

# NEGLIGENT INVESTIGATION BY POLICE: CAN A DUTY OF CARE BE FOUND USING THE EXISTING NEGLIGENCE PRINCIPLES IN AUSTRALIA?

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## I. INTRODUCTION

There is a struggle in the courts to find a balance between allowing public authorities to function properly and protecting the public from a failure by public authorities to exercise their power appropriately. In October 2007, the Supreme Court of Canada controversially brought down its decision in *Hill v Hamilton-Wentworth Regional Police Services Board* ('*Hill*').<sup>1</sup> The facts involved a man being wrongly convicted of a crime, suing the police, being successful in terms of the court finding a duty of care owed to him, but ultimately receiving no compensation. The tort of negligent investigation was first recognised in the Canadian province of Ontario in 1995 in *Beckstead v Corporation of the City of Ottawa Chief of Police*<sup>2</sup> and was affirmed by the Ontario Court of Appeal in 1997.<sup>3</sup> Some other provinces in Canada have recognised the tort, such as Quebec,<sup>4</sup> while other jurisdictions in Canada have rejected the tort, for example, Alberta.<sup>5</sup> The tort had not been considered by the Supreme Court until *Hill*.<sup>6</sup> The decision in the Supreme Court overrules the lower court decisions, and now the tort is recognised in all Canadian provinces. In Australia and the United Kingdom, the courts do not refer to a tort of negligent investigation but rather consider whether there is a duty of care within the existing tort of negligence. In the United Kingdom, the tort has been rejected by the House of Lords.<sup>7</sup> The tort has been rejected by lower courts in Australia<sup>8</sup> and New Zealand.<sup>9</sup> Therefore it is still open for the higher courts in Australia and New Zealand to decide whether or not to follow the approach of the House of Lords or the Canadian Supreme Court. The focus of this paper will be on the relationship between the police and the accused. This paper will consider the Canadian case and decision, and whether an Australian court would find for the plaintiff in similar circumstances. This is important when considering the powers that police are given as well as the function of the law of torts.

## II. CANADIAN CASE OF *HILL*

### A. Facts

Between December 1994 and January 1995, there were 10 robberies of trust companies, credit unions and banks in Hamilton, Ontario. After the seventh robbery, Jason Hill, an Ontario man, became a suspect after the police had received a tip from the public. There were a number of issues, during the police investigation, with the conduct of a line-up, the interviewing of witnesses, and the failure to reinvestigate when there was new evidence. The other participants in the line-up, which included Hill, who was a young Aboriginal man, were 11 Caucasian foils.<sup>10</sup> In the 10th robbery, the two tellers had enlarged photos of Hill, which had been released by police, on their desks. The two bank tellers were

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1 [2007] SCC 41.

2 *Beckstead v Corporation of the City of Ottawa Chief of Police* (1995) 37 OR (3d) 64 (gen Div).

3 *Beckstead v Corporation of the City of Ottawa Chief of Police* (1997) 37 OR (3d) 62 (CA).

4 *Jauvin v Quebec (Attorney General)* [2004] RRA 37.

5 *Dix v Canada (Attorney General)* [2003] 1 WWR 436.

6 [2007] SCC 41.

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

8 *Duke v State of New South Wales* [2005] NSWSC 632.

9 *Gregory v Gollan* [2006] NZHC 426.

10 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41 [6].

interviewed by police together. Despite receiving a tip that Hill was not the robber, but rather two Hispanic men,<sup>11</sup> Hill was arrested by police in 1995 and spent 20 months in jail. He was charged with 10 counts of robbery; however, nine of the charges were gradually dropped. The police proceeded with the charge for the 10th robbery and Hill was found guilty and sentenced to three years in prison. Hill appealed against his conviction, which was allowed, and a new trial was ordered at which he was acquitted of the robbery charge.

