundaries of the scope of the duty of care owed by the police. This paper considers recent cases in which the police have been sued in negligence in circumstances where a confrontation has ended in a mentally ill person being shot by police. In particular it looks at the policy arguments that have been raised for and against imposing a duty of care on police, the factors that impact on duty determination and how and in what circumstances a duty of care may be said to arise.

I INTRODUCTION

Police encounters with people suffering from mental illness are often complex, unpredictable and may be dangerous. While the vast majority of the estimated 148,000 annual interactions in Australia between police and people with a mental illness end constructively,¹ there continue to be a number of incidents that result in serious or fatal consequences for the person with mental illness. In fact, according to the Australian Institute of Criminology, of all persons fatally shot by police between 1 January 1990 and 30 June 2011, 40% were people with a mental illness.² In recognition that traditional police tactics have been unsuccessful in

* Mandy Shircore, Senior Lecturer, James Cook University. The author wishes to express thanks to Nichola Corbett-Jarvis and the anonymous referees for their valuable comments on an earlier draft of this article.

¹ Australian Institute of Criminology, 'Police Shooting statistics', (Letter to ABC Four Corners 20.2.2012), Four Corners ABC, <http://www.abc.net.au/4corners/stories/2012/03/01/3443486.htm>.

² Ibid.

dealing with people with mental illness, a number of jurisdictions have adopted new and specialised training procedures.³

Failure by police to provide an integrated and appropriate response to a man, who whilst suffering from a psychotic episode was shot by police, has been the subject of a recent negligence action in the Australian Capital Territory.⁴ Like so many police negligence cases before, the ACT police attempted to defend their actions in *Crowley v The Commonwealth*⁵ by denying that they owed the plaintiff a duty of care. The ‘no duty’ argument was based chiefly on the ubiquitous policy arguments first raised in the seminal case of *Hill v Chief Constable of West Yorkshire*.⁶ Originally devised in *Hill* to shield police from a claim that they had failed to protect a member of the general public from being harmed by an unknown third party criminal, the policy arguments adopt the familiar line that imposition of a duty will result in defensive practices being adopted by police and constitute a drain on police resources.⁷ Despite limited scrutiny of their validity, the policy arguments both in Australia and the United Kingdom have continued to be applied to an increasing array of police conduct, so much so that they have been criticised by some commentators as creating a *de facto* police immunity.⁸

³ For example in Victoria police are being provided with additional coaching after an internal review found that ‘previous training was flawed and increased the risks of violent confrontations’, see John Silvester, ‘Police to revamp training for handling mentally ill’, (The Age, Melbourne, 25.2.2012), <http://www.theage.com.au/victoria/police-to-revamp-training-for-handling-mentally-ill-20120224-1tu12.html>. In New South Wales and the ACT a four-day Mental Health Intervention Team training program was implemented in 2007 to assist police in dealing with people with mental illness, see New South Wales Police, Community Issues Mental Health http://www.police.nsw.gov.au/community_issues/mental_health.

⁴ *Crowley v The Commonwealth* (2011) 251 FLR 1 (‘*Crowley*’).

⁵ (2011) 251 FLR 1

⁶ [1989] AC 53 (‘*Hill*’).

⁷ *Hill* [1989] AC 53, 57.

⁸ See for example Mandy Shircore, ‘Police Liability for Negligent Investigations: When will a Duty of Care Arise’ (2006) 1 *Deakin Law Review* 33; Claire McIvor, ‘Getting Defensive About Police Negligence: The Hill Principle, The Human Rights Act 1998 and the House of Lords’ (2010) 69 *The Cambridge Law Journal* 133. See also 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.

It is arguable that the ACT Supreme Court in *Crowley* has gone some way towards stemming the pervasive reach of the *Hill* policy considerations by providing welcome guidance as to the appropriate boundaries of the duty of care owed by police, principally as it relates to positive acts of the police as opposed to police investigatory omissions. In finding that the *Hill* public policy considerations had been previously misunderstood and as a consequence too widely applied in a previous police shooting case, the court in *Crowley* held that the police owed a duty of care to the mentally ill plaintiff and were negligent in their response to his psychotic episode.

