Domestic and Family Violence and Police Negligence

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Abstract

Domestic and family violence in Australia has received unprecedented attention over the past few years. A number of recent reports and reviews have identified that improved policing is key to enhancing the safety of women and children. In response to these reports, and in recognition that police are often the first to respond to domestic violence, a number of jurisdictions have strengthened police powers and, in some cases, mandated police responses. This article draws on a qualitative study of victims' experiences of police responses to domestic violence in order to identify the extent and breadth of the problems that continue to plague police responses to domestic violence in Queensland, in spite of legislative change. The article then uses Queensland as a case study to consider whether a victim of domestic violence, who claims that the police failed to adequately respond to or deal with their request for assistance, would be able to successfully take a private civil action against the police in Australia; specifically in the tort of negligence. The current position in Australia concerning the existence and scope of the duty of care owed by police to victims of third party harm is unclear. While a number of state courts have considered the issue, to date there has been no High Court of Australia determination directly on point. Recent cases decided in the United Kingdom and Canada, changing community attitudes, and the enhanced police powers that have been introduced in Queensland and elsewhere to ensure police better respond to domestic and family violence reopen the debate about whether police should owe a duty of care to victims of crime, specifically victims of domestic violence.

I Introduction

Domestic and family violence in Australia has received unprecedented attention over the past few years. The issue has generated bipartisan political and community support for greater resources, cultural change and law reform. Most relevantly here, a number of initiatives have been taken in the context of improving police responses to domestic violence. For example, in September 2015, the Federal Government committed financial resources to a range of initiatives including awareness campaigns and specialised training for police emergency services. Further, financial

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commitments for supporting frontline legal services followed in October 2015.[1] In Victoria, the Royal Commission into Family Violence noted that '[f]or many women and their children, police not only provide protection at a time of crisis but are the entry point to the broader family violence system. The quality of the police response is therefore crucial'.[2] The Victorian Government has committed significant resources to tackling domestic violence, including the police response, following the findings of the Royal Commission.[3] Upon appointment to the Special Taskforce on Domestic and Family Violence in Queensland, Dame Quentin Bryce AD CVO noted that there will be a focus on the 'absolutely critical' window of time when a woman makes an initial call for help and an overhaul to the way in which police officers deal with victims of domestic violence.[4] The subsequent *Not Now, Not Ever Report* of the Special Taskforce found responses by police to domestic violence were often lacking and need to be improved through a proactive investigation and protection policing policy to enhance victim safety and encourage cultural change.[5]

The purpose of this article is to consider whether a victim of domestic violence, who claims that the police failed to adequately respond to or deal with their request for assistance, would be able to successfully take a private civil action against the police in Australia, specifically in the tort of negligence. This question is significant for a number of reasons. First, mechanisms for complaints regarding police conduct generally have limited scope; they do not provide compensation and are often criticised due to their internal focus.[6] Civil suits on the other hand provide a transparent and objective process to test the appropriateness of the police conduct.[7] A court finding of negligence against the police provides not only monetary compensation, but importantly acknowledgement and vindication that the plaintiff was wronged by the State.[8] Second, a civil action may provide another avenue to regulate and improve police conduct and facilitate positive cultural change within

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1 Attorney-General (Cth), 'Women's Safety Package Legal Support Providers' (Press Release, 16 October 2015) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/16-October-2015-Womens-Safety-Package-Legal-Support-Providers.aspx>.

2 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 34.

3 Minister for the Prevention of Family Violence (Vic), 'Urgent Family Violence Investment Will Help Keep Women and Children Safe' (Media Release, 13 April 2016) <http://www.premier.vic.gov.au/urgent-family-violence-investment-will-help-keep-women-and-children-safe/>.

4 Ben Doherty, 'Domestic Violence: Quentin Bryce to Head Taskforce after Horror Week', *The Guardian* (online), 13 September 2015 <https://www.theguardian.com/society/2015/sep/13/domestic-violence-response-first-call-for-help-is-critical-says-quentin-bryce>.

5 Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) vol 1, 14 ('*Not Now, Not Ever Report*').

6 See generally Western Australia Ombudsman, *Investigation into Issues associated with Violence Restraining Orders and Their Relationship with Family and Domestic Violence Fatalities* (2015); New South Wales Ombudsman, *Audit of NSW Police Force Handling of Domestic and Family Violence Complaints* (2011); Western Australia Ombudsman, *An Investigation into the Police Response to Assault in the Family Home* (2003); Jude McCulloch and Darren Palmer, *Civil Litigation by Citizens against Australian Police between 1994 and 2002: Report to the Criminology Research Council* (2002).

7 See, eg, Kirsty Horsey, 'Trust in the Police? Police Negligence, Invisible Immunity and Disadvantaged Claimants' in Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 2012) 80; Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police' (2016) 75(1) *The Cambridge Law Journal* 128.

8 See, eg, Horsey, above n 7, 81; Melanie Randall, 'Private Law, the State and the Duty to Protect: Tort Actions for Police Failures in Gendered Violence Cases' (2009) 44 *Supreme Court Law Review* 343.

the police service.[9] Certainly, other intentional torts such as false imprisonment and trespass have had this effect.[10] Third, the recent decision of *Michael v Chief Constable of South Wales Police* in the United Kingdom ('UK')[11] dealt specifically with police failings in a domestic violence case that had fatal consequences. This case highlighted the privileged position that police occupy within the tort of negligence in the UK, a position that continues to attract criticism by commentators and some members of the judiciary.[12] The *Michael* case reopens questions about the current position in Australia.

To set the scene for examining the possibility of private civil action against the police in Australia in the context of DV, we begin with a case study from Queensland that highlights the extent and breadth of the problems that continue to plague police responses to domestic violence. We then briefly outline the requirements of a negligence action in this context and the particular hurdles that need to be overcome for a successful suit. We then consider how the issues have been dealt with in the UK and Canada, before turning to an analysis of the Australian position. We conclude that given changing community attitudes towards domestic violence and higher expectations being placed on police as first responders to domestic and violence, it is possible that Australian courts will be willing to find the police owe a victim of domestic violence a duty of care for a negligent failure to adequately respond to or investigate claims of domestic violence.

II The Extent of the Problem of Policing Domestic Violence: A Queensland Case Study

One of the authors of this article (Douglas) is currently involved in a broader and ongoing study undertaking interviews with women who have engaged with the legal system in relation to domestic violence. As part of this study, 65 women in Brisbane, Australia, were interviewed by Douglas about their experiences of domestic violence and of engaging with the legal system as a response. Women who were over 18 years old, had experienced a violent relationship with an intimate partner and engaged with the legal system in some way to respond to the violence, were recruited through a

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9 *Not Now, Not Ever Report*, above n 5, vol 1, 8; Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012: Best Practice Report* (2012); See also Erika Chamberlain, 'Negligent Investigation: Tort Law as Police Ombudsman' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 283; Janet Ransley, Jessica Anderson and Tim Prenzler, 'Civil Litigation against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability' (2007) 40(2) *The Australian and New Zealand Journal of Criminology* 143, 143–4; ABC Radio National, 'Civil Actions against Police by Crime Victims', *The Law Report* (Damien Carrick, 18 March 2014) <http://www.abc.net.au/radionational/programs/lawreport/ciivil-actions-against-police-by-crime-victims/5325170#transcript>.

10 Anthony Gray, 'Liability of Police in Negligence: A Comparative Analysis' (2016) 24(1) *Tort Law Review* 34, 48.

11 [2015] AC 1732 ('*Michael*').

12 Gray, above n 10; Horsey, above n 7; Tofaris and Steel, above n 7. See also Mandy Shircore, 'Police Liability for Negligent Investigations: When Will a Duty of Care Arise?' (2006) 11(1) *Deakin Law Review* 33; Claire McIvor, 'Getting Defensive about Police Negligence: The *Hill* Principle, the *Human Rights Act 1988* and the House of Lords' (2010) 69(1) *The Cambridge Law Journal* 133; *Michael* [2015] AC 1732 (Lord Kerr JSC and Baroness Hale DPSC in dissent).

variety of domestic violence assistance and support services in Brisbane.[13] Almost all of the women interviewed had engaged with the police (n=58) and while some gave very positive reports in relation to the police approach, all participants identified that responses were extremely inconsistent.[14]

Key themes that emerged in relation to concerns about the approach of Queensland police were: poor risk assessment and failure to address safety needs; delay in attending after being called; inappropriate responses including failing to investigate or charge breaches of protection orders; lack of information and inappropriately redirecting victims away from police services. Despite the introduction of risk assessment tools in policing,[15] many participants reported that police often failed to identify factors that indicated a high risk of future harm.[16] For example, one participant had called ambulance services because her ex-partner was outside her house with a firearm and threatening to kill himself. She was also being stalked by him, receiving numerous emails from him on a daily basis. Both suicide threats[17] and stalking[18] have been identified as high risk behaviour. This participant subsequently went to her local police station to ask what she could do, explaining that she was scared to go home. She reported that police did not seem to take the emails seriously and that the police officer asked only whether there had been physical abuse. Thus, police remained completely unaware of the suicide threat.[19] Similarly, another interviewee commented that the police 'didn't do anything — probably because there was no physical violence'.[20]

Another common complaint, resulting in several women lodging formal complaints about police was the failure of officers to investigate or charge breaches

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13 Interviews were labelled with an identity ('ID') number and are referred to by their ID number and date of interview. For more information about the study, funded by the Australian Research Council's Future Fellowship scheme (project number FT140100796), see the project web page: TC Beirne School of Law, University of Queensland, *Using Law and Leaving Domestic Violence* <https://law.uq.edu.au/research/our-research/using-law-and-leaving-domestic-violence>. A narrative interviewing style was used to encourage the participants to tell their stories and describe their experiences in detail at their own pace and as accurately as possible. See generally Martine B Powell, Ronald P Fisher and Rebecca Wright, 'Investigative Interviewing' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: An Empirical Perspective* (Guildford Press, 2005) 11; Uwe Flick (ed), *Designing Qualitative Research* (SAGE, 2007) 2. The interviews were generally around 60 to 90 minutes in length and were recorded with the participants' consent. The study was approved by the University of Queensland Human Ethics Committee.