Hill began civil proceedings against the Hamilton-Wentworth Police Services Board and individual police officers, claiming malicious prosecution, negligence and breach of his rights under the *Canadian Charter of Rights and Freedoms*.<sup>12</sup> At trial, the judge found that Hill had been wrongly convicted but that his rights had not been violated, nor was any tort committed.<sup>13</sup> Hill appealed this judgment, which was dismissed by the Ontario Court of Appeal.<sup>14</sup> The Court of Appeal was unanimous in its support of the tort of negligent investigation but was divided on its application. Three judges held that the standard of care was not breached<sup>15</sup> while two judges found the police conduct did amount to a breach of the tort of negligent investigation.<sup>16</sup> Hill appealed to the Supreme Court of Canada<sup>17</sup> and the respondents cross-appealed.<sup>18</sup>

### B. Reasons of the Majority

In *Hill*, the majority of the Supreme Court were very clear about the existence of the tort of negligent investigation.<sup>19</sup> As McLachlin CJ stated at the beginning of the judgment, delivered on behalf of the majority with Binnie, LeBel, Deschamps, Fish and Abella JJ:

I conclude that the police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and their conduct during the course of investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.<sup>20</sup>

In Canada, the *Anns v Merton London Borough Council* ('*Anns*')<sup>21</sup> approach is used to determine whether a duty of care is owed by a defendant to a plaintiff. In *Anns*<sup>22</sup> the council was sued for failing to inspect foundations. Lord Wilberforce stated the test as involving two stages. The first is to ask if there is a sufficient relationship of proximity between the parties. If the answer to that question is 'yes', then it is necessary to consider

11 Ibid [7].

12 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

13 *Hill v Hamilton-Wentworth Regional Police Services Board* (2003) 66 OR (3d) 746.

14 The judges found that the trial judge's conclusions were not unreasonable or insufficient and that the police officers had not acted maliciously or for an improper purpose: see *Hill v Hamilton-Wentworth Regional Police Services Board* (2005) 76 OR (3d) 481.

15 Ibid [112] (MacPherson JA, with MacFarland and Goudge JJA concurring).

16 Ibid [156] (Feldman and LaForme JJA).

17 The appellant appealed the finding that the police were not negligent and did not pursue the claim under the *Canadian Charter of Rights and Freedoms*. Hill alleged that the police investigation was negligent, first because the identifications by the two bank tellers were not conducted according to non-mandatory guidelines that they be interviewed separately and they had newspaper photos of Hill on their desks identifying him as the suspect. Second, Hill objected to the administration of the photo line-up. Third, Hill alleged that the police failed to adequately reinvestigate the robberies when new evidence emerged to cast doubt on his initial arrest.

18 The respondents cross-appealed the finding that there was a tort of negligent investigation.

19 Until this judgment, the question of whether there was a duty of care owed to a suspect by an investigating police officer was not settled in Canadian law.

20 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, [3].

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

22 Ibid.

whether there is any reason to negate that duty.<sup>23</sup> Since 2001, the approach in Canada has involved a three-stage process involving the reasonable foreseeability of the injury, the relationship of proximity and any residual policy considerations which ought to negate or limit the duty of care.<sup>24</sup> The policy considerations are ‘not concerned with the relationship between the parties but with the effect of recognising a duty of care on other legal obligations, the legal system and society more generally’.<sup>25</sup>

The Court stressed that this case, in *Hill*, only involved the relationship between the police and a suspect. Other relationships, such as victims and police and the families of victims, should be subjected to a fresh *Anns*<sup>26</sup> approach.<sup>27</sup> Here, the Court found that the relationship between Hill and the police was personal, close and direct. He was not in a pool of potential suspects but had been singled out and identified as a particularised suspect at the relevant time.<sup>28</sup> There was also Hill’s personal interest in the conduct of the investigation, being his freedom and reputation, as well as the public interest:

Recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.<sup>29</sup>

The Court concluded that an investigating police officer does owe a duty of care to a particular suspect<sup>30</sup> and rejected the argument that recognition of the duty of care would create a conflict between the duty owed by the police officer to the suspect and the police officer’s duty to the public.<sup>31</sup>

