CASE NOTES

ANCELL v MCDERMOTT*

POLICE LIABILITY AFTER *ANCELL*: A LAW UNTO THEMSELVES?

1 *Introduction*

Immunity from some forms of legal action creates a class of persons which is not subjected to law's authority to the same extent as others, thereby abrogating the principle of equal justice before the law.[1] In the case of public authorities such as the police, however, courts have been willing to grant a limited immunity from tortious liability on the grounds that it is necessary for the authority to freely exercise its democratically conferred functions.[2] The recent English case of *Ancell v McDermott*[3] tested the limits of this immunity, and the judgment of their Lordships in the Court of Appeal has raised the spectre of total immunity from liability in negligence for the acts or omissions of on-duty police officers. It is the thesis of this note that the judgment in *Ancell* is problematic, both in its application of precedent and in its implications for the future of police liability.

2 *The Facts*

Early one summer morning, Mrs Dawn Ancell was killed, and her husband and daughter injured, when the car she was driving skidded out of control after coming into contact with diesel spilled on the road. The fuel had leaked approximately half an hour earlier from the car of the first defendant, whose fuel tank had ruptured after striking a piece of metal lying on the road. A few minutes after the spillage, police officers from the Hertfordshire Constabulary noticed the diesel and followed the trail until they came to the first defendant's car, now out of fuel. The officers assisted the first defendant, but did not return to the scene of the spill. Shortly before the fatal accident, a Bedfordshire police constable also noticed the spill, but took no action. Ten minutes later, Mrs Ancell's car slipped on the diesel and collided with an oncoming truck.

* [1993] 4 All ER 355. Court of Appeal (UK), 29 January 1993, Nourse, Beldam LJJ, Sir John Megaw (*Ancell*).

1 *Giannarelli v Wraith* (1988) 165 CLR 543, 575 (Wilson J).

2 See *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; *Anns v Merton London Borough Council* [1978] AC 728; *Rowling v Takaro Properties Ltd* [1988] AC 473. In an Australian context, see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. The issue is also discussed in Peter Cane, *Tort Law and Economic Interests* (1991) 252; J Doyle QC, 'Tort Liability for the Exercise of Statutory Powers' in Paul Finn (ed), *Essays on Torts* (1989) 203; R Heuston & R Buckley, *Salmond & Heuston on the Law of Torts* (20th ed, 1992) 224 ('*Salmond & Heuston*'); W Morison & C Sappideen, *Torts: Commentary & Materials* (8th ed, 1993) 284.

3 [1993] 4 All ER 355.

Mrs Ancell's estate, her husband and her daughter sued, *inter alia*, the Chief Constables of the Hertfordshire and Bedfordshire Constabulary,[4] alleging negligence in their failure to warn road users of the hazard or control traffic in the affected area. The Chief Constables applied under RSC Ord 18, r 19 to have the claim struck out for containing no reasonable cause of action. Their application was dismissed by Garland J on the grounds that 'it should be tried so that the facts can be ascertained and the arguments ... [concerning] a duty of care based on fact' be heard.[5] The Chief Constables appealed.

3 *The Judgment*

In upholding the Chief Constables' appeal and striking out the plaintiff's claim, Beldam LJ (with whose judgment the other two judges concurred) utilised essentially two grounds. First, that the degree of proximity required to found a duty of care had not been established and second, that public policy reasons militated against the finding of a duty of care in the circumstances. His Lordship's reasoning and his application of authority raise a number of issues, and each will be dealt with in turn.

(a) *Proximity Issues*

It is a well-established principle in tort law that a defendant will not generally be held liable for a failure through pure omission[6] to prevent harm caused by the independent acts of a third party.[7] In the renowned case of *Home Office v Dorset Yacht Co*,[8] Lord Diplock upheld this general principle in relation to public authorities such as prison wardens, stating that:

> [t]he risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognized at common law as giving rise to [an action] against anyone except the criminal himself [*sic*].[9]

However, in circumstances where a plaintiff's relationship to the public authority defendant is rendered especially close by an 'exceptional added risk'[10] to the plaintiff or his/her class in particular, a sufficiently high degree of proximity may exist to found a duty of care. In *Hill v The Chief Constable of West Yorkshire*,[11] Lord Keith applied this principle as a grounds for striking out a

4 Under s 48 of the Police Act 1964 (UK), Chief Constables are made vicariously liable for the tortious acts of officers in their charge: Clerk & Lindsell, *Clerk & Lindsell on Torts* (16th ed, 1989) 205.