14 See also Victoria, Royal Commission into Family Violence, above n 2, vol III, 7.

15 See, eg, Queensland Police, *Operational Procedures Manual* (Issue 60, 13 October 2017) <https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/opm.htm> ch 9 'Domestic Violence'. See especially app 9.1 'Domestic Violence Protective Assessment Framework (DV-PAF)'.

16 See also Victoria, Royal Commission into Family Violence, above n 2, vol III, 13.

17 See Domestic and Family Violence Death Review and Advisory Board, *2016–2017 Annual Report* (Queensland Government, 2017) where suicide and suicide threats feature strongly in a number of the reviews. See also NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (NSW Department of Attorney General and Justice, 2015).

18 Mindy B Mechanic, Terri L Weaver and Patricia A Resick, 'Risk Factors for Physical Injury among Help-Seeking Battered Women: An Exploration of Multiple Abuse Dimensions' (2008) 14(10) *Violence against Women* 1148.

19 ID53, 16 September 2015.

20 ID35, 13 May 2016.

of protection orders.[21] One woman explained that her new partner, a protected person on the protection order, was being stalked by the respondent (her ex-partner). This participant reported that she and her new partner 'were going to the police station two or three times a week complaining about [stalking] breaches'.[22] Yet, the police took no action. Unfortunately, there were fatal consequences in this case that occurred just hours after the couple had made a further report of breach of the protection order to the police.

This failure to act on breaches of protection orders contributes to fear and frustration, may make women reluctant to call the police, may contribute to their lack of safety and may result in further harm. One woman pointed out: 'so I reported it to the police. Every single time he's done something [to breach the protection order] I've reported it to the police. Every single time nothing's happened'.[23] She went on to explain: 'I'm not having terrible experiences with the legal system, with the court system. It's [the] … Police Service that is throwing up barriers to me … [they are] completely ignoring me'.[24] Another woman commented similarly: 'They blame me for the violence, they don't do anything. Nothing ever happens'.[25] A number of participants commented on lengthy waiting times for police arrival, claiming they were 'so late' and often took up to two to three hours to arrive, even in urban areas.[26] Those living in more remote areas reported that there were often particularly long delays. One woman responded: 'It … took them 5–6 hours after the phone call to come to my property … When they did get there they explained to me unless they witnessed it there is nothing they could do but I could file my own [domestic violence order ('DVO') application] against him at the local court house'.[27] Many of the women interviewed claimed that police delays and failure to act resulted in greater levels of abuse and increased danger. Other interviewees said they had learned from their experiences of police delay on call outs. They observed variously that 'by the time police come he'd be gone'[28] and 'they don't turn up',[29] some of these interviewees had stopped calling the police.

III The Negligence Question: Duty of Care and the Police

An action in negligence will lie only where the plaintiff has suffered harm as a result of the negligent conduct of the defendant.[30] In negligence actions brought against the police for a failure to adequately respond to an allegation of domestic violence, plaintiffs claim that the police negligence resulted in further recognised harm,

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[21] See, eg, ID39, 21 May 2015; ID37, 28 October 2016; ID34, 18 August 2016; ID51, 1 July 2016; ID24, 15 September 2016; ID60, 2 June 2016; ID53, 12 July 2016.

[22] ID39, 21 May 2015.

[23] ID37, 20 April 2016.

[24] ID37, 20 April 2016.

[25] ID41, 6 April 2016; ID39, 6 October 2016.

[26] ID3, 28 January 2015; ID57, 2 September 2016; ID24, 10 March 2015.

[27] ID49, 20 May 2016; ID48, 27 May 2016 (7-hours wait time for police arrival); ID3, 28 January 2016 (3-hours wait time for police arrival).

[28] ID61, 27 May 2015.

[29] ID62, 2 January 2016.

[30] *Harriton v Stephens* (2006) 226 CLR 52, 126 [251].

through acts of domestic violence.[31] In the Queensland case study, one interviewee's new partner was killed by her former violent partner a short time after the interviewee had made a complaint to police.[32] Similarly, in two of the cases examined in this article, tragically the further violence resulted in the death of the victim. In the cases discussed, the civil claim was brought by affected family members.[33]

There is also little doubt that the police conduct in many police negligence cases has been grossly inadequate.[34] Had a duty been found to exist, the plaintiff would have had little difficulty establishing breach of the duty. However, as the case law demonstrates, establishing that the police owed the plaintiff a duty of care can be problematic. If no duty is owed, it does not matter how inadequate the police conduct is, no action will lie. There are a number of reasons why courts have struggled with this threshold issue.

First, there is an established principle that a person does not generally owe a duty of care to protect another from the actions of a third party. This stems from a reluctance to impose a duty of care for omissions or failures to act. The High Court of Australia confirmed this position in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[35] where it held, by majority, that the defendant shopping centre did not owe a duty of care to the plaintiff, who was assaulted by unknown assailants in the shopping centre car park. The plaintiff was the manager of one of the shopping centre shops and claimed that had the defendant kept the lights in the car park lit until later (as the co-manager had previously requested), the attackers would have been deterred. However, the Court held that the defendant did not owe a duty to the plaintiff because it did not have the ability to control or prevent the random attack.[36] Exceptions to this general principle have included circumstances where the defendant is under a positive duty to control a person's actions (thereby preventing them from harming another); where a person is under a positive duty to protect another (thereby protecting them from harm caused by a third party); or where the defendant has been deemed to have 'accepted responsibility' toward the plaintiff.[37]

Second, while there is no doubt that the police are under a public duty to protect the community, converting that into a private duty owed to an individual member of the public has proved problematic.[38] This is due to a concern that the private duty may conflict with, or be irreconcilable with, the public duty to protect

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31 *Batchelor v State of Tasmania* (2005) 13 Tas R 403 ('*Batchelor*'); *State of New South Wales v Spearpoint* [2009] NSWCA 233 (30 July 2009) ('*Spearpoint*'); *Michael* [2015] AC 1732.

32 ID39, 21 May 2015.

33 *Batchelor* (2005) 13 Tas R 403; *Michael* [2015] AC 1732.

34 In *Michael*, Lord Kerr JSC notes that an investigation by the Independent Police Complaints Commission contained serious criticisms of the police forces involved: [2015] AC 1732, 1744 [16]. In *Brooks v Commissioner of Police of the Metropolis*, Lord Steyn refers to the Macpherson Report that 'exposed a litany of derelictions of duty and failures in the police investigation': [2005] 1 WLR 1495 1498–9 [8] ('*Brooks*').

35 (2000) 205 CLR 254 ('*Modbury*').

36 Ibid 266–7 [29].

37 See, eg, *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 and obiter dicta to this effect in *Spearpoint* [2009] NSWCA 233 (30 July 2009) [24] (Allsop ACJ).

38 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 ('*Hill*'); *Brooks* [2005] 1 WLR 1495; *Van Colle v Chief Constable of the Hertfordshire* [2009] 1 AC 225 ('*Van Colle*'); *Michael* [2015] AC 1732.

the public at large, as interpreted through the governing legislative framework. This argument has found favour in a number of police negligence cases, although importantly, the plaintiff in those cases has generally been a person under police investigation.[39]

Finally, and arguably most contentiously, there is the policy argument emanating from the seminal UK case of *Hill v Chief Constable of West Yorkshire*.[40] In this case, it was held that due to the special nature of their work, police should not be subjected to a private duty of care in relation to investigative work. As this ground has been relied on extensively to deny a duty of care owed by police, both in the UK and Australia, this case and its findings warrant brief review.

Hill involved the mother of the last victim of the 'Yorkshire Ripper' who alleged that the police owed a duty of care to 'use their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator of the crimes and so protect members of the public who might otherwise be his future victims'[41] and that the police failed to discharge this duty. Lord Keith of Kinkel delivered the leading judgment striking out the application primarily because of a lack of proximity. His Lordship held that as the victim was one of many potential victims, and the police could not be said to owe a private duty of care to the world at large, no duty was owed to the particular victim. In reaching this conclusion, the House of Lords stated that two 'ingredients' were required to create the degree of proximity necessary to give rise to a private duty of care as opposed to a public duty of care: (1) the defendants degree of control over the alleged offender; and (2) the plaintiff's membership in a special class of foreseeable victim.[42] Neither was determined as present in *Hill.*[43] While this was enough to dispose of the action, his Lordship went further and noted that '[t]he manner of the conduct of [a police] investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example … what is the most advantageous way to deploy the available resources'.[44] 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 held to be inappropriate.[45] His Lordship was concerned that a duty of care would encourage defensive police practices,[46] would involve police time and expense in defending actions,[47] and that actions in negligence were not an effective vehicle for improving the effectiveness of police investigations and the suppression of crime.[48]

In 2005, the House of Lords in *Brooks*[49] upheld *Hill*. However, the House of Lords reformulated the *Hill* principle in terms of an 'absence of duty of care' rather

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39 *Tame v New South Wales* (2002) 211 CLR 317 ('*Tame*'); *Cran v New South Wales* (2004) 62 NSWLR 95 ('*Cran*'); *Australian Capital Territory v Crowley* (2012) 7 ACTLR 142 ('*Crowley*').

40 [1989] AC 53.