The Court found that there was no compelling policy reason why a duty of care should not be found in the circumstances. In fact, the Court found there were policy reasons supporting the finding of a duty of care.<sup>32</sup> The Court considered the policy reasons raised by the respondents, namely: the ‘quasi-judicial’ nature of police duties; the potential for conflict between the duty of care and other duties owed by the police; the amount of discretion needed in police work; the negative effect on the investigation of crime; and the floodgates argument.<sup>33</sup> The Court stated that such policy considerations need to be more than speculative and ‘a real potential for negative consequences must be apparent’.<sup>34</sup> It was found that according to such a standard, ‘none of these considerations provide a

23 Ibid 751, where Lord Wilberforce stated: ‘In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.’

24 Jason W Neyers and Una Gabie, ‘Canadian Tort Law Since *Cooper v Hobart*: Part 1’ (2005) 13 *Tort Law Journal* 302.

25 *Cooper v Hobart* [2001] 3 SCR 537, [37].

26 *Anns v Merton London Borough Council* [1978] AC 728, 751.

27 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, [27].

28 Ibid [33].

29 Ibid [36].

30 Ibid [39].

31 Ibid [40].

32 Ibid [47].

33 Ibid [48].

34 Ibid.

convincing reason for rejecting a duty of care'.<sup>35</sup> With regard to the negative impact on policing, the Court said:

In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other.<sup>36</sup>

The Court found that there was a lack of evidence of the negative effect on policing<sup>37</sup> and noted that:

Many police officers (like other professionals) are indemnified from personal civil liability in the course of exercising their professional duties, reducing the prospect that their fear of civil liability will chill crime prevention.<sup>38</sup>

On the issue of opening the floodgates, the Court found that the requirement of sufficient proximity between the investigating police officer and the suspect, as well as the element of compensable injury, ensured that there would not be indeterminate liability.<sup>39</sup> The Court considered the experience of the provinces of Ontario and Quebec, where the tort has been recognised for some years, and found that there was no evidence that the floodgates had opened.<sup>40</sup>

The best that can be said from the record is that recognizing a duty of care owed by police officers to particular suspects led to a relatively small number of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the prima facie duty of care established at the first stage of the *Anns* test.<sup>41</sup>

Having found that a duty of care was owed, the Court then considered what the standard of care was and whether it had been breached. It held that the standard was that of a reasonable police officer in all the circumstances and that the standard had not been breached in the current case, even though there were faults in the investigation.<sup>42</sup> These faults included the conduct of the investigation during 1995,<sup>43</sup> the conduct of the photo line-up<sup>44</sup> and the lack of reinvestigation when new information emerged.<sup>45</sup> The Court applied the standard of a reasonable police officer at the time, which 'allows for minor mistakes and misjudgements.'<sup>46</sup>

The Court found that for the final element, damage, the plaintiff must show a suffering of compensable damage and a causal connection to a breach of the standard of care owed:

It is important as a matter of policy that recovery under the tort of negligent investigation should only be allowed for pains and penalties that are wrongfully imposed. The police must be allowed to investigate and apprehend suspects and should not be penalized for doing so under the tort of negligent investigation unless the treatment imposed on a suspect results from a negligent investigation and causes compensable damage that would not have occurred but for the police's negligent conduct.<sup>47</sup>

The Court concluded that while a duty of care was owed to the plaintiff, it had not been breached. There were mistakes made in the investigation, but not enough to amount to a breach. The Court found that the standard at the time in 1995 was not as high as it would

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35 Ibid.