5 Law Report, 'Ancell v McDermott', *The Times* (London), 17 February 1992.

6 The act/omission distinction is fundamental to the tort of negligence, particularly in the area of the liability of public authorities for a failure to exercise their powers in order to forestall harm. For discussion, see *Salmond & Heuston*, above n 2, 224; Doyle, above n 2, 204.

7 *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, 93-4 (Lord Atkin); *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1063 (Lord Diplock); *Jaensch v Coffey* (1984) 155 CLR 549, 578-9 (Deane J).

8 [1970] AC 1004 (Lord Diplock).

9 Ibid 1070.

10 Ibid.

11 [1989] AC 53 (*Hill*).

claim in negligence brought by the mother of the last victim of a serial murderer against the police in charge of the investigation. The plaintiff alleged that had the police investigation been carried out with reasonable care, her daughter would not have been killed. Their Lordships, however, held that no duty of care existed between police and the plaintiff's daughter because, *inter alia*, 'Miss Hill was one of a vast number of the female general public who might have been at risk ... but was not at a *special distinctive risk.*'[12]

Beldam LJ in *Ancell* applied Lord Keith's ratione from *Hill* without qualification, arguing that 'there is [no] sufficient distinction from the reasoning in *Hill's* case' to justify a finding of proximity between the plaintiffs and the police.[13] It is submitted, with respect, that his Lordship reached this conclusion without full reflection, and that the nature of the risk, the width of the class of beneficiaries and hence the degree of proximity in *Ancell* can be distinguished from *Hill.*

The duty of care claimed in *Hill* involved a duty to control the actions of a third party *prior* to the act/omission which directly injured the plaintiff. The imposition of such a duty would, in effect, have required the police to be able to tell in advance where a crime would occur, and subsequently control the activities of criminals whose whereabouts and identity are in all probability unknown at the time the offence is committed.[14] In contradistinction, the duty of care claimed in *Ancell* required that police, acting *ex post facto* to the creation of the risk, contain or warn of a finite, highly localized risk, fixed in its physical position. US and Canadian courts have been willing to recognize such situations, where 'the police are aware of a *narrowly defined* and *readily identifiable* source of danger to the public but cannot ... foresee a specific victim',[15] as sufficient to constitute the 'special relationship' necessary to found a duty of care.[16] Corollatively, the class of potential beneficiaries of the duty of care claimed in *Ancell* is narrower. It is narrower by virtue of the limited nature of the risk, and may be further narrowed to a group of 'realistic plaintiffs' who could be expected in the specific circumstances of the case.[17]

These proximity considerations are highly fact-specific, and as Lord Keith commented in *Hill* 'all circumstances must be considered and analysed in order to ascertain whether such an ingredient [to found proximity] is present.'[18] These

[12] Ibid 62 (emphasis added).

[13] [1993] 4 All ER 355, 365.

[14] *Hill* essentially illustrated that police will 'not be liable for damage caused by *offenders whom they carelessly fail to apprehend*': see *Salmond & Heuston*, above n 2, 226 (emphasis added).

[15] Note, 'Police Liability for Negligent Failure to Prevent Crime' (1981) 94 *Harvard Law Review* 821, 827; Neville McClure, 'Duty to All and Duty to None: *Jane Doe v Board of Commissioners for the Municipality of Metropolitan Toronto*' (1990) 48 *University of Toronto Faculty of Law Review* 168, 170.

[16] *Evers v Westerberg* 38 AD 2d 751; 329 NYS 2d 615 (1972); *Leake v Cain* 720 P 2d 152 (1986); *Air India Flight 182 Disaster Claimants v Air India* (1987) 44 DLR (4th) 317; *Schact v The Queen in the Right of Ontario* (1972) 30 DLR (3d) 641; *Miller v Côté* (1970) 17 DLR (3d) 247; *Jane Doe v Board of Commissioners of Police for the Municipality of Toronto* (1989) 58 DLR (4th) 396.

[17] Carol Brennan, 'Police Negligence Defined' (1992) 142 *New Law Journal* 1118 (Part 1); 1169 (Part 2), 1170.

[18] *Hill* [1989] AC 53, 60.

issues are not determinable on the limited details provided at the pleadings stage, and thus the trial judge in *Ancell* ordered that the claim be allowed to stand 'so that the facts can be ascertained'.[19] In overturning Garland J's decision, Beldam LJ said:

> The question was not whether the police officers in the circumstances [of this case]... owed a duty to the plaintiffs, but whether in *any circumstances* ... a police constable owes a duty to other drivers to protect them from ... hazards created by others.[20]

In my opinion, his Lordship's statement is contradictory to Lord Keith's dictum in *Hill* and, in effect, precludes any possibility of finding proximity. If the court does not consider the particular circumstances of the case at hand, how will it be able to determine whether a 'special relationship' of the kind necessary to establish proximity exists? By definition, such relationships are 'rare'[21] and dependent on 'special' facts; they cannot be determined generically in the manner postulated by Beldam LJ.