41 Ibid 58.

42 Ibid 60–62.

43 Ibid 62.

44 Ibid 63.

45 Ibid.

46 Ibid 63–4.

47 Ibid 63.

48 Ibid.

49 [2005] 1 WLR 1495.

than a 'blanket immunity'.[50] This relaxation (at least in nomenclature) was due to findings of the European Court of Human Rights in *Osman v United Kingdom*[51] that an immunity rule in favour of the police would breach art 6 of the *European Convention on Human Rights*[52] by preventing a plaintiff from having their matter determined by a tribunal of law on the facts of the matter.[53]

While denying the plaintiff's claim in *Brooks*, Lord Steyn acknowledged that cases of outrageous negligence by police, unprotected by specific torts, might fall beyond the *Hill* principle. However, these cases on the margin of the principle, if they arose, would have to be heard and determined on their facts.[54] Despite numerous challenges and sustained criticism, the *Hill* principle has continued to be followed in several high profile cases, resulting in claims that it still provides a form of police immunity.[55]

Accordingly, to successfully sue the police for the negligent investigation of domestic violence matters, a plaintiff will need to overcome these three issues. In the following sections, we consider how courts in the UK and Canada have responded specifically to alleged police negligence in the context of domestic violence before returning to examine the position in Australia.[56]

IV Joanna Michael and the UK experience

Failure by police in the UK to appropriately respond to Joanna Michael's call for help in the critical window of time between a threat to her life and ultimate murder by her former partner was the subject of a UK Supreme Court hearing in 2014.[57] The action, brought by her parents, claimed that the police were negligent in responding to Ms Michael's desperate telephone call for help ('the common law negligence action') and that there was also a breach of Ms Michael's right to life under art 2 of the *European Convention on Human Rights* ('the art 2 claim'). As the appeal

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50 Ibid 1509 [27]]. In the decade after *Hill* [1989] AC 53, courts in the UK had applied the public policy considerations to differing forms of police conduct elevating the *Hill* principle to a 'doctrine of immunity'. See, eg, *Ancell v McDermott* [1993] 4 All ER 355; *Clough v Bussan* [1990] 1 All ER 431; *Alexandrou v Oxford* [1993] 4 All ER 328; *Hughes v National Union of Mineworkers* [1991] 4 All ER 278; *Elguzouli-Daf v Commissioner of Police of Metropolis* [1995] QB 335.

51 [1998] ECHR 101 (28 October 1998).

52 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, ETS No 194 (entered into force 1 June 2010).

53 The European Court of Human Rights later acknowledged that the use of the third stage of the *Caparo* duty of care test assuaged earlier concerns expressed in *Osman v United Kingdom* of a 'blanket immunity' being applied to police in negligence cases: [1998] ECHR 101 (28 October 1998). See also *Z v United Kingdom* [2001] ECHR 333 (10 May 2001) [100].

54 *Brooks* [2005] 1 WLR 1495, 1511 [34].

55 *Brooks* [2005] 1 WLR 1495; *Van Colle* [2009] 1 AC 225; *Michael* [2015] AC 1732. See also Elizabeth M Brownhill, 'Case Note: Police Duty of Care and the Application of the "*Hill* Immunity" in Australian Tort Law' (2013) 21(2) *Torts Law Journal* 152, 153.

56 For detailed analysis of how the courts in New Zealand may respond to similar claims, see: 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] 2 *New Zealand Law Review* 243.

57 *Michael* [2015] AC 1732.

concerned a police application to strike out the claims, the only issues before the Court were whether the police owed Ms Michael a duty of care and whether there was sufficient evidence to support an art 2 claim. In a 5:2 decision, the Supreme Court held that the police did not owe Ms Michael a duty of care and the negligence action was struck out. The art 2 claim was permitted to go to trial for the evidence to be determined.[58] Only the negligence action is considered here.

On the 5 August 2009 at 2.29 am, Ms Michael rang 999 from her mobile phone. The call was diverted to a police call centre. Ms Michael requested urgent help as her ex-boyfriend had entered her house, assaulted her, taken the man she was with from the house, and threatened to return and kill her. While there was some dispute about whether the operator heard the words 'kill' there is no doubt that she knew that Ms Michael had been assaulted and threatened with imminent further harm. The operator told Ms Michael that she would contact the local police who would need to call her back to obtain further details. Upon receiving the abbreviated information, the local police coded the request as requiring a response within 60 minutes (this was despite the fact that the operator identified an 'immediate response' requirement). The local police station was only a few minutes from Ms Michael's home. At 2.43 am, Ms Michael called the police a second time and was again diverted to the call centre. She was heard to scream before the phone went dead. The local police were advised and arrived at the house at 2.51 am to find Ms Michael had been murdered. In delivering the judgment for the majority, Lord Toulson JSC commented:

> The consequences are stark and tragic. Ms Michael has lost her life in the most violent fashion. … An investigation by the Independent Police Complaints Commission led to a lengthy report. It contained serious criticisms of both police forces for individual and organisational failures.[59]

Lord Toulson JSC made it clear that the policy aims that underlie and maintain the *Hill* immunity rest in the notion that the duty owed by police to the public at large does not give rise to a special duty of care owed towards a particular category of victim. His Lordship noted that if police are to perform their duties with a 'defensive' attitude, in fear of being sued, this would arguably change their operational priorities and hence divert public resources.[60] Through a detailed examination of previous case law, Lord Toulson JSC emphasised the common law principle that the law does not generally impose a duty of care on A to protect B from third party harm, arguing that the police do not enjoy an immunity from liability in negligence, but are treated in a similar manner to other public bodies and individuals.[61] His Lordship supported the view that the law should develop carefully and incrementally by analysing 'whether there is an argument by analogy for

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[58] *Michael* [2015] AC 1732. Note that it would not be possible for individuals to seek similar compensation under Australian human rights legislation: *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

[59] *Michael* [2015] AC 1732, 1744 [15]–[16] referring to Independent Police Complaints Commission, *Commissioner's Report: Independent Investigation into Police Contact with Joanna Michael prior to her Death* (2010). The investigation resulted in disciplinary action for two call handlers.

[60] *Michael* [2015] AC 1732, 1765 [121].

[61] Ibid 1764 [115].

extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable'.[62]

Lord Toulson JSC rejected any suggestion that the Court should create new exceptions to cover the factual situation in *Michael*, finding the arguments raised in the case, the intervener's liability principle, Lord Bingham's liability principle and Lord Kerr's proximity principle, to be circular and arbitrary in scope.[63]

Furthermore, his Lordship found neither of the previously existing exceptions applied to the facts. This was because there was no explicit and voluntary assumption of responsibility by the police to Ms Michael that they would provide her with protection. The telephone communications between the police and the victim conveying the threat of the imminent attack were neither sufficient to establish that the police had assumed responsibility nor that the police were in a position of control over the source of the harm.[64]

Lord Kerr JSC and Baroness Hale DPSC provided powerful dissenting judgments. Both relied on the three-stage *Caparo* test[65] that is applied in duty of care determinations in the UK. These stages are that there is reasonable foreseeability, a relationship of proximity, and that it is fair, just and reasonable for a duty of care to be imposed. Lord Kerr JSC and Baroness Hale DPSC determined there was reasonable foreseeability of harm in the circumstances and considered that to establish proximity there must be a 'special relationship' between the plaintiff and the defendant.[66] This would be established where, as in this case, 'the police know or ought to know of an imminent threat of death or personal injury to a particular individual which they have the means to prevent'.[67]

In relation to whether it would be fair, just and reasonable to impose liability on police, both noted that police should not be treated differently to other defendants. Baroness Hale DPSC commented that

> it is difficult indeed to see how recognising the possibility of such common law claims could make the task of policing any more difficult than it already is … [i]t might conceivably, however, lead to some much-needed improvements in their response to threats of serious domestic abuse.[68]

Lord Kerr JSC similarly refused to be persuaded by the *Hill* policy considerations. His Lordship noted the lack of empirical evidence to support the feared outcomes of imposing liability.[69]

Chamberlain has suggested that the majority decisions in the line of cases following on from *Hill* in the UK, namely *Brook*,[70] *Smith*,[71] and now *Michael*,[72]

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62 Ibid 1761 [102].
63 Ibid 1764–5 [117]–[122], 1767–9 [129]–[137].
64 Ibid 1769 [38].
65 *Caparo Industries Plc v Dickman* [1989] QB 653.
66 *Michael* [2015] AC 1732, 1770 [142] (Lord Kerr JSC).
67 Ibid 1785 [197] (Baroness Hale DPSC).
68 Ibid 1785–6 [198] (Baroness Hale DPSC).
69 Ibid 1782 [184] (Lord Kerr JSC).
70 *Brooks* [2005] 1 WLR 1495.
71 *Van Colle* [2009] 1 AC 225.
72 *Michael* [2015] AC 1732.

continue to provide unwarranted protection for the police and perpetuate stereotypes of complainants making spurious claims of violence.[73] The case of *Smith* is particularly pertinent in this regard. The plaintiff, Smith, had made numerous complaints to the police regarding serious threats of violence and death made against him by his male ex-partner. The police investigating the complaints refused to read the explicit text messages, took little interest in the matter and took no immediate action to investigate (despite being provided with the partner's contact details). Instead, they delayed any investigation while they waited for the calls and texts to be traced. In the meantime, Smith was violently attacked by his ex-partner. Lord Hope found that no duty of care was owed to Smith and observed:

> It is an unfortunate feature of the human experience that the breakdown of a close relationship leads to bitterness, and that this in its turn may lead to threats and acts of violence. So-called domestic cases that are brought to the attention of the police all too frequently are a product of that phenomenon. … Not every complaint of this kind is genuine, and those that are genuine must be sorted out from those that are not. … Some cases will require more immediate action than others. The judgment as to whether any given case is of that character must be left to the police.[74]

In *Michael*, Baroness Hale DPSC acknowledged the cultural attitudes that were expressed in *Smith* and that are perpetuated through the application of the *Hill* policy considerations, stating:

> I very much regret to say that some of the attitudes which have led to the inadequacies revealed in [the *Everyone*'*s Business*] report may also have crept into the policy considerations discussed in the *Van Colle* and *Smith* cases [2009] AC 225 (by Lord Carswell, at para 107 and Lord Hope of Craighead, at para 76). If the imposition of liability in negligence can help to counter such attitudes, so much the better.[75]

The case of *Michael* presented a valuable opportunity in the UK to realign the duty of care argument with current public policy and sentiment. Instead, the majority decision focused on an incremental approach to omissions cases, demonstrating a reluctance to depart from established exceptions and explore policy considerations. In doing so, the House of Lords further entrenched the immunity of the police in a negligence suit in circumstances where their response to domestic violence has been incompetent.[76] As Randall has noted, 'what is necessary is a legal recognition that, "[w]hen the state fails to take affirmative steps to protect … women from … violence, it is complicit in creating the harm"'.[77]

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[73] See especially Chamberlain, above n 9, 298.