36 Ibid [56].

37 Ibid [58].

38 Ibid [59].

39 Ibid [60].

40 Ibid [61].

41 Ibid [61].

42 Ibid [89].

43 Ibid [77].

44 Ibid [81].

45 Ibid [84].

46 Ibid [77].

47 Ibid [92].

be if today's standards were being applied, particularly with the racial make-up of the police line-up. It was held that the police conduct was not unreasonable, especially since, at the time, there were no guidelines or rules about how to conduct the line-up.<sup>48</sup> With regard to the decision not to reinvestigate, the Court held that even though the decision was flawed, 'it has not been established that Detective Loft breached the standard of a reasonable police officer similarly placed'.<sup>49</sup>

### C. *Reasons of the Minority*

Charron J, with Bartarache and Rothstein JJ, delivered the judgment on behalf of the dissenting judges on the cross-appeal. The minority decision found that there should not be a tort of negligent investigation in Canada.

A private duty of care owed by the police to suspects would necessarily conflict with the investigating officer's overarching public duty to investigate crime and apprehend offenders. The ramifications from this factor alone defeat the claim that there is a relationship of proximity between the parties sufficient to give rise to a *prima facie* duty of care. In addition, because the recognition of this new tort would detrimentally affect the legal system, and society more generally, it is my view that even if a *prima facie* duty of care were found to exist, that duty should be negated on residual policy grounds.<sup>50</sup>

With regard to whether a duty of care is owed, Charron J considered the *Anns*<sup>51</sup> test and searched for analogous categories in other jurisdictions such as the United Kingdom, New Zealand and Australia, where there are authorities which hold that no duty of care is owed by the police to suspects in a police investigation.<sup>52</sup> Charron J concluded that there was a lack of proximity in the relationship between the investigating officer and the suspect.<sup>53</sup>

Even if there was some proximity, the policy reasons, from the third stage of the process to determine whether there was a duty of care owed to the plaintiff, would preclude the finding of a duty of care.<sup>54</sup> One of the policy reasons was the exercise of the police discretionary power and the fear that if a private duty of care was found to be owed, then the exercise of this power may not be used to 'advance the public interest as it should be, but out of fear of civil liability'.<sup>55</sup> Another policy reason was that the tort would not be limited to plaintiffs who had been wrongly convicted, but also applied to plaintiffs where the investigation is terminated at an earlier point.<sup>56</sup> Charron J also pointed out the differences between civil actions and criminal trials, in particular, the different burdens of proof and the rules of evidence and procedure. Charron J stated:

On the one hand, there is no question that negligent police investigation may contribute to the wrongful conviction of a person who did not commit the crime ... On the other hand, a negligent investigation will often be the effective cause of an acquittal ... Numerous evidentiary and procedural safeguards are built in the criminal trial process to guard against wrongful convictions.<sup>57</sup>

These policy concerns about the difference between the public and the private areas of the law were not resolved, according to Charron J, by defining the standard of care.<sup>58</sup> Taking all these concerns into consideration:

The private nature of the tort action necessarily narrows the focus of the criminal investigation to the individual rights of the parties and, in the process, it is almost

48 Ibid [80].

49 Ibid [89].

50 Ibid [112].

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

52 For example, *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24; *Duke v State of New South Wales* [2005] NSWSC 632; and *Gregory v Gollan* [2006] NZHC 426.

53 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, [148].

54 Ibid.

55 Ibid [149].

56 Ibid [154].

57 Ibid [160].

58 Ibid [169].

inevitable that courts lose sight of the broader public interests at stake. In short, tort law simply does not fit.<sup>59</sup>

Charron J found that the existing torts of false arrest, false imprisonment, malicious prosecution and misfeasance in public office are sufficient to deal with negligent police practice and that these torts do not give rise to policy concerns.<sup>60</sup> Charron J concluded by considering the government inquiries and studies into police practice and stated that ‘compensation for the wrongfully convicted is a matter better left for the legislators in the context of a comprehensive statutory scheme’ rather than ‘left to the vagaries of the proposed tort action.’<sup>61</sup>

#### D. Summary

There was a conflict in the judgments between the private versus public nature of the duty and the policy reasons involved. While the minority found there was a lack of proximity in the relationship between the police and the suspect, the majority found that the proximity was enough for the floodgates not to open. The minority found it was not necessary to find a new tort as existing torts were sufficient, whereas the majority found a new tort was necessary. The policy reasons the minority relied on were found to be no more than speculative by the majority. The police discretion, which the minority found meant there should not be a duty of care, was a reason the majority found there was a duty of care owed. Both referred to other jurisdictions such as the United Kingdom and Australia.