This effective negation of the importance of proximity appears to concord with two recent decisions of the Court of Appeal concerning police negligence,[22] both of which minimise the importance of the 'special relationship' even if established. This trend is particularly evident in *Osman*, where McCowan LJ found that the facts as alleged 'presented an arguable case ... that there existed a very close degree of proximity amounting to a special relationship'[23] but nevertheless struck out the statement of claim, citing public policy reasons as overriding. It is tentatively suggested that through *Ancell* and *Osman*, the court is surreptitiously rendering the degree of proximity between the plaintiff and the police immaterial to the establishment of a duty of care, thereby extending police immunity significantly. Instead, singular reliance is being placed on public policy reasons, but how valid are these ?

(b) *Public Policy Issues*

The second ground upon which Beldam LJ struck out the claim was that of public policy considerations; viz that it would be contrary to the general public interest to impose a duty of care on police in the circumstances. In *Hill*, Lord Keith explicated three key public policy reasons that militated against finding a duty of care between the plaintiff and the police in that case: concerns of non-justiciability; fear of 'overkill'; and the 'floodgates' argument. These arguments are applied without differentiation to the facts in *Ancell*,[24] but it is submitted that

[19] Law Report, 'Ancell v McDermott', *The Times* (London), 17 February 1992.

[20] *Ancell v McDermott* [1993] 4 All ER 355, 359 (emphasis added).

[21] *Yuen Kun-yeu v Attorney-General of Hong Kong* [1988] AC 175, 193 (Lord Keith).

[22] *Alexandrou v Oxford* [1993] 4 All ER 328; *Osman v Ferguson* (1993) 4 All ER 344 (*Osman*).

[23] *Osman* (1993) 4 All ER 344, 350. *Osman* revolved around the failure of the police to apprehend a schoolmaster who subjected a family to a campaign of violent harassment. The police were aware of numerous incidents which had been reported to them, and knew the identity of the attacker. The police failed to apprehend the assailant, who eventually murdered the plaintiff's father and severely injured the second plaintiff.

[24] *Ancell v McDermott* [1993] 4 All ER 355, 366.

this blanket application of *Hill* is incorrect because such public policy concerns are of only limited application in *Ancell*.

(i) Non-justiciability

Courts have consistently declined to impose liability for negligence[25] where it would require the court to adjudicate on actions or decisions which simply cannot be subjected to a test of reasonableness because the court is incapable of assessing them.[26] Such 'non-justiciable' areas have included the budgetary decisions of governments and subordinate authorities which exercise democratically conferred discretionary powers in order to 'strik[e] a just balance between rival claims of efficiency and thrift.'[27] On the other hand, certain actions of a public authority may not entail 'non-justiciable' issues, and so a duty of care can be imposed. In *Anns v Merton London Borough Council*,[28] Lord Wilberforce articulated this justiciable/non-justiciable distinction in terms of the 'policy/operation' dichotomy, the former being immune from actions in negligence while the latter are not.[29]

The 'Yorkshire Ripper' inquiry (the subject of the claim in *Hill*) was a long-term exercise involving executive level decisions concerning investigative techniques, deployment of resources and liaison between forces. It may reasonably be considered to involve innumerable discretionary decisions which cannot be assessed by the courts.[30] It is difficult, however, to find similarly non-justiciable elements in *Ancell*. The constables' alleged negligence did not entail a failure in investigation or related matters comparable to *Hill* and, as noted above, the risk was narrowly defined and readily identifiable. While acknowledging that the policy/operation dichotomy is largely a matter of degree,[31] it is submitted that the police behaviour that was the subject of the claim in *Ancell* was heavily operational and gave rise to triable issues. As Lord Wilberforce observes, '[t]he more "operational" a power or duty may be the easier it is to superimpose upon it a duty of care.'[32]

The court in *Ancell* makes no reference to the policy/operation distinction, but it has been applied by the Court of Appeal in two previous cases where the

[25] *East Suffolk Rivers Catchment Board v Kent* [1940] 1 KB 319, 338 (du Parcq LJ); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1066-70 (Lord Diplock); *Anns v Merton London Borough Council* [1978] AC 728, 753-5 (Lord Wilberforce); *Rowling v Takaro Properties Ltd* [1988] AC 473, 500-3 (Lord Keith).