Focusing on the three Australian negligence cases that have dealt with the police shooting of a mentally ill person, this paper analysis how the courts have dealt with the pivotal question of the existence and scope of the duty of care owed by police. Although involving similar fact situations, each of the three cases represents a different approach to the *Hill* policy considerations, with varying results. As such the law in this area remains unsettled. Furthermore while the law discussed may be said to apply to police activity more generally, the focus is directed to these confrontations as they represent vastly different factual situations to that envisaged by the original *Hill* decision and as such should and do encompass different legal considerations.⁹

The paper begins with a broad overview of the *Hill* considerations and their application in Australia before turning to a discussion of the police shooting cases. The paper concludes that the recent *Crowley* judgment adopts an approach that sits

⁹ See, eg, Australian Broadcasting Commission, *Four Corners* program 'Closing Ranks' 6/3/2012 at <http://www.abc.net.au/4corners/stories/2012/03/01/3443486.htm>; The Conversation 'Tyler Cassidy Inquest – Police and community need better mental health training' 25/11/2011 at <http://theconversation.edu.au/tyler-cassidy-inquest-police-and-community-need-better-mental-health-training-4459>.

most comfortably with the current methodology of the High Court to novel duty situations and offers appropriate limits to the *Hill* policy considerations. Importantly the case also provides a measure of accountability to ensure police act reasonably and appropriately in dealing with some of the most vulnerable and marginalised members of the community, the mentally ill.

II THE DUTY OF CARE CONUNDRUM AND THE CONTINUING LEGACY OF HILL V CHIEF CONSTABLE OF WEST YORKSHIRE

Over the past two decades in Australia, there have been a number of civil suits instigated by disgruntled members of the public for various alleged police flaws, the majority of which have failed at the first hurdle of the negligence claim, duty of care.¹⁰ The arguments militating against a duty finding have been based in large part on the policy arguments first enunciated in *Hill*.

In *Hill*, the mother of the last victim of a serial murderer brought an action against the police alleging negligence in their failure to apprehend the accused prior to the death of her daughter.¹¹ The court denied the police owed a duty of care to the victim, due to the lack of proximity. As the daughter was one of a large number of potential victims she was not at a distinctive risk, no ‘special relationship arose’ and thus no duty to protect her existed.¹² Although lack of proximity was sufficient to dispose of the action in *Hill*, Lord Keith created further barriers for plaintiffs,¹³ by

¹⁰For an overview of the Australian cases dealing with police negligence cases see Paul Marshall, ‘Police liability in negligence : The Application of the Hill Immunity in Australia’ (2007) 15 *Tort Law Journal* 34; See also Shircore above n 8.

¹¹For a detailed critique of the investigation in *Hill*, including the reasons why the plaintiff brought the claim, see Joan Smith, *Misogynies: Reflections on Myth and Malice* (1989) 117-151.

¹²*Hill* [1989] AC 53, 57.

¹³See for example Laura Hoyano, ‘Policing Flawed Police Investigations: Unravelling the Blanket’ (1999) *The Modern Law Review* 912, in which she suggests that Lord Keith took this step to ensure the path to liability was ‘blocked’ for future plaintiffs.

enunciating a number of public policy grounds supporting a ‘no-duty’ finding.¹⁴ Similar to policy arguments once used to support advocates immunity, Lord Keith held police should not be liable for actions arising from the investigation and suppression of crime, on the basis that it ‘may lead to the exercise of a function being carried on in a defensive frame of mind.’¹⁵ Along with this defensive practice argument, Lord Keith also held that police policy and discretion, both integral to police officers’ duties of investigation, should not be questioned by the court. Police resources, he said, should not be diverted from police operational functions to the time and trouble of litigation.¹⁶

There has been much criticism of both the rationale for the *Hill* policy considerations and their application to allegations of police failings, particularly in fact situations that differ vastly from *Hill*.¹⁷ Despite warnings from the European Human Rights Court that the *Hill* policy considerations should not be used as a blanket immunity for police in the United Kingdom,¹⁸ the House of Lords has continued to provide strong support for the defensive practice argument, in contexts that differ factually from *Hill*.¹⁹ Although the High Court of Australia has not had the opportunity to consider the application of *Hill* directly, support has been shown for the policy considerations.

In *Sullivan v Moody* the High Court noted:

¹⁴ In *Hill*, Lord Templeman similarly referred to policy grounds as the reason for denying a duty of care was owed.