[74] *Van Colle* [2009] 1 AC 225, 272–3 [76].

[75] *Michael* [2015] AC 1732 1786 [198], referring to HM Inspectorate of Constabulary, *Everyone's Business: Improving the Police Response to Domestic Abuse* (2014).

[76] Ibid 1781–2 [181] (Lord Kerr JSC in dissent). *Michael* can be compared with the earlier UK case of *Van Colle*, involving two separate matters Van Colle and Smith. Smith lived with his lover Jeffrey. The couple had separated and Smith had contacted the police several times because of violence. Jeffrey eventually attacked Smith with a hammer, causing brain damage. Smith brought a claim in negligence against Jeffrey. The claim failed on appeal because no duty of care was found to be owed by the police: [2009] 1 AC 225. However, Bingham LJ, in dissent, said there ought to be a duty: [2009] 1 AC 225, 261 [44].

[77] Randall, above n 8, 345.

V Jane Doe and the Canadian experience

Seven years after the UK set the path towards an apparently intractable position of police protection through the *Hill* immunity, courts in Canada took a distinctly different approach. In *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*,[78] the Ontario High Court of Justice refused an application to strike out a motion that a duty of care was owed by the police to the victim of a serial rapist. The Court held it was arguable that a sufficient relationship of proximity existed between the police and the victim, who was one of a narrow group of potential victims.[79] At the trial that followed, the Ontario Trial Court rejected the relevance of the *Hill* public policy considerations, finding that the police owed a duty of care to victims of a serial rapist.[80] The predictable modus operandi of the rapist meant that the police could identify potential victims as young women, living in apartments with balconies in a small geographical area. Jane Doe argued that the police knew of the threat posed to the identifiable group of young women (of which she was one) and were negligent in their deliberate decision not to warn them that they were at risk of attack. In fact, as the Court found, the police used the women as 'bait' in an attempt to catch the rapist. This has led Randall to argue that the 'police response to the investigation … was profoundly shaped by rape myths and other discriminatory attitudes and practices towards women in general, and the first few victims specifically'.[81] She also notes that the case attracted significant attention both domestically and internationally, inspiring campaigns and garnering public support and scrutiny of the conduct of police investigations into sexual assaults.[82]

In the 2001 trial, *BM v British Columbia (Attorney General)*,[83] the judge held that while the police owed a duty of care to a victim of domestic violence who they had declined to assist, the action was dismissed on the basis that there was no causal connection between the breach and the later event. In this case, the first plaintiff, Bonnie Mooney, had approached the police to make a complaint about her ex-husband's escalating violence towards her and to seek protection.[84] Despite the fact that the perpetrator had a criminal history of violence, manslaughter and sexual assault, the police officer said there was little he could do and advised her to seek a restraining order and to stay in public places. Some weeks later, her ex-husband arrived at her home, shot and killed her friend, shot and injured her daughter and then, after Bonnie Mooney managed to escape, set fire to the house, killing himself.

On appeal, in dissent, Donald J would have allowed the appeal.[85] His Honour found both that there had been a breach of duty by the police and that the breach had

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[78] [1990] 74 OR (2d) 225 (Ontario High Court of Justice, Div Ct).

[79] Ibid.

[80] *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* [1998] 39 OR (3d) 487 (Ontario Court, Gen Div).

[81] Randall, above n 8, 350. The article provides a detailed account of the Jane Doe investigation and the blatantly sexist and appalling treatment of the rape victims during the investigation.

[82] Ibid 348.

[83] (2004) 31 BCLR (4th) 61 ('*BM*').

[84] Bonnie Mooney's children were also plaintiffs in the action. The case is discussed in detail in Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, 2014) ch 2, 70–71.

[85] *BM* (2004) 31 BCLR (4th) 61.

materially contributed to BM's loss.[86] In relation to duty, Donald J distinguished the case from *Hill*, noting that Bonnie Mooney was a person known to the police to be at a distinctive risk of harm and this gave rise to a relationship of proximity.[87] Referring to government domestic violence policy, his Honour noted, '[t]he general duty of the police is to protect, but in the area of domestic violence the degree of protection is heightened by government policy. The discretion whether to act on a complaint is very limited'.[88] Justice Donald did not find any policy reasons to negate the duty of care. Notably, Hall and Smith JJ in the majority at the Court of Appeal based their analysis entirely on causation, with no discussion of duty. This has led at least one commentator to posit that the majority's failure to engage with the finding of the trial judge lends some support to the trial judge's finding of a duty of care.[89]

The majority finding in relation to causation was based on the perceived unpredictable nature of the attack many weeks after the initial complaint to the police and the fact that the threat of deportation and further imprisonment had not deterred the defendant on this or other occasions of violence.[90] A detailed analysis of causation in police negligence cases is beyond the scope of this article. However, Randall has noted that the majority finding 'speaks volumes about judicial failure to grasp the problem of domestic violence' and the 'escalated risk women face of further violence … in the immediate and short-term post-separation period'.[91] Characterising the attack on the plaintiff as part of the 'intimate terrorization of spouses' who dare to leave the relationship, Randall noted that the outcome for Bonnie Mooney was sadly entirely predictable.[92]

While the Supreme Court of Canada has not had the opportunity to consider the applicability of the *Hill* public policy considerations in relation to victims of third party harm (including domestic violence), it has confirmed that it will require more than unproven claims of the 'chilling effects' that imposing liability may have on police to deny a duty of care. In *Hill v Hamilton-Wentworth Regional Police Services Board*,[93] the Supreme Court of Canada was prepared to find that the police owed a duty of care to a suspect who, during investigation, was subjected to a litany of police failings. These failings included blatant racist stereotyping and tunnel vision in the investigation and they resulted in the plaintiff, an Aboriginal man, spending 20 months in custody for a crime he did not commit. Applying the two-stage *Anns* approach to duty determinations,[94] the majority held that the relationship between investigating police and suspect was sufficiently close to be considered legally proximate. The *Hill* public policy arguments were dismissed as it was held that there was no evidence that a finding of a duty of care would give rise to inconsistent

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[86] Ibid [94] (Donald J).
[87] Ibid [46] (Donald J).
[88] Ibid [50] (Donald J).
[89] Randall, above n 8, 358.
[90] *BM* (2004) 31 BCLR (4th) 61, [138]–[144].
[91] Randall, above n 8, 360.
[92] Ibid.
[93] [2007] 3 SCR 129 ('*Hamilton-Wentworth RPSB*').
[94] In Canada the courts employ the test adopted from *Anns v Merton Borough Council*, which, upon first determining foreseeability and proximity, asks whether there are any policy reasons to negate the duty of care: [1978] AC 728.

obligations or that a duty of care would have the adverse effect of instilling defensive policing practices.[95]

Although the Supreme Court was careful to confine the findings to the factual situation before it, the Court's willingness to challenge the public policy considerations suggests that the *Hill* immunity is unlikely to be a significant hurdle in Canada in police negligence cases brought by victims of third party harm. In fact, it may be inferred that the Canadian police accept that the courts are unlikely to protect them through the application of the *Hill* immunity. In her recent book, Sheehy details examples where police have failed to provide assistance to women who have asked for help and have shortly thereafter been killed by their partners. She reports that several of these cases resulted in civil suits against police that were settled out of court.[96]

VI The Australian Position

In Australia, there is no precedent indicating that police are immune from owing a duty of care in the context of negligent police investigations. However, it is clear that, despite a significant number of cases being brought against the police, a duty of care is often denied.[97] This is the case irrespective of whether the plaintiff is a victim of third party criminal acts, a suspect under police investigation or a third party harmed during police investigations. Examples of unsuccessful past litigation include: allegations of negligence in the use of information that exposed the plaintiffs to the death penalty;[98] allegations of police negligence in the handling of a missing person investigation;[99] allegations of negligence by off-duty police who failed to act or restrain an abusive, violent nightclub patron;[100] allegations of police negligence in administrative tasks that resulted in prolonged detainment of a person under investigation;[101] and allegations of police negligence in attempting to control a psychotic man that resulted in the police shooting him causing quadriplegia.[102]

Unlike both the UK and Canada, courts in Australia no longer include a test of proximity within a duty of care analysis. Instead, they apply a multi-factorial approach to novel duty of care determinations. After determining reasonable foreseeability, the salient features of the case are identified and applied against other analogous cases.[103]

Reasonable foreseeability is the cornerstone of the duty of care determination in Australia. The plaintiff will need to establish that a reasonable police officer in the circumstances would foresee that a failure to respond, or an inadequate response, could result in further injury to the plaintiff. It is not necessary that the police foresee

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95 *Hamilton-Wentworth RPSB* [2007] 3 SCR 129, 159 [56].
96 Sheehy, above n 84, 86–7.
97 *Spearpoint* [2009] NSWCA 233 (30 July 2009) [31]; Shircore, above n 12, 9.
98 *Rush v Commissioner of Police* (2006) 150 FCR 165 ('*Rush*').
99 *Cumming v New South Wales* [2008] NSWSC 690 (9 July 2008) ('*Cumming*').
100 *Peat v Lin* [2005] 1 Qd R 40 ('*Peat*').
101 *Cran* (2004) 62 NSWLR 95.
102 *Crowley* (2012) 7 ACTLR 142.
103 *Sullivan v Moody* (2001) 207 CLR 562 ('*Sullivan*').

the exact sequence of events, just that the victim falls into a distinct class of persons to whom the injury could be foreseen.[104] In a domestic violence scenario, this element in the duty of care equation will generally be easily satisfied. This is especially so in an environment where police are increasingly trained in the use of risk assessment tools and in the recognition of 'red flags' for future danger in domestic violence cases.[105] For example, drawing on interviewees' experiences from the Queensland case study, interviewees reported stalking via text messages and in person by their former partner, and that police reportedly did little in response.[106] Yet stalking is recognised as high risk behaviour in the context of domestic violence and it is therefore arguable that it is reasonably foreseeable that an inadequate response to it could result in further injury to the victim. However, establishing reasonable foreseeability by itself, is not sufficient to establish a duty of care.[107] As noted earlier in Part III, the salient features applicable to police negligence cases involving victims of third party criminal harm include a reluctance to impose liability on a person for the acts or omissions of the third party, the assumption of responsibility, inconsistent obligations and the *Hill* public policy considerations. Parts IVA–D below examine how these matters have been considered in the Australian context.