[26] Doyle, above n 2, 233.

[27] *East Suffolk Rivers Catchment Board v Kent* [1940] 1 KB 319, 338 (du Parcq LJ).

[28] *Anns v Merton London Borough Council* [1978] AC 728, 754 (Lord Wilberforce).

[29] In *Rowling v Takaro Properties Ltd* [1988] AC 473, 501 the Privy Council stated that the policy/operation distinction is essentially a question of justiciability, 'expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution.' A similar assertion is made in Craig, *Administrative Law* (2nd ed, 1989) 450-2.

[30] Lord Keith states that 'such decisions would not be regarded by the courts as appropriate to be called in question': *Hill* [1989] AC 53, 63. See also Lord Templeman's speech (64), which covers the problems of justiciability in cases like *Hill*.

[31] *Anns v Merton London Borough Council* [1978] AC 728, 754 (Lord Wilberforce).

[32] Ibid.

liability of police in negligence was at issue.[33] In *Rigby v Chief Constable of Northamptonshire*, the decision of police to use tear gas to flush a criminal out of a shop, without preparing fire-fighting equipment to control the fire subsequently ignited, was deemed 'operational' and so subjected to a duty of care. The distinction has also been used extensively in Canadian and US cases to determine which police activities should be subjected to a duty of care.[34] This is not to suggest that the policy/operation dichotomy should be a touchstone for liability,[35] but rather that the distinction be used to determine those cases in which a duty of care *may* be imposed, and a standard of care assessed. Thus, police activities that are inherently non-justiciable can be shielded from liability while maintaining a degree of accountability for police negligence in justiciable areas.

(ii) 'Overkill'

The second public policy argument used in *Hill* and applied by Beldam LJ[36] is the danger of 'overkill'.[37] This argument asserts that the scope of liability and the fear of being sued may lead the police-defendants to conduct their affairs in a 'detrimentally defensive frame of mind',[38] which would hamper police efficiency and be injurious to the public interest. However, as Cane observes, the reasoning behind a fear of 'overkill' suffers from two important defects. Firstly, there is little empirical evidence to support the idea that the supposed 'defensive attitude' actually arises,[39] and secondly, it attributes to potential defendants 'an ignorance of the requirements of the law (which does not expect the taking of "unnecessary precautions") and ... uses this ignorance as the basis for a legal rule.'[40]

(iii) The 'Floodgates' argument

In *Hill* and subsequently in *Ancell*, the court relies heavily on the perennial 'floodgates argument', which asserts that finding liability in this instance will encourage an endless flood of claims from members of the public for every perceived failure of the police to protect against harm. The defence of such

33 *Knightley v Johns* [1982] 1 All ER 851; *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985.

34 *Air India Flight 182 Disaster Claimants v Air India* (1987) 44 DLR (4th) 317, 326; *Jane Doe v Board of Commissioners of Police for the Municipality of Toronto* (1989) 58 DLR (4th) 396. In *Doe* (408-31), Henry J found the aspects of the police activity which were the subject of the claim to be sufficiently 'operational' to give rise to triable issues, and allowed the statement of claim to stand.

35 *Rowling v Takaro Properties Ltd* [1988] AC 473, 501.

36 *Ancell v McDermott* [1993] 4 All ER 355, 365-6.

37 This term is used by Lord Keith in *Rowling v Takaro Properties Ltd* [1988] AC 473, 502.

38 *Hill* [1989] AC 53, 63.

39 Cane, above n 2, 258. The 'overkill' argument is also used to justify advocates' immunity from suit: *Giannarelli v Wraith* (1988) 165 CLR 543; *Rondel v Worsley* [1969] AC 191. In that context, the threat of 'overkill' has been found severely wanting in empirical substantiation: see C G Veljanovski and C J Whelan, 'Professional Negligence and the Quality of Legal Services — An Economic Perspective' (1983) 46 *Modern Law Review* 700, 713.

40 Cane, above n 2, 258.

claims, it is argued, would 'extensively hamper the performance of ordinary police duties and [divert] police manpower [sic].'[41]

However, the 'floodgates' rationale loses persuasive force in light of the restricted and self-limiting principles already governing the liability of public authorities. The requirement of a relationship of 'special closeness' between the plaintiff and the authority ensures that the requisite proximity will rarely be established. The policy/operation distinction further restricts any potential claims to operational activities only. Hence, as Henry J observed in *Doe*:

> Actions in this area are self-limiting; they can only be launched in very special circumstances. It is no answer ... to say that the inconvenience of the police occasioned by defending their conduct should deprive the plaintiff of recourse to the courts.[42]

It should also be noted that in both Canada and the US, the liability of police for negligence while performing operational functions has been recognized for some time,[43] and there is no indication that the much forewarned 'flood' of claims has arisen.