¹⁵ *Hill* [1989] AC 53, 57.

¹⁶ *Hill* [1989] AC 53, 59.

¹⁷ See for example *Shircore* and *McIvor* above n 8.

¹⁸ *Osman v. United Kingdom* - 23452/94 [1998] ECHR 101.

¹⁹ See *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495; *Chief Constable of Hertfordshire Police v Van Colle and Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50.

In *Hill v Chief Constable of West Yorkshire*, the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkell pointed out that the conduct of police investigation involves a variety of decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate.²⁰

In respect to a person under investigation by the police, Gummow and Kirby JJ stated in *Tame v New South Wales*:

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 ultimately based in the statutory framework and anterior common law by which the relevant police service is established and maintained, fully to investigate the conduct in question.²¹

Consistent with these statements, state courts have applied the *Hill* grounds to an expanding array of police negligence cases, often without a clear pronouncement of the ambit of the exclusionary grounds. So wide has been the application of the *Hill* considerations that they have been referred to by some courts and commentators as the 'doctrine of police immunity', to which ad hoc exceptions have developed.²²

The circumstances in which a duty of care has been denied at a state level in Australia include:

²⁰(2002) CLR 251, [57].

²¹*Tame v New South Wales* (2002) 211 CLR540, [231].

²² See eg, *Cran v New South Wales* (2004) 62 NSWLR 95, where Santow JA refers continually to the police immunity from owing a duty of care in relation to investigations, except possibly where the police have expressly assumed responsibility to an individual. More recent Australian cases have stated however there is no police immunity in Australia. See, eg *Peat v Lin* [2005] 1 Qd R 40; *New South Wales v Tryst* [2008] NSWCA 107 (Campbell J.A.)

- Allegations of police negligence in failing to investigate or prosecute a crime in which the plaintiff was the complainant.²³
- Where the plaintiff is a person under investigation,²⁴ including where the plaintiff claimed the police were negligent in failing to arrange prompt drug analysis with the result that the accused's detention in custody was prolonged. To subject administrative police tasks to a duty of care was held to have dire resource implications warranting 'immunity' to the police.²⁵
- Where the plaintiff was a victim of criminal conduct. In such cases the 'general rule ...that one man is under no duty of controlling another man to prevent his doing damage to a third'²⁶ has operated to defeat claims brought by victims of criminal conduct.²⁷ Although it must be noted, that there have been two instances in which the state courts have held, in refusing to strike out the plaintiff's statement of claim, that it was arguable that the police had assumed responsibility to an identified individual who had relied on police protection, thereby giving rise to a possible duty of care.²⁸
- Allegations of negligence in the use of information which then exposed the plaintiff to the death penalty.²⁹ This was based on the purpose and function of the police to investigate the matter and the conflicting obligations that imposition of a duty would place upon the officers.³⁰
- Where the plaintiffs have alleged negligence in the police handling of a matter involving a family member, with the result that the plaintiff has

²³ See *Gibbs v Commissioner of Police (Qld)* [2000] QCA 33 (unreported, 21 February 2000).

²⁴ See, eg, *Wilson v New South Wales* (2001) 53 NSWLR 407, *Courtney v Tasmania* [2000] TASSC 83.

²⁵ See *Cran v New South Wales* (2004) 62 NSWLR 95.

²⁶ *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J). See also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

²⁷ See, eg, *Osman v Ferguson* [1993] 4 All ER 344, *Van Colle v Hertfordshire Police* [2008] 3 All ER 977 (QB), *Taha v Shaq Industries Pty Ltd* [2012] VSC 30, *Victoria v Richards* (2010) 27 VR 343.

²⁸ See, eg, *Batchelor v Tasmania* (2005) 13 Tas R 403, *NSW v Spearpoint* [2009] NSWCA 233.

²⁹ *Rush v Commissioner of Police* (2006) 150 FCR 165.