There have been a number of articles written on this case since the decision was handed down only 12 months ago. Erika Chamberlain has described the majority judgment as naïve and the minority judgment as more realistic when considering the conflict of duties.<sup>62</sup> However, Chamberlain points out that the Court was sympathetic to police intuition and was ‘unwilling to second guess the exercise of discretion’.<sup>63</sup> Jennifer Freund expressed concern that the decision ‘seems to be a simplistic view of the complex nature of policing’.<sup>64</sup> Whereas Rakhi Ruparelia has found it ‘disturbing’ that there was a minority judgment at all and that the standard used meant that there was an ‘impossibly high standard for plaintiffs to prove police negligence’.<sup>65</sup> Ruparelia argues that the change is ‘more symbolic than real’.<sup>66</sup>

### III. APPROACH IN THE UNITED KINGDOM

It is also relevant to consider what is happening in the United Kingdom in this area. The current English approach as to whether a duty of care is owed is to use the three stages from *Caparo Industries v Dickman*.<sup>67</sup> The House of Lords has taken a very conservative approach when dealing with the issue of police and their duties with regards to their investigations compared with the Canadian Supreme Court. In *Hill v Chief Constable of West Yorkshire*,<sup>68</sup> the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion,

59 Ibid [180].

60 Ibid [181].

61 Ibid [187].

62 Erika Chamberlain, ‘Negligent Investigation: The End of Malicious Prosecution in Canada’ (2008) 124 *Law Quarterly Review* 205, 207.

63 Ibid 206.

64 Jennifer Freund, ‘Police Civil Liability for Negligent Investigation: An Analysis of the Supreme Court of Canada Decision in *Hill v Hamilton-Wentworth Regional Police Services Board*’ (2008) 53 *Criminal Law Quarterly* 469, 485.

65 Rakhi Ruparelia, ‘“Denying Justice”: Does the Tort of Negligent Investigation Go Far Enough?’ (2008) 16 *Tort Law Review* 48.

66 Ibid.

67 [1990] 2 AC 605 (Lord Bridge of Harwich).

68 [1989] AC 53.

including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was held to be inappropriate.<sup>69</sup>

In *Brooks v Commissioner of Police for the Metropolis & Ors*,<sup>70</sup> the House of Lords upheld *Hill v Chief Constable of West Yorkshire*.<sup>71</sup> However, Lord Steyn reformulated the principle in terms of an absence of a duty of care rather than a blanket immunity.<sup>72</sup>

It is, of course, desirable that police officers should treat victims and witnesses properly ... But to convert that ethical value into general legal duties of care ... would be going too far. The prime function of the police is the preservation of the Queen's peace ... A retreat from the principle in *Hill* would have detrimental effects for law enforcement.<sup>73</sup>

#### IV. APPROACH IN AUSTRALIA

##### A. Existing Negligence Principles

The current approach in Australia as to whether a duty of care is owed is to be found in *Sullivan v Moody*<sup>74</sup> where the High Court considered whether a duty of care was owed by a public authority to parents for the negligent investigation of child sexual abuse. The Court held:

There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.<sup>75</sup>

The Court stated that '[a] duty of the kind alleged should not be found if that duty would not be compatible with other duties the respondents owed.'<sup>76</sup> The Court also considered with approval the English authorities and concluded:

But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regards to the interests of another class of persons where that would impose upon them conflicting claims or obligations.<sup>77</sup>