A *Liability for Third Party Criminal Conduct: Control, Vulnerability and Assumption of Responsibility*

As noted earlier, the leading case in Australia concerning liability in negligence for third party criminal conduct is *Modbury*.[108] In that case, the majority held that no duty of care arose as the shopping centre had no power to control the actions of the attackers or the circumstances of the attack and had not assumed responsibility to protect the plaintiff. As Gleeson CJ noted, the law does not generally impose liability for the failure to take positive steps to protect another from a third party's criminal acts.[109] However,

> [t]here may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it.[110]

Chief Justice Gleeson's qualified interpretation of the general principle identifies that where the salient feature of 'control or assumption of responsibility' can be satisfied, it operates as a possible 'exception' to the above principle.[111] In the same case, Gaudron J also added that '[u]sually a duty of care of that kind arises because

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[104] *Chapman v Hearse* (1961) 106 CLR 112, 120–21.
[105] See, eg, Queensland Police, above n 15, ch 9, app 9.1.
[106] See, eg, Queensland case study: ID39; ID53.
[107] *Sydney Water Corporation v Turano* (2009) 239 CLR 51.
[108] (2000) 205 CLR 254.
[109] Ibid 264 [20] (Gleeson CJ) quoting Dixon J's statement of the general rule in *Smith v Leurs* 'that one man is under no duty of controlling another man to prevent his doing damage to a third': *Smith v Leurs* (1945) 70 CLR 256, 262.
[110] (2000) 205 CLR 254, 267 [30] (Gleeson CJ).
[111] Ibid.

of a special vulnerability, on the one hand, and on the other, special knowledge, the assumption of responsibility or a combination of both'.[112] Justice Hayne highlighted that in cases where a duty of care is imposed 'the party who owed the duty has had power to assert control over that third party'.[113]

It is therefore arguable that to fall within an exception to the principle identified in *Modbury*, the plaintiff would need to establish the high degree of foreseeability and predictability of the criminal conduct and the existence of a 'special relationship' between the parties. The 'special relationship' would normally be characterised by notions of control or assumption of responsibility, vulnerability and knowledge. As the below analysis suggests, police negligence in a domestic violence scenario, should fall within these exceptions.

1 *High Degree of Foreseeability and Predictability*

The event that unfolded in *Modbury* consisted of a random and unpredictable, one-off stranger violence. However, domestic violence is a pattern of behaviour based on the perpetrator's control of the victim. It does not tend to be random or unpredictable, particularly in relation to repeat offenders, even though the exact time and location may not be known.[114]

Increased development of risk assessment tools and their implementation has also highlighted when future domestic and violence and harm is most likely to occur.[115] This unique element of predictability and high degree of foreseeability of harm is an important and distinguishing factor between domestic violence crime and other crimes. There are increasing numbers of deaths as a result of domestic violence in Australia.[116] Further, a number of reviews of domestic violence related deaths emphasise consistency in the risk factors that were present leading up to the death.[117]

2 *Control over the Risk of Harm*

The defendant's control over the risk of harm, as in *Modbury*, is often a determinative factor when considering the duty of care owed by a public authority.[118] In the domestic violence scenario, this relates to the ability of the police to control the risk of harm, namely the perpetrator of the violence. Lack of control of the

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[112] Ibid 270 [43] (Gaudron J).
[113] Ibid 292 [111] (Hayne J).
[114] Tolmie, above n 56, 253. See also Randall, above n 8. For statutory definitions of domestic and family violence, see *Domestic and Family Violence Protection Act 2012* (Qld) s 8 ('*DFVP Act*'); *Family Violence Protection Act 2008* (Vic) s 5.
[115] Carolyn Rebecca Block, 'Reducing Intimate Partner Homicide Rates: What are the Risk Factors for Death When a Woman is Being Abused?' in Australian Institute of Criminology, *Domestic-Related Homicide: Keynote Papers from the 2008 International Conference on Homicide* (Report No 104, Research and Public Policy Series, 2009) 62; Jacquelyn C Campbell et al, 'Assessing Risk Factors for Intimate Partner Homicide' (2003) 250 *National Institute of Justice Journal* 14.
[116] See especially Tracy Cussen and Willow Bryant, *Domestic/Family Homicide in Australia* (Australian Institute of Criminology, Research in Practice No 38, May 2015).
[117] See, eg, NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (NSW Department of the Attorney General and Justice, 2015) 14–16.
[118] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 559 (Gleeson CJ), 630 (Kirby J).

perpetrator was a significant factor in the UK case of *Michael* and, although involving distinctly different facts, it was also a critical factor in the recent police negligence case of *Crowley* determined in the Australian Capital Territory ('ACT') Court of Appeal.[119] It is instructive to consider what the ACT Court of Appeal determined to be necessary to amount to sufficient 'control over the risk of harm' to give rise to a duty of care.

Crowley[120] involved a mentally ill man who was shot by the police after he was found in a disturbed state in a public place, wielding a kendo stick in a threatening manner. The trial judge found that the police owed him a duty of care and that they breached that duty by 'failing to make a detailed plan or a formal risk assessment [before locating Mr Crowley] … getting out of the police car rather than remaining within it; and … failing to attempt any real negotiation …, but instead adopting an aggressive and threatening manner'.[121] On appeal, all findings of negligence were overturned on the basis of a different interpretation of control.[122] While the trial judge held that the 'police officers had taken control of the situation when they stopped the police car close to Mr Crowley, did not reverse the car and alighted it',[123] the Court of Appeal did not agree. It found that '[t]here is clearly a difference between having taken control and being in the process of taking control'.[124] In deciding that the trial judge had erred, the Court of Appeal stated:

> We would describe the conduct of the two police officers as attempting to take control of the situation … . By their conduct, which was carried out in the course of investigating and suppressing apparent criminal or possible criminal behaviour, they did not assume a duty of care to Mr Crowley. It could not be said … that they had *sufficient control over him and his conduct* so that they were in a position to take reasonable steps to avoid the risk of injury to him.[125]

Unfortunately, this case does not clarify what is *sufficient* to satisfy the salient feature of control or assumption of responsibility, it merely identifies that constructive control, or attempting to take control, is not sufficient to satisfy control in terms of establishing a duty of care. The decision in *Crowley* could lead to the conclusion that anything short of actual physical control does not amount to control. However, the salient feature of control, as was interpreted in *Crowley*, can arguably be distinguished when applied to a domestic violence situation in several overlapping ways.

First, the parties to the action differ. The plaintiff in *Crowley* was potentially at risk of harming himself or undefined members of the general public that may have crossed his path. In a scenario involving domestic violence there is a clearly defined victim who is likely to be harmed by the perpetrator's domestic violence,[126] and the victim is clearly known and identified. In a domestic violence scenario, where the

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[119] (2012) 7 ACTLR 142.
[120] Ibid.
[121] Ibid 186 [254].
[122] Ibid 196–7 [311]–[313].
[123] Ibid 196 [307]. Although this is how it was expressed in the Court of Appeal, it should be noted that the trial judge, Penfold J, considered the police officers had taken control when they alighted the car close to Mr Crowley: *Crowley v Commonwealth* (2011) 251 FLR 1 112 [588].
[124] *Crowley* (2012) 7 ACTLR 142, 197 [311].
[125] Ibid 197 [313] (emphasis added).
[126] Usually the perpetrator's (ex) intimate partner and potentially their children.

police have had previous dealings with the offender in the context of domestic violence, there is a higher degree of predictability; police know who the victim is and the fact they are likely to be harmed in some way.[127]

Second, in contrast to victims of domestic violence, Mr Crowley was also the person under investigation, analogous with the situation in *Tame.* In *Tame*, the High Court found that police did not owe a duty of care to those they investigated because this would be inconsistent to, and incompatible with, the police officer's duty based in the statutory framework and anterior common law.[128]

Third, victims of domestic violence can be distinguished where they actively seek help from the police.[129] This is critical because they have availed themselves to the protection of police, who have the capacity and legal authority to help. There is therefore a higher degree of control in those circumstances.

Fourth, in both scenarios the risk of perpetrating harm is from the alleged perpetrator. However, in a domestic violence context, if the police cannot 'physically' control the alleged perpetrator, they have unique powers in many jurisdictions under relevant domestic violence legislation to indirectly control the perpetrator or protect the victim from the source of harm.[130] In Queensland, for example, police have the power to arrest a person without a warrant[131] where they reasonably suspect that the person is committing an offence pursuant to certain provisions of domestic violence legislation. These offences include breaches of domestic violence orders, certain protection notices or release conditions.[132] Queensland police also have powers to issue a protection notice and take a person into custody in certain circumstances where they reasonably believe that a person has committed domestic violence. In addition, police must apply for a protection order in some circumstances involving suspected domestic violence where police have taken a person into custody.[133] In circumstances where the police have the capacity and duty to control, a failure of the police to exercise their powers may demonstrate a failure to take reasonable steps to avoid the ultimate harm.[134]

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127 Notably in the Queensland case study most of the interviewees who reported calling the police about their violent partner's or ex partner's behaviour had done so on multiple occasions, for example ID37, 20 April 201 and ID41.

128 (2002) 211 CLR 317, 396 [231]; Gray, above n 10, 49.