³⁰ *Rush v Commissioner of Police* (2006) 150 FCR 165, [117].

suffered psychiatric harm. These included claims by the plaintiffs of police negligence in identifying their deceased mothers after a traffic accident. The result of the negligence being that each of the deceased was identified as the other, with one incorrectly buried and the other incorrectly cremated.³¹ Another involved a claim made by a family that the police had been negligent in the handling of a missing person investigation, resulting in a five year delay in identifying a body as a missing person.³²

- Where off-duty police officers attending a nightclub, witnessed a patron of the club being abusive and violent and failed to act to restrain him prior to his viscous assault on the plaintiff.³³
- Where police officers alerted an absconding parent that they were aware of her whereabouts, allowing her the opportunity to remove the children from the plaintiff.³⁴

Despite these cases, there is some evidence that Australian courts have become more circumspect in their approach to the *Hill* principle. In two separate instances involving actions initiated by victims of domestic violence, state courts refused to strike out the plaintiff's claim as it was held to be arguable that the police had assumed responsibility to provide some protection for the particular victims, thereby negating or limiting the effect of the *Hill* policy considerations.³⁵ More recently in *NSW v Tryst*, Campbell JA refused to accept that the *Hill* policy considerations applied to a factual situation outside of the context of *Hill*.³⁶

³¹*Halech v South Australia* (2006) 93 SASR 427.

³²*Cumming v New South Wales* [2008] NSWSC 690 (unreported judgment).

³³*Peat v Lin*[2005] 1 Qd R 40.

³⁴*Quintano v New South Wales* [2002] NSWSC 766.

³⁵*Batchelor v Tasmania* (2005) 13 Tas R 403, *NSW v Spearpoint* [2009] NSWCA 233.

³⁶[2008] NSWCA 107.

The *Crowley* case similarly signals that Australian courts are carefully considering what is and should be the ambit of the *Hill* policy considerations. Despite an earlier New South Wales Court of Appeal case that had held the *Hill* policy considerations applicable to a police shooting case, the ACT Supreme Court in *Crowley* was prepared to limit the effect of the *Hill* principles within an analysis that considered all the salient features of the case. The *Crowley* case and the two shooting cases that preceded it are considered in detail in the following section.

III POLICE SHOOTING CASES

At the outset it should be noted that the police shooting cases involve vastly different factual situations to that of *Hill*. In two of the cases the injury was caused to the plaintiff directly through the police shooting, while in the other case the plaintiffs were family members of the man shot by the police. It is somewhat surprising that the *Hill* policy considerations were considered relevant to the shooting cases.. *Hill* was concerned with the discretionary decision making of police involved in a police investigation. Furthermore, in *Hill* both the criminal third party and the victim were unknown to the police. The alleged police negligence involved an omission to act (failure to apprehend the criminal third party), and it was this omission that caused the plaintiff's harm. In the shooting cases, on the other hand, the police negligence involved apprehending a mentally disturbed person and during the operation, discharging a firearm directly wounding (in one case fatally) the disturbed person.

In the first of the cases *Zalewski v Turcarolo*,³⁷ the Victorian Supreme Court (Appeal Division) found police liable in negligence and battery after they had shot and injured the 22 year-old plaintiff, who had a history of mental illness. On the day of the shooting, the plaintiff had become depressed, was suffering from psychotic delusions and had taken his father's shotgun into his bedroom and shut the door (the implication being that the plaintiff was contemplating self-harm). The plaintiff's father had entered the room to ask the plaintiff what he was doing, but after being asked to be left alone, the father called the police requesting assistance. Upon arrival at the house, there was no attempt by police to determine whether the gun was loaded or to negotiate with the plaintiff from outside his room. Instead within minutes, the police had entered the bedroom with their guns drawn and shot the plaintiff, seriously injuring him. The plaintiff claimed that the police failed to correctly assess the situation and to act in accordance with training and instructions.

The Victorian police argued that even if they were negligent in their conduct towards the plaintiff, they were immune from liability based on public policy considerations, namely because 'the absence of such an immunity would lead to investigative operations being carried on in a detrimentally defensive frame of mind'.³⁸ Hansen J noted that any immunity granted to the police did not apply to all police activities, as had been conceded by Lord Keith in *Hill*.³⁹ Police officers, it was said, may be liable for 'on the spot' operational activities, including for example negligent driving, referred to in the UK case of *Knightley v Johns*⁴⁰ as

³⁷[1995] 2 VR 562 (*Zalewski*).

³⁸*Zalewski* [1995] 2 VR 562, 574.