*Tame v New South Wales; Annetts v Australian Stations Pty Limited ('Tame')*<sup>78</sup> applied the principles from *Sullivan v Moody*. The facts of *Tame* involved a police officer incorrectly recording the blood alcohol content of the plaintiff on the accident report. When the plaintiff was later told of this mistake, which had already been rectified, the plaintiff suffered psychiatric injury. Gleeson CJ found no duty of care was owed because the primary duty of the police officer in making the accident report was to his or her superiors. Therefore, to find a duty of care to the person being investigated would be inconsistent with that primary duty.<sup>79</sup> Gummow and Kirby JJ found that:

It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer's duty ... fully to investigate the conduct in question<sup>80</sup>

<sup>69</sup> *Sullivan v Moody* (2001) 207 CLR 562, 581.

<sup>70</sup> [2005] UKHL 24.

<sup>71</sup> [1989] AC 53.

<sup>72</sup> *Brooks v Commissioner of Police for the Metropolis & Ors* [2005] UKHL, [27].

<sup>73</sup> *Ibid* [30].

<sup>74</sup> (2001) 207 CLR 562.

<sup>75</sup> *Ibid* 580.

<sup>76</sup> *Ibid* 581.

<sup>77</sup> *Ibid* 582.

<sup>78</sup> (2002) 211 CLR 317.

<sup>79</sup> *Ibid* 333.

<sup>80</sup> *Ibid* 396.

Hayne J stated that:

Police officers investigating possible contravention of the law do not owe a common law duty to take reasonable care to prevent psychiatric injury to those whose conduct they are investigating. Their duties lie elsewhere and to find a duty of care to those whom they investigate would conflict with those other duties.<sup>81</sup>

The current Australian approach, when faced with a novel category, is to go to general principle<sup>82</sup> and refer to analogous cases.<sup>83</sup> Factors such as responsibility and relationship, vulnerability, control, reliance, other areas of law and coherence of the law are all relevant considerations.

### *B. Australian Cases Involving Police Investigation*

There have been a number of cases recently which have considered whether police owe a duty of care in their investigations and considered the English authorities. Some cases have involved the relationship between the police and the accused and others with the victims of crime. This paper is limiting its focus to the former but it should be explained that in Australia, *Hill v Chief Constable of West Yorkshire*<sup>84</sup> was distinguished in *Batchelor v Tasmania*<sup>85</sup> on the basis that there was a police policy to arrest a person in such circumstances as were present in that case. The circumstances in that case involved a wife being shot by her husband after she had gone to the police to seek assistance. It was alleged that the police officers were negligent in failing to arrest the husband, in informing him of their plans to go the house, and in not evacuating the house when it was noticed that one of the husband's firearms was missing.<sup>86</sup>

It is also relevant to consider *Cran v State of New South Wales* ('Cran')<sup>87</sup> for fears about defensive policing.<sup>88</sup> In that case, the police failed to get a certificate of analysis by the next court date and the plaintiff ended up spending 62 days in jail. The New South Wales Court of Appeal found that there was no duty of care owed to the plaintiff for the investigation of the case and that policy considerations were paramount.<sup>89</sup> The Court considered the dependence of the plaintiff on the defendant, the vulnerability of the plaintiff, the nature of the function being performed, the relevant police guidelines and, by analogy, other cases.<sup>90</sup> However, Santow JA stated:

While it may be said that calling police to account for failure to perform ministerial tasks actually enhances the performance of their duty, I do not consider that that resolves the fundamental difficulty. It is that by subjecting by way of exception mechanical tasks to a duty of care, courts are thereby affecting police priorities in the allocation of resources. Subjecting even ministerial tasks to prospective civil liability thus has policy implications.<sup>91</sup>

Another example was in November 2007 when a university student in Queensland was unsuccessful in an action against the police and the government in negligence and false imprisonment.<sup>92</sup> Justice Lyons found there had been no negligence in the arrest and imprisonment and that it was not necessary to 'precisely examine the nature and extent of

81 Ibid 418.

82 Carolyn Sappideen, Prue Vines, Helen Grant and Penelope Watson, *Torts Commentary and Materials* (9th ed, 2006) 208.

83 Frances McGlone and Amanda Stickley, *Australian Torts Law* (2005) 125.

84 [1989] AC 53.