129 Almost all of the interviewees in the Queensland case study who had contact with police had called the police asking for assistance.

130 See, eg, *DFVP Act* pt 4 div 1 s 100 'Police officer must investigate domestic violence'; pt 4 div 2 'Power to issue police protection notice'; pt 4 div 3 'Power to take person into custody'; pt 4 div 4 'Power to apply for urgent temporary protection order'; pt 4 div 5 'Power to direct person to remain, or move to and remain, at place'. Note that in *Spearpoint*, Allsop ACJ said that the circumstances of communication of the warrant 'may conceivably give rise to questions of assumption of responsibility whether to an individual or generally which might assist in the imputation of a legal obligation to act and to exercise care': [2009] NSWCA 233 (30 July 2009), [24].

131 *Police Powers and Responsibilities Act 2000* (Qld) s 365(1)(j).

132 See, eg, *DFVP Act* ss 177–179. Note that it was the police failure to exercise their powers that a number of interviewees in the Queensland case study referred to, eg. police failing to do 'anything' (eg ID41, 6 April 2016); failing to charge a breach of a DVO (eg ID37, 28 October 2016).

133 *DFVP Act* pt 4 div 2, pt 4 div 3. On the duty to apply for a protection order, see s 118.

134 See, eg, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

3 *Special Vulnerability and Special Knowledge*

Domestic violence victims are, in a legal sense, vulnerable. The salient feature of vulnerability is inextricably linked to control. Vulnerability in the legal sense means that the victim could not reasonably be expected to have protected themselves from the risk or source of harm.[135] In evaluating vulnerability, the courts traditionally examine the degree of reliance[136] the plaintiff places on the proper exercise of reasonable care and skill of the defendant.[137] Furthermore, where a defendant has the ability to direct or control the plaintiff's actions and knows that if they do not exercise care, the plaintiff could be harmed, a duty to take care may arise.[138] Victims in domestic violence cases often contact the police as their primary, and sometimes only, means of accessing protection.[139] In situations where the victim is directed away by the police, it is arguable that the victim is being placed in harm's way.[140]

In seeking police assistance, it is also reasonable to conclude that the victims' own support network is unable to assist and the victim is relying on the police for protection. Police, at that point, in accordance with their powers under domestic violence and police powers legislation, have the ability to direct the victim's conduct by applying for a protection order, assisting in removing them from the property, directing the perpetrator to remain at the place and assisting the victim in accessing other domestic violence services.[141] Should the police indicate that they intend to exercise those powers, it could be implied that they have assumed responsibility for the victim's protection (as far as can be provided) and the victim should be able to rely upon them. Reliance coupled with the fact that, often, victims are unable to protect themselves from the source of the harm, makes them vulnerable, in a legal sense, exposed to a known risk over and above that of the general public.[142]

B *Assumption of Responsibility or Reliance, and the Duty to Protect*

In the Australian context, case law suggests that reliance and assumption of responsibility depend upon the nature of the communication between the parties, rather than the mere fact the victim sought police help.[143] As was seen in the case of

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[135] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (McHugh J) ('*Crimmins*'). Research has explained the barriers women in face in leaving violence and seeking safety: Niwako Yamawaki et al, 'Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship with Her Abuser, and the Decision to Return to Her Abuser' (2012) 27(16) *Journal of Interpersonal Violence* 3195.

[136] *Crimmins* (1999) 200 CLR 1.

[137] *Crowley* (2012) 7 ACTLR 142.

[138] *Crimmins* (1999) 200 CLR 1, 43 [107] (McHugh J).

[139] Ed Gondolf, E R Fisher and J R McFerron, 'The Help-Seeking Behavior of Battered Women: An Analysis of 6,000 Shelter Interviews' in Emilio C Viano (ed), *The Victimology Handbook: Research Findings, Treatment, and Public Policy* (Garland, 1990) 113.

[140] Cf *Stuart v Kirland-Veenstra* (2009) 237 CLR 215, 254–5 [114]–[116] (Gummow, Hayne and Heydon JJ) ('*Stuart*').

[141] See, eg, *DFVP Act* pt 4, especially ss 100, 107.

[142] *Osman v Ferguson* [1993] 4 All ER 344 (McCowan and Simon Brown LJJ).

[143] *Batchelor* (2005) 13 Tas R 403; *Spearpoint* [2009] NSWCA 233 (30 July 2009); *Michael* [2015] AC 1732.

Michael, the victim's telephone call to the police, and the police assurance that they would attend to her, was not sufficient to give rise to an assumption of responsibility or to provide the police with sufficient control of the situation.[144] However, there have been two Australian lower court decisions, both involving strike-out applications by the police, which suggest that the police powers and actions undertaken by the police were arguably sufficient to give rise to a duty of care.

Spearpoint[145] involved an appeal against the lower court's refusal to grant the police application to strike out the plaintiffs' negligence claim. The police argued there was no reasonable cause of action because they did not owe the plaintiffs a duty of care. In their statement of claim, the plaintiffs, Ms Spearpoint and her father, alleged the police were negligent in failing to arrest or detain Ms Spearpoint's ex-partner, Fittler.[146] This was in circumstances where there had been multiple breaches of a domestic violence order, and there were assurances from the police that a 'warrant had issued for the arrest' of Fittler and that he 'was a wanted person and would be detained'.[147] The failure to arrest and detain Fittler allowed him to attend at the plaintiffs' home and cause further injury and loss to the victim. In refusing the police appeal, the Court of Appeal of New South Wales ('NSW') were prepared to find that 'communications' between the police and domestic violence victims that create 'reliance' may satisfy the salient feature of 'assuming responsibility' and therefore give rise to a finding that the police owed the victims a common law duty of care.[148] In concluding, Beazley JA remarked that, 'there is no case in Australia which says that a police officer is immune from suit in the sense that a police officer never can owe a duty of care … it is not established on this case that there could be no duty of care'.[149]

In the earlier case of *Batchelor*,[150] the plaintiff (Warren Batchelor) alleged that the police were negligent in failing to protect Warren Batchelor's mother (Sonya Mercer) from the fatal shooting by his father (Darren Batchelor). Prior to the shooting, Sonya Mercer had attended the police station complaining of serious assaults and threats made by Darren Batchelor. While at the station, Darren Batchelor arrived and, in contravention of the local pro-arrest and pro-charge police policy, the police did not arrest him to issue a restraining order. Instead, they advised him they were taking Sonya Mercer to the marital home to collect her belongings and confiscate his firearms. Darren Batchelor left the station, travelled to the home, took a firearm and lay in wait. When the police arrived with Sonya Mercer, Darren Batchelor shot her through the window of the house before turning the gun on himself. The Court found that it was arguable that the police owed a duty of care to the Sonya Mercer requiring them to protect her from Darren Batchelor[151] by virtue

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144 *Michael* [2015] AC 1732, 1760–61 [99], 1769 [138] (Lord Toulson JSC).
145 [2009] NSWCA 233 (30 July 2009).
146 Ibid [3(g)] (Ipp JA).
147 Ibid.
148 Ibid [7], [14]–[16] (Ipp JA).
149 Ibid [31] (Beazley JA).
150 *Batchelor* (2005) 13 Tas R 403.
151 Ibid 414–15 [26] (Blow J).

of the 'pro-charge, pro-arrest' policing policy operating at the time and that this duty flowed through to the son.[152]

> Justice Blow held that the plaintiffs may have an arguable case if they could prove that the ['pro-charge, pro-arrest'] policy was then in force; that the application of that policy would have required a police officer to seek a warrant for the apprehension of the father; that a justice would have issued such a warrant; that the police would have been able to arrest the father, that the killing of the mother would thereby be prevented and that this chain of events did not occur because one or more police officers omitted to act in accordance with his, her or their training and/or instructions.[153]

In his reasoning, Blow J referred to *Crimmins*[154] where McHugh J laid out six questions[155] that a court needs to consider when determining whether a statutory authority owes a duty of care in a novel fact scenario and had breached that duty by failing to exercise a statutory power. Relevantly, the second of McHugh J's questions was:

> By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.[156]

In response to that question, Blow J expressed the view that 'by reason of police officers' statutory or assumed obligations in relation to restraint orders, they have the power to protect those alleged to be at risk of domestic violence from a risk of harm'.[157] Of particular significance is the context of the 'pro-charge, pro-arrest' policy. This policy was a fundamental component of the *Safe at Home* criminal justice framework for responding to family violence in Tasmania. Under this framework police were automatically dispatched to domestic violence incidents following receipt of a call for assistance on a 24/7 police phone line to investigate,

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[152] Ibid 416–17 [34] (Blow J).

[153] Ibid 414–415 [26] (Blow J).

[154] (1999) 200 CLR 1.

[155] The six questions are:
(1) Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
(2) As noted in text below accompanying n 157.
(3) Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
(4) Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
(5) Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.
(6) Are there any other supervening reasons in policy to deny the existence of a duty of care? If yes, then there is no duty.
If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.

[156] *Crimmins* (1999) 200 CLR 1, 39 [93] (McHugh J).

[157] *Batchelor* (2005) 13 Tas R 403, 416 [31] (Blow J).

gather evidence, report to other support agencies and undertake a risk assessment of the offender to either implement criminal prosecution and/or civil remedies.[158]

Similar approaches have been introduced in other jurisdictions. For example, in Queensland, discussed further below, when police reasonably suspect there is domestic violence and that a person is at risk of domestic violence, the police have various legislative powers that they are expected to use.