³⁹[1989] AC 53.

⁴⁰[1982] 1 All ER 851.

incidents of ‘specifically identified antecedent negligent conduct’.⁴¹ Finding that the *Zalewski* case differed from *Hill*, which had involved failure of police to apprehend an unknown criminal, Hansen J held that the basis for the immunity did not exist ‘because *Zalewski* did not act in accordance with his training and instructions’ in what was considered as an incident of antecedent negligent conduct.⁴²

More than ten years later in *NSW v Klein*,⁴³ the New South Wales Court of Appeal expressed doubt about the correctness of the *Zalewski* decision. In the *Klein* case, the relatives of a man shot and killed by police claimed psychiatric harm caused by the alleged police negligence in dealing with the mentally ill man. The man had been at his grandmother’s house when in a disturbed psychotic state he surrounded himself with knives. When approached by his mother he became aggressive. After she called the police, the man set a fire in the house. The fire brigade was called, however they were unable to enter the house to extinguish the fire while the disturbed man remained inside. The statement of claim did not specify what occurred next, other than to state that the disturbed man was later shot by police outside the house.⁴⁴ On appeal the court struck out the plaintiffs’ claim on the basis that the police did not owe them a duty of care.

Although *Klein* concerned claims of psychiatric harm caused to the plaintiffs as a result of being in the vicinity of the police shooting, the court considered how courts in Australia had dealt with the *Hill* policy grounds since the Victorian case

⁴¹*Zalewski* [1995] 2 VR 562, 575.

⁴²*Zalewski* [1995] 2 VR 562, 577 (Hansen J)

⁴³[2006] Aust Torts Reports 81-862 (*Klein*).

⁴⁴*Klein* [2006] Aust Torts Reports 81-862, 864.

of *Zalewski*.⁴⁵ While not going so far as to declare that *Zalewski* had been wrongly decided, Young CJ was persuaded that the *Hill* policy grounds had received widespread acceptance in Australia since *Zalewski*, noting in particular the comments by the High Court in *Sullivan v Moody*,⁴⁶ *Tame v Annetts*⁴⁷ and *D'Orta-Ekenaike v Victoria Legal Aid*.⁴⁸ In doing so Young CJ doubted the precedent value of *Zalewski*.⁴⁹ His Honour noted that the few cases in the United Kingdom and Australia where a duty had been held to exist involved 'exceptional circumstances' or situations where the police had assumed responsibility to a particular individual, for example by taking control of the situation.⁵⁰ As the police had not assumed responsibility for the plaintiffs in *Klein*, the court was prepared to strike out the plaintiffs' claim, because as Young CJ stated 'the core principle in *Hill's* case is so strong that the hopelessness of the plaintiffs' case is plain no matter what the facts.'⁵¹ As noted by Penfold J in the *Crowley* case discussed below, what the court meant by 'the core principle' in *Hill's* case was not clearly explained.⁵²

In May 2011, in *Crowley v The Commonwealth*,⁵³ after a detailed examination of the facts and history of police negligence cases in Australia and the United Kingdom, Penfold J in the Supreme Court of the ACT held police liable in negligence for the shooting injury to the plaintiff, Jonathan Crowley. On the day of the shooting, after contact with mental health workers, the plaintiff had left his

⁴⁵*Klein* [2006] Aust Torts Reports 81-862, [19].

⁴⁶(2001) 207 CLR 562.

⁴⁷(2002) 211 CLR 317.

⁴⁸(2005) 223 CLR 1.

⁴⁹*Klein* [2006] Aust Torts Reports 81-862, [25].

⁵⁰*Klein* [2006] Aust Torts Reports 81-862, [25].

⁵¹*Klein* [2006] Aust Torts Reports 81-862, [23].

⁵²*Crowley* (2011) 251 FLR 1, 98.

⁵³(2011) 251 FLR 1 ('*Crowley*').

parents' house carrying a kendo stick.⁵⁴ After some unusual and threatening interactions with members of the public, the police were called to locate the plaintiff. Upon discovering the plaintiff in a suburban street, two police officers pulled up in their car close to the plaintiff and after alighting from the vehicle yelled at the plaintiff to put down his weapon and get on the ground. The plaintiff failed to comply and instead advanced towards the police who attempted to disarm him by spraying him with capsicum spray. When this did not work and the plaintiff attacked the officers with the kendo stick, one of the officers shot the plaintiff. Similar to the *Zalewski* case, the police negligence was found to consist of inadequate preparation and failure to follow appropriate training and procedure in dealing with the mentally disturbed plaintiff in the circumstances.