85 [2005] TASSC 11.

86 Ibid [4].

87 (2004) 62 NSWLR 95.

88 Harold Luntz and David Hambly, *Torts Cases and Commentary* (5th revised ed, 2006) 207.

89 *Cran v State of New South Wales* [2004] NSWCA 92, [77].

90 Ibid [31].

91 Ibid [51].

92 Mark Oberhardt, 'Kill Suspect Fails to Win Damages', *The Courier Mail* (Brisbane), 1 November 2007.

the duty of care owed to the plaintiff'.<sup>93</sup> It should be noted that the case was primarily decided on the issue of false imprisonment.

Since the decision of *Hill*, there have been some decisions in Australia involving police and whether they owe a duty of care or not. *State of New South Wales v Tyszyk*<sup>94</sup> was held not to involve investigation by police but rather with the discretion exercised by the police to deal with a fallen tree and a drainpipe. The Court of Appeal held that the police did not owe a duty of care to the plaintiff because he was not in a more vulnerable position than other members of the public and there was nothing in the relationship that was different from the rest of the public. *Kirkland-Veenstra v Stuart*<sup>95</sup> was also held to not involve investigation by police but, rather, the failure to exercise a statutory power. The Court of Appeal held that no duty of care was owed by the police. This case has gone on appeal to the High Court. In *Cumming v State of NSW*,<sup>96</sup> Harrison AsJ held that the police did not owe a duty of care to the family of a person reported as a missing person. It was held that there are four main reasons for courts to decide that there is no duty of care when considering circumstances involving police investigation. The first is that it would impose a duty to an indeterminate class of people. The second is that it would inhibit fearless investigation of criminal activity. Third, there may be a conflict of duties. The final reason is it would involve the court intruding on matters of police policy and discretion, including decisions made as to priorities in the deployment of resources.<sup>97</sup>

### C. Summary of Position in Australia

It would seem, from a consideration of the Australian cases involving police investigation, that the courts are not prepared to find a duty of care owed. This is so even though there may be factors such as closeness in the relationship between the parties, control and vulnerability. The overarching consideration seems to be a concern about the coherence of the law and conflicts with other duties and policies.

However, the courts have not 'unreservedly committed to the public policy immunity prevailing in England'<sup>98</sup> and have, therefore, left open the door to an 'exceptionally egregious situation where courts could find liability for negligent investigation'.<sup>99</sup> There is some consideration of the powers that police are given as well as the function of the law of torts. A duty of care would only be found if all the relevant factors were present. If there was a case where there was a sufficient relationship between the parties, vulnerability of the plaintiff was high, control of the defendant was high, there was coherence in the law and no interference with existing laws, and there were guidelines in place that had not been complied with, then a duty of care could be found to exist. The facts in *Cran*<sup>100</sup> appear to fit that scenario but the Court of Appeal was not prepared to find such a duty. It would seem that it will take the High Court to find such a duty.

## V. CONCLUSION

The decision by the majority of the Canadian Supreme Court in *Hill*<sup>101</sup> has been criticised by some commentators on the basis that finding a duty of care owed by an investigating police officer to a particularised suspect will hamper police and will produce defensive policing. However, it can be argued that it is actually a good result for the public. It has the potential to protect individuals and set standards. There is an argument that the police need to be accountable, like other groups in the community who provide services and have

93 *Ferguson v State of Queensland* [2007] QSC 322, [134].

94 [2008] NSWCA 107.

95 [2008] VSCA 32.

96 [2008] NSWSC 690.

97 *Ibid* [66].

98 *Rush v Commissioner of Police* [2006] FCA 12, [99].