C Inconsistent Duties and Coherence in the Law

Australian courts have often held that a defendant does not owe a duty of care to an individual person where the scope (or content) of that duty may conflict (or be inconsistent) with the defendant's other duties or obligations.[159] This argument has been particularly persuasive where the defendant is a statutory authority.[160] In police negligence cases, an inconsistency has been found between the duties or obligations owed by the police to protect the public generally (both at common law and under statute) and the alleged duty owed to the individual plaintiff.[161] The argument is that police cannot impartially and competently investigate crime if they are subject to a duty to the person they are investigating. Furthermore, it is argued that any such duty, if imposed, would result in the suspect's rights or interests prevailing over the interests of whole of the community.[162]

Not all jurisdictions and judges have so willingly adopted these arguments. In Canada, in *Hamilton-Wentworth RPSB*, McLachlin CJ argued that the interests of all concerned in the administration of justice, including both the public generally and persons under investigation, required that investigations be conducted appropriately.[163] Without evidence of any inconsistency, the Court was not prepared to accept that the imposition of a common law duty would conflict with public duties. In *Crowley* at first instance, Penfold J found that the policy documents under which ACT police operated included the principle that 'the safety of the police, the public and offenders or suspects is paramount'.[164] Her Honour considered that duties 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.[165] The Court of Appeal, however, seemed to accept a conflict would arise, without any discussion of the content of such duties.[166]

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158 Tasmanian Government, *Safe at Home: An Integrated Response to Family Violence, Review (Phase 2) — Terms of Reference*, Safe at Home <http://www.safeathome.tas.gov.au/review_of_safe_at_home_services/terms_of_reference_stage_2>.

159 *Sullivan* (2001) 207 CLR 562.

160 Ibid; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270.

161 *Heptonstall v Gaskin* [2003] NSWSC 693 (1 August 2003); *Cran* (2004) 62 NSWLR 95; *Courtney v Tasmania* [2000] TASSC 83 (30 June 2000); *Crowley* (2012) 7 ACTLR 142; *Tame* (2002) 211 CLR 317. See also *Michael* [2015] AC 1732.

162 *Crowley* (2012) 7 ACTLR 142, 189 [272].

163 *Hamilton-Wentworth RPSB* [2007] 3 SCR 129, 154 [41].

164 *Crowley v Commonwealth* (2011) 251 FLR 1, 112 [592].

165 Ibid 109–10 [576].

166 *Crowley* (2012) 7 ACTLR 142, 189 [272]–[273].

Gray has suggested that Australian courts have readily applied the 'inconsistent obligations' argument in relation to public authorities, including police, without 'delineation of exactly what inconsistency there is'.[167] However, Gray argues there is nothing in relevant police legislation that suggests recognition of a duty of care would conflict with other police obligations or duties.[168] Specifically in the context of domestic violence, when one considers the relevant legislative framework that governs police responses, it is apparent that a common law duty of care owed to a victim of domestic violence is compatible with police duties and obligations as set out in the governing legislation. To illustrate this point, the *Domestic and Family Violence Protection Act 2012* (Qld) ('*DFVP Act*') is examined here. As a starting point, a duty of care is not owed by the police simply because they have powers that, if exercised, may prevent harm to the victim.[169] Further, a duty will not be owed based solely on the reasonable foreseeability that if the power is not exercised, harm may arise.[170]

The main objects of the *DFVP Act* include 'to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives, hold perpetrators accountable and prevent or reduce domestic violence'.[171] The focus of the legislation is on the protective needs of the victim and imposing conditions on the perpetrator's behaviour where necessary to meet those needs.[172] The *DFVP Act* repeals the 1989 version of the Act[173] and arguably articulates significant social changes in relation to domestic violence. It reflects a contemporary, broader definition of domestic violence[174] and aims to improve the safety of victims. The Act gives the police powers to detain a person in high-risk situations,[175] and the power to direct a person to remain at a location in order to be served with the order.[176] A police officer may issue a police protection notice where it is 'necessary or desirable' to protect a victim[177] and to issue temporary protection notices.[178] Section 100 of the *DFVP Act*, titled 'Police officer must investigate domestic violence', requires the police to adopt a proactive investigative response including considering whether it is necessary or desirable to take actions to protect a person from domestic violence. Such actions may include applying for a protection order, taking the respondent into custody,[179] and recording

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167 Gray, above n 10, 58.

168 Ibid. Sometimes private and public duties can align, see, eg, *Crimmins* (1999) 200 CLR 1. The fact that in some cases they might not align does not seem to be a sufficient reason to negate duty where duties do align.

169 See, eg, *Stuart* (2009) 237 CLR 215; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

170 See, eg, *Stuart* (2009) 237 CLR 215.

171 *DFVP Act* (Qld) s 3(1)(a).

172 Ibid s 37; Queensland, Department of Communities, Child Safety and Disability Services, *Legislation Explained: The Domestic and Family Violence Protection Act 2012* <http://www.domesticviolence.com.au/files/pdf/Legislation-Explained-The-Domestic-Violence-Family-Protection-Act-2012.pdf>.

173 *Domestic Violence (Family Protection) Act 1989* (Qld).

174 *DFVP Act* pt 2 div 2.

175 Ibid s 116.

176 Ibid s 134. This is to avoid issues with serving the notice: *Not Now, Not Ever Report*, above n 5, vol 1, 318–33.

177 These operate for the same period as a court ordered protection notice in circumstances where the perpetrator cannot be located or is evading the police serving the order: *DFVP Act*s 101(d).

178 Ibid s 44.

179 Ibid s 100 (3).

reasons for not taking action following investigation,[180] with the safety of the victim as the paramount consideration.[181] The use of the word 'must' is an express mandate to investigate, as a minimum, where the police reasonably suspect domestic violence has been committed. The language of this section compels police investigation and does not leave scope for the exercise of discretion at the point of deciding whether to investigate.[182]

Section 100(2) *DFVP Act* continues that '[i]f, after the investigation, the police officer reasonably believes domestic violence has been committed, the police officer must consider whether it is necessary or desirable' to take certain actions.[183] Section 100(2) provides that *after* the investigation and evidence gathering, the police are still mandated to 'consider' how best to deploy their scarce resources.[184] The mandatory consideration required of police under this provision, when viewed through the lens of the expansive police powers conferred under the *DFVP Act*, highlights that a number of variables need to be taken into account by police officers when making decisions in response to domestic violence. These include situational factors, seriousness of injury to victims, seriousness of the offence, the use of weapons and the fact many victims do not want offenders charged.[185]

It is relevant to once again return to the *Crimmins* six point test (discussed above in Part VI(B)),[186] to review the interaction between the common law and these legislative changes that seek to broaden the police powers and responsibilities in responding to domestic violence. The second question of this test provides that '[b]y reason of the defendant's statutory or assumed obligations, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, there is no duty'.[187] As noted above in considering the *Batchelor* judgment,[188] this question is most relevant to the discussion here as it highlights the interaction between powers conferred upon statutory authorities under the relevant legislation and the impact of their intersection with the duty determination at common law. In applying this question to the police, it seems indisputable that, by reason of the police statutory obligations conferred under the *DFVP Act* as outlined above, police have a power to protect a specific class (domestic violence victims) from the risk of harm. In fact, the *DFVP Act* compels police to investigate to protect the victims. Therefore, the second question in

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180 Ibid s 100(4); *Not Now, Not Ever Report*, above n 5, vol 1, 258.

181 *Not Now, Not Ever Report*, above n 5, vol 1, 323.

182 See also Queensland Police, *Queensland Police Service Response to Domestic Violence* (26 May 2015) Queensland Police <https://www.police.qld.gov.au/programs/dv/response.htm>; Queensland Police, above n 15, ch 9 (of particular importance is 9.6.2 that gives the police a wide range of powers under both the *Police Powers and Responsibilities Act 2000* (Qld) and the *DFVP Act*).

183 *DFVP Act* s 100(2).

184 The section provides that the police *may* apply to the court for one of six courses of action as defined by sections: ibid s100(3)(a)–(f).

185 Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 17–18.

186 *Crimmins* (1999) 200 CLR 1, 39 [93] (McHugh J).

187 Ibid 39 [93(2)] (McHugh J).

188 *Batchelor* (2005) 13 Tas R 403. Notably, the first four questions in the *Crimmins* test can also be answered in the affirmative and it is arguable a duty of care can be identified.

Crimmins can be answered in the affirmative and there is no conflict with the interests of the public at large.[189]

D Policy Considerations

Unlike the UK and Canada, the High Court of Australia has not had the opportunity to consider the *Hill* considerations directly, although broad support has been shown for the underlying policy, particularly as it relates to defensive policing practices.[190] At a state level, these policy considerations have operated to deny a duty of care in a large number of cases.[191]

Notwithstanding this, there have been indications that some judges are prepared to challenge the broad application of the policy considerations to factual situations removed from *Hill* investigation.

In both *Batchelor* and *Spearpoint*, the courts refused to strike out the plaintiffs' claims because the police assumed some responsibility to protect the victims.[192] This assumption of responsibility was considered capable of negating or limiting the effect of the policy considerations identified in *Hill*. In *Spearpoint*, Ipp JA referred to the 'cogent' argument of Lord Bingham (dissenting in *Van Colle*) 'supporting the proposition that police could owe a duty of care to a private individual arising out of a failure to arrest or otherwise protect that person from harm'.[193] In *Victoria v Richards*,[194] the Victorian Court of Appeal refused to strike out a claim that the police had been negligent when they exposed the plaintiff to capsicum spray that police were using to subdue a suspected offender. Justice Redlich noted that

> [w]hile latitude must be given to police in the judgments and decisions that must be made in their discharge of their common law and statutory duties to enforce the criminal law, the 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.[195]

In *New South Wales v Tyszyk*,[196] Campbell JA considered that *Hill* applied only to the investigation of crimes where the group of potential victims (plaintiffs)

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[189] See above n 155.

[190] *Tame* (2002) 211 CLR 317; *Cran* (2004) 62 NSWLR 95; *Crowley* (2012) 7 ACTLR 142. See also Paul Marshall, 'Police Liability in Negligence: The Application of the *Hill* Immunity in Australia' (2007) 15(1) *Torts Law Journal* 34. The author identifies a number of cases where courts have sounded 'a note of caution' in relation to the scope of the *Hill* principle: at 51.