Penfold J in *Crowley's* case noted that developments in Australia since the 1995 case of *Zalewski* raised the question of whether *Zalewski*, so similar on the facts to the case of *Crowley*, was still good law.⁵⁵ In an exhaustive analysis of the police negligence cases, Penfold J held that the *Hill* public policy grounds as accepted in Australia, were intended to apply to police investigative work, that is, work that involves the investigation of crime leading to the apprehension of criminals.⁵⁶ Thus a case involving positive police conduct, or operational police work, causing damage to specified individuals, as occurred in *Crowley* and *Zalewski* could fall outside the *Hill* principle.⁵⁷ Penfold J considered that the court in *Klein* had defined police investigative work too widely, in effect applying the no duty

⁵⁴ A kendo stick is a bamboo stick used in the practice of martial art known as kendo.

⁵⁵ *Crowley* (2011) 251 FLR 1, 89.

⁵⁶ *Crowley* (2011) 251 FLR 1, 95-6.

⁵⁷ *Crowley* (2011) 251 FLR 1, 103.

finding to any conduct that could be considered remotely related to investigative work.⁵⁸

Penfold J considered investigatory work, as intended by the *Hill* line of cases, applies to police work that raises issues such as: the allocation of resources; choices made by police officers in the lines of inquiry; the care and efficiency with which lines of inquiry are pursued; the records made in the course of inquiry and the management of information generated during an investigation, including in the course of an apprehension.⁵⁹

Factors which would warrant a no duty finding would therefore include:

[T]he difficulty of identifying a class of persons to whom the duty would be owed, ... the risk of subjecting police to irreconcilably conflicting duties, and ... the public policy impacts such as the constraining effect of such a duty on the proper and effective conduct of investigations.⁶⁰

In finding that the *Hill* policy grounds did not apply to the *Crowley* case her Honour stated:

I propose to determine this action on the basis that liability for physical injuries caused as a result of police negligence, even if that negligence occurs in the course of police action that is directly related to a current investigation, is to be determined by reference to whether in the circumstances of the particular case the police officers involved have assumed a duty of care, rather than by reference to a general absence of any duty of care in relation to anything that happens in the course of a police investigation.⁶¹

She stated further:

There are no doubt various ways in which police may assume a duty of care in a particular situation; for present purposes it is sufficient to say that where

⁵⁸*Crowley* (2011) 251 FLR 1, 95.

⁵⁹*Crowley* (2011) 251 FLR 1, 104.

⁶⁰*Crowley* (2011) 251 FLR 1, 105.

⁶¹*Crowley* (2011) 251 FLR 1, 106.

police have taken control, or are attempting to take control, of a situation in reliance on their authority and powers as police officers, it is reasonable to find that they have assumed a duty of care to anyone who is directly caught up in their exercise of authority.⁶²

A Preserving the Coherence in the Common Law

Following the current approach of the High Court to novel duty determinations,⁶³ Penfold J also considered whether a finding that the police owed a duty of care to the plaintiff, would be inconsistent with other police duties and thereby disturb the coherence in the common law.⁶⁴ The defendants had argued that any specific duty owed to the plaintiff (an individual offender or suspect) would conflict with their general police duties to prevent crime and protect the public. However Penfold J refused to accept that owing a duty of care to individuals caught up in operational situations (including suspects and offenders), would conflict with more general duties, noting in particular that a common law duty would in fact be consistent with Australian Federal Police policy documents which include the principle that ‘the safety of the police, the public and offenders or suspects is paramount’.⁶⁵

Her Honour noted that a duty of care could be owed to more than one person in a given situation and that exercising judgment in complex situations, with a number of peoples’ welfare to consider, did not necessarily involve conflicting considerations and duties. This case could be distinguished from *Sullivan v Moody*⁶⁶ where the interests of the children were paramount and any duty owed to the fathers would necessarily conflict with the duty owed to the children.