99 *Freund*, above n 63, 470.

100 (2004) 62 NSWLR 95.

101 *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41.

responsibilities. There needs to be a balance between the rights of a person's liberties with the right of the police to do their job and, ultimately, to protect the public. This decision should be put in context. Canada has had a number of cases involving negligent investigation and, therefore, it is an issue very much in the public consciousness at the present.<sup>102</sup> There were a number of wrongful convictions and Royal Commissions dealing with the 'systemic racism in the criminal justice system'.<sup>103</sup> This situation should be contrasted with other jurisdictions which may have other issues more in the public domain, for example, police corruption.

Should this decision have any repercussions in Australia? While this case demonstrates that the police should have nothing to fear from the tort, it is more likely that Australia would follow the House of Lords rather than the Supreme Court of Canada. However, it is important to remember that people do suffer damage as a result of poor, or arguably negligent, investigation by the police. *Cran*<sup>104</sup> is an example of the damage that can result from negligent investigation. Police are given many powers and the public expects them to be accountable. Why should they not be liable, as other groups such as doctors, lawyers and engineers are? With regards to the argument about the burden on the individual, police can be insured, similarly to other groups owing a duty of care. Also, the application of vicarious liability will shift the burden to the employers who are also in the position of being able to make changes to existing practices in order to improve guidelines and methods used in the investigation process.<sup>105</sup>

One of the ideas underpinning torts and the law of negligence is the loss-spreading function and compensating someone when they have suffered damage.<sup>106</sup> Of course, if everyone who suffered damage was compensated, the floodgates would certainly open.<sup>107</sup> However, as long as there is a sufficiently close relationship between the investigating police officer and the suspect, that fear can be dealt with. Therefore, if, as the majority concluded in *Hill*,<sup>108</sup> the suspect must be singled out and particularised, the potential number of plaintiffs will be limited. If proper limits are clearly established, the potential for unlimited liability can be confined.

There is also the argument that one of the functions of torts is the incentive effect and that this will hamper the public duty performed by police officers and make their difficult work more difficult rather than improve the standard of their work.<sup>109</sup> However, there has not been an economic analysis of the effect of taking precautions, so this argument is merely an assertion.<sup>110</sup> From a public policy perspective, it would seem arguable that the precautions would be a burden that the public would be willing and prepared to bear. If police are compared to health professionals, it would seem that 'as long as the courts maintain a deferential stance in terms of the standard of care, there is no reason for police to fear that their discretion will be constantly second-guessed'.<sup>111</sup>

The case of *Hill*<sup>112</sup> illustrates that finding a duty of care owed by investigating police to suspects does not automatically lead to compensation being paid. It is not a tort of strict liability. Rather, there must be a breach of the duty of care for liability to arise. The standard of care is what is reasonable to expect in the circumstances. Why should jurisdictions in Australia, New Zealand and the United Kingdom not protect suspects from negligent investigation? Police have nothing to fear from such a standard and the public is justified in expecting such a standard to be complied with. However, if a fact scenario

102 Chamberlain, above n 61, 208.

103 Ruparelia, above n 64, 52.

104 (2004) 62 NSWLR 95.

105 Chamberlain, above n 61, 209.

106 Danuta Mendelson, *The New Law of Torts* (2007) 5.

107 Ibid.

108 [2007] SCC 41.

109 Keith Stanton, 'Decision-making in the Tort of Negligence in the House of Lords' (2007) 15 *Tort Law Review* 93, 101.

110 Ibid.

111 Chamberlain, above n 61, 207.

112 [2007] SCC 41.

similar to *Hill*<sup>113</sup> came before an Australian court, it would seem from the result in *Cran*<sup>114</sup> that the plaintiff would be unsuccessful. It would take the High Court to find such a duty of care owed, using the existing negligence principles, and that would seem unlikely at present.

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113 Ibid.

114 (2004) 62 NSWLR 95.