[191] *Peat* [2005] 1 Qd R 40; *Quintano v New South Wales* [2002] NSWSC 278 (10 April 2002); *Cran* (2004) 62 NSWLR 95; *Wilson v New South Wales* (2001) 53 NSWLR 407; *Heptonstall v Gaskin* [2003] NSWSC 693 (1 August 2003); *Gibbs v Queensland* [2000] QCA 33 (21 February 2000); *Courtney v Tasmania* [2000] TASSC 83 (30 June 2000); *Mensinga v Commissioner of Australian Federal Police* (2001) 161 FLR 149; *Grimwade v Victoria* (1997) 90 A Crim R 526; *Halech v South Australia* (2006) 93 SASR 427; *Rush* (2006) 150 FCR 165.

[192] *Batchelor* (2005) 13 Tas R 403; *Spearpoint* [2009] NSWCA 233 (30 July 2009).

[193] [2009] NSWCA 233 (30 July 2009) [11] citing *Van Colle* [2009] 1 AC 225.

[194] (2010) 27 VR 343.

[195] Ibid 348 [20] (citations omitted).

[196] [2008] NSWCA 107 (26 May 2008).

was large, noting that in determining whether the *Hill* policy principles apply, the facts of each situation must be considered.[197]

Despite these positive indications that courts in Australia have, in recent times, been prepared to be more circumspect in their treatment of the *Hill* immunity, the most recent police negligence case of *Crowley* in the ACT Court of Appeal has reaffirmed a strong commitment to the English position. In finding no duty was owed to Mr Crowley, the Court stated that:

> The discharge by the police of their public duties cannot be constrained or limited by the fear that in carrying out those duties police officers may be found to be liable to suspected criminals, victims or bystanders, because that will impede the discharge of those duties. If it were otherwise, policing would become unduly defensive and therefore inefficient, and, as a consequence, members of the community would be put at risk.[198]

Without a finding that the police were in a position of control of Mr Crowley, or had assumed a responsibility to protect him, the Court of Appeal held there was no reason to take the case beyond the core principle in *Hill*.[199]

As was highlighted above, criticism of the *Hill* public policy considerations has been sustained over a long period of time. Commentators and some judges have noted the lack of any empirical evidence to support the claim that recognition of a duty of care would encourage defensive practices by police.[200] In fact, such an argument once espoused by medical and legal professionals to avoid liability has long been rejected by the courts.[201]

It should be noted that, in most instances, individual police will be indemnified against any civil claims resulting from performance of their professional duties — thus reducing the chilling effect of potential litigation.[202] Furthermore, while there is some evidence that police, just like other professionals, do legitimately fear civil litigation,[203] there are also studies that suggest fear of litigation promotes better policing policies.[204] Underpinning the law of torts is its deterrent effect, a point not missed by McLachlin CJ in *Hamilton-Wentworth RPSB*, in which her Honour noted that the law of negligence could result in police taking greater care in the conduct of investigations.[205] As Horsey suggests, courts are being irresponsible to

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197 Ibid [123]–[124]. Despite this finding, Campbell JA still denied the police owed a duty of care to the claimant: at [153]. No duty of care arose because of the fact that the police had not contributed to the risk of harm (a downpipe that was dangling and fell on the clamant) and had not exercised control over the situation and the claimant was not vulnerable in the relevant sense: at [140]–[152].

198 *Crowley* (2012) 7 ACTLR 142, 189 [274].

199 Ibid 193–7 [295]–[313].

200 Shircore, above n 12; Tofaris and Steel above n 7; *Hamilton-Wentworth RPSB* [2007] 3 SCR 129.

201 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

202 See, eg, *DFVP Act* s 190.

203 See, eg, S Jellett, NK Pope and KE Voges, 'The Stress of Litigation: Fear of Litigation as a Stressor in Queensland Police Officers' (1994) 48(4) *Australian Police Journal* 163; Forrest Scogin and Stanley L Brodsky, 'Fear of Litigation among Law Enforcement Officers' (1991) 10(1) *American Journal of Police* 41.

204 See, eg, Tom 'Tad' Hughes, 'Police Officers and Civil Liability: "The Ties That Bind"?' (2001) 24(2) *Policing: An International Journal of Police Strategies and Management*' 240, 245; McCulloch and Palmer, above n 6.

205 *Hamilton-Wentworth RPSB* [2007] 3 SCR 129, 159 [56].

disadvantaged groups (particularly women) by hiding behind unproven 'policy' justifications denying a duty of care. In doing so, they ignore the reality that police internal complaints mechanisms are failing and there is a systemic failure of police to protect the vulnerable in society.[206]

Arguments that imposing a duty of care on police for negligent investigations will have the effect of diverting resources from the importance of investigating crime are similarly unconvincing. As Penfold J in the *Crowley* trial noted, 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.[207]

Finally it is worth reiterating that the *Hill* considerations were originally conceived to cover a broad general police investigation where the assailant and the potential victims were both unknown. Such an investigation involved many tactical decisions and discretionary choices. Attempts to limit the application of the *Hill* considerations to purely investigative work have proved difficult, often leading to unhelpful distinctions between investigative work and operational work and antecedent acts of negligence.[208] The result has been a haphazard expansion of the *Hill* public policy considerations to categories of police work well outside the original scope of a broad general investigation.[209] Despite the difficulties in defining what is meant by purely investigative work, it is argued that cases involving clear failures by the police to follow police procedure and policy requirements with known assailants and victims, should be seen to fall outside the original remit of the *Hill* policy considerations.

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[206] Horsey, above n 7, 81–5. See also *Michael* [2015] AC 1732 1782–3 [184]–[185] (Lord Kerr JSC in dissent).

[207] *Crowley v Commonwealth* (2011) 251 FLR 1, 113 [594].

[208] See, eg, *Zalewski v Turcarolo* [1995] 2 VR 562 where the *Hill* policy considerations did not apply to a police shooting as it was said to involve an antecedent negligent conduct; *New South Wales v Klein* [2006] Aust Torts Reports 81-862 where the *Hill* policy considerations were held to apply to a police shooting.

[209] Examples include where the plaintiff is the person under investigation: *Wilson v New South Wales* (2001) 53 NSWLR 407; *Courtney v Tasmania* [2000] TASSC 83 (30 June 2000); *Cran* (2004) 62 NSWLR 95. Others include where the plaintiffs have alleged negligence in the police handling of a matter involving a family member, with the result that the plaintiff has suffered psychiatric harm: *Halech v South Australia* (2006) 93 SASR 427; *Cumming* [2008] NSWSC 690 (9 July 2008). In another case, the alleged police use of information exposed the plaintiffs to the death penalty: *Rush* (2006) 150 FCR 165.

VII Conclusion

Despite the persuasive authority of *Michael*,[210] Australian courts may be willing to find that the police owe a victim of domestic violence a duty of care for a negligent failure to adequately respond to or investigate claims of domestic violence. Both *Batchelor*[211] and *Spearpoint*[212] indicate that there may be circumstances where police have assumed an obligation to protect the victim. Recent reports of police settling negligence claims for a failure to adequately respond to domestic violence victims also suggest that police may be concerned about the uncertainty of litigation and be seeking to avoid a public court decision.[213]

Furthermore, in most circumstances the law would be able to accommodate findings of a duty owed by police officers to the plaintiff and a breach of that duty. The plaintiff in such cases should be able to establish reasonable foreseeability and distinguish their factual matrix from *Modbury*.[214] In saying this, the courts must also be willing to recognise the distinctive nature of domestic violence, the vulnerability of victims to further harm at the hands of perpetrators and the unique powers and responsibilities that police hold to protect victims. A broad and liberal interpretation of the '*Hill* Immunity' cannot be reconciled with current public sentiment in relation to domestic violence. Yet, as this article has argued, imposition of a duty of care owed to specific victims of domestic violence who seek police assistance is consistent with the duties and obligations of police under domestic violence legislation. When reviewing general police powers and responsibilities under the *DFVP Act*, for example, it is evident that police have significant access to the legal mechanisms to control further risks of domestic violence. We argue that the language of the legislation facilitates a relationship of dependence between the victim and the police that is congruous with the finding of a common law duty of care.[215] Further, given the extensive, intrusive legislative powers police have, it is arguable that they have the power to take reasonable steps to control the perpetrator who is the source of harm.[216]

Victims of domestic violence are permitted by law to take reasonable self-protection measures, but beyond that their only option is to inform the police, who the State has entrusted with the responsibility and resources to protect the public.[217] As Tofaris and Steel have suggested, this combination of the police resources, coupled with the victims' reliance on them and the fact that victims cannot be reasonably expected to protect themselves from violence, gives rise to a relationship of dependence between the police and victims that militates in favour of the existence of a duty of care.[218]

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210 [2015] AC 1732.
211 *Batchelor* (2005) 13 Tas R 403.
212 *Spearpoint* [2009] NSWCA 233 (30 July 2009).
213 For a discussion of these cases, see also ABC Radio National, above n 9.
214 *Modbury* (2000) 205 CLR 254.
215 Gary Chan Kok Yew, 'Finding Common Law Duty of Care from Statutory Duties: All within the *Anns* Framework' (2016) 24(1) *Tort Law Review* 14, 32.
216 Tolmie, above n 56, 256 citing *Batchelor* (2005) 13 Tas R 403, 416 [31] (Blow J).
217 Tofaris and Steel, above n 7.
218 Ibid.

The interview findings reported in Part II of this article demonstrate ongoing issues with policing domestic violence, including a failure to identify high risk, a failure to exercise available powers and excessive delay.[219] Victims continue to experience inadequate police responses that, in some cases, are likely to have caused them to experience further injury. In the efforts to eliminate domestic violence, there are now stronger policy arguments and wider social implications *for* finding a duty of care than not. Allowing victims to use civil litigation as an avenue to seek reparation supports the requirement for an integrated response, provides a forum for independent police accountability, upholds the rule of law and supports the corrective justice and deterrence underpinnings of tort law — to punish perpetrators and compensate victims.

[219] See the discussion of the Queensland case study in Part II, in particular reports from interviewees ID39, ID 53, ID37, ID41 and ID61.