⁶²Crowley (2011) 251 FLR 1, 106.

⁶³See *Sullivan v Moody* (2002) CLR 251.

⁶⁴Crowley (2011) 251 FLR 1, 107.

⁶⁵Crowley (2011) 251 FLR 1, 108.

⁶⁶Crowley (2011) 251 FLR 1, 110.

Accordingly Penfold J found that once ‘the police officers got out of their car and started giving orders to Jonathon, they were clearly exercising their authority as police officers and taking control of the situation.....[in doing so they]...assumed a duty of care to those willingly or unwillingly caught up in that situation, being at least Jonathon.’⁶⁷

Any suggestion that the finding of a duty of care would detract from the primary role of publicly funded entities by diverting attention to the trouble and expense of litigation would be to ‘reject the currently wide-spread expectation that publicly-funded bodies should be accountable both for the expenditure of public funds and more broadly for the exercise of the powers and discretions conferred on them for the purpose of their functions, an expectation that is reflected in Australia in the proliferation of methods of scrutinising the expenditure of public moneys and methods of challenging both specific and systemic exercises of public powers.’⁶⁸

After an exhaustive consideration of the evidence, which included examination of the police training procedures and police policy manuals, Penfold J held that the two police officers involved in the confrontation with Jonathon had breached their duty of care to him by failing to plan and assess the situation adequately (which included a failure to follow police procedural principles) and confronting Jonathon in the manner in which they did, although no breach was found in relation to the use of weapons by the officers involved.

IV CONCLUSION

⁶⁷*Crowley* (2011) 251 FLR 1, 112.

⁶⁸*Crowley* (2011) 251 FLR 1, 112.

In finding that the police owed a duty of care to the plaintiff in *Crowley*, the ACT Supreme Court has rejected the reasoning of the NSW Court of Appeal in *Klein*. In doing so, Penfold J has attempted to articulate the boundaries of the *Hill* public policy grounds and reconcile the many cases that have considered the application of the grounds as they have been applied to an increasing array of police conduct. By following the current approach of the High Court to novel duty of care questions, Penfold J has rejected any notion that police enjoy immunity from negligence actions and from which exceptions must be argued. Instead her Honour has analysed the existence and scope of a duty of care in terms of the legislative framework of the police services, coherence of the law, issues of control and the effect of public policy grounds.

By limiting the ambit of the *Hill* grounds to carefully defined investigative duties, her Honour has determined that a duty of care may arise where police exercise their authority, take control of a situation and in doing so cause harm to persons directly caught up in the exercise of such authority. Such an analysis accords with the few recent state cases in which there has been a refusal to strike out the plaintiff's claim on the basis that the police had taken control of a situation and assumed responsibility to the plaintiff.⁶⁹ While both the House of Lords in the United Kingdom and the Canadian Supreme Court have been afforded the opportunity to reassess the continued effect of the *Hill* policy grounds as they apply to more contemporary police conduct,⁷⁰ the Australian High Court has yet

⁶⁹ See, eg, *Batchelor v Tasmania* (2005) 13 Tas R 403, *NSW v Spearpoint* [2009] NSWCA 233.

⁷⁰ See, *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495, *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593, *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.

to directly consider the issue. With the *Crowley* case currently under appeal, it may yet provide an appropriate vehicle for High Court determination.⁷¹

Should the determination in *Crowley* be upheld, police will be required to ensure that they assess and execute confrontations with people suffering mental illness in accordance with appropriate procedures and training. Although outside of the scope of this paper, this may involve establishing systems that involve greater integration with mental health service providers and a more co-ordinated response to dealing with people experiencing psychotic episodes.⁷²

The task faced by police in apprehending and dealing with people suffering from mental illness and psychotic episodes is an unenviable one. Compounding the problem is that the mental health system is overstretched and training procedures for police have tended to be inadequate. But as *Crowley* demonstrates, the common law can provide a measure of accountability to ensure that police operate in a reasonable manner to minimise the possibility of continued adverse outcomes.

⁷¹At the time of writing, the appeal has been heard by the ACT Court of Appeal and judgment reserved.

⁷²One of the findings in the *Crowley* case was that the ACT Mental Health Service was negligent in failing to pass on information concerning Jonathon Crowley to the police, which may have assisted in his apprehension.