4 *Towards Complete Immunity? — The British Context*

Ancell is consistent with a number of recent cases involving police liability decided by English courts.[44] *Bussan*, *Alexandrou* and *Osman* are characterized by the same undifferentiated application of *Hill* discernable in *Ancell*, and each constitutes another step towards complete immunity for police activities. By shifting immunity from criminal investigations to include what are essentially 'the general public duties of police',[45] *Ancell* may represent the last step.

Precisely defined and confined, some immunities (such as those covering 'policy' decisions) serve a useful purpose and protect the courts from having to adjudicate matters which may compromise their standing. However, as Burke notes, 'a heavy burden of justification should be placed on any who claim immunity ... and any doubt resolved [by] a denial of that claim.'[46]

The unwillingness of British Courts to try cases involving even the most heinous alleged ineptitude on the part of police (such as *Osman*) erodes a number of important beneficial purposes served by tortious liability. Actions such as *Hill* and *Ancell* are brought not simply for compensation, but primarily

[41] *Ancell v McDermott* [1993] 4 All ER 355, 366; see also *Hill* [1989] AC 53, 63.

[42] *Jane Doe v Board of Commissioners of Police for the Municipality of Toronto* (1989) 58 DLR (4th) 396, 430. In *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, 674, Wilson J also found that the existing law with respect to the liability of public authorities in negligence 'contains its own built-in barriers against the flood.'

[43] See above n 16.

[44] *Clough v Bussan* [1990] 1 All ER 431; *Alexandrou v Oxford* [1993] 4 All ER 328; *Osman* (1993) 4 All ER 344.

[45] S Greenfield, G Osborne & M Whittaker, 'Police Liability after *Ancell*' (1993) 137 *Solicitors Journal* 328.

[46] Richard Burke, 'Privileges and Immunities in American Law' (1985) 31 *South Dakota Law Review* 1, 39.

to 'prove a point'.[47] Public recognition of tortfeasance and the moral satisfaction of having 'won' are fundamental purposes of tort law, and go hand-in-hand with punishment of the tortfeasor.[48] Neither of these aims is satisfied under an immunity.[49]

Accountability in negligence can serve as a 'useful protection to the citizen'[50] against substandard police behaviour where administrative self-regulation and the criminal law fail.[51] Occasional tort suits may therefore:

> serve as *one* way of overseeing police activity, and may provide some deterrence of substandard police behaviour ... This cannot help but render the police more cautious and responsive to the interests of the individuals with whom they must deal everyday in their work.[52]

In an inversion of the 'overkill' argument, the 'defensive' attitude supposedly engendered by potential liability could thus result in a more careful and conscientious exercise of reponsibility and higher standards for police activity.[53]

5 *Conclusion — The Australian Context*

Notwithstanding the strong trend towards an unqualified police immunity evolving in British jurisdictions, there is little to suggest that Australian courts are inclined to travel the same path. Although the area of police liability has not been widely adjuducated here, two authorities suggest that police activities in circumstances such as those in *Ancell* may attract a duty of care.[54]

In the case of *Ticehurst v Skeen*,[55] a single judge of the New South Wales Supreme Court considered the plaintiff's claim that the police had been negligent in failing to warn of a traffic hazard on the highway, resulting in injury to the plaintiff.[56] A lack of evidence against the police ultimately caused the claim to

47 McClure, above n 15, 183.

48 A D Hambly & Harold Luntz, *Torts : Cases & Commentary* (3rd ed, 1992) 97.

49 An alternative to private law remedies are public law remedies. Experience suggests, however, that such remedies are difficult to obtain by individuals, whose *locus standi* may be uncertain. Public law actions are also harder to establish because the activity which is the subject of the claim must be shown to be *mala fides*, a very demanding test in light of the wide discretionary powers of police: see Suzanne Bailey, 'Beyond the Call of Duty' (1987) 50 *Modern Law Review* 956, 962.

50 *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641, 674 (Wilson J).

51 Mr Justice Allen Linden, 'Tort Law's Role in the Regulation and Control of the Abuse of Power' in *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control: Special Lectures of the Law Society of Upper Canada* (1979) 67, 71.

52 Ibid 72-3.

53 For example, in the Canadian case of *Priestman v Colangelo and Smythson* [1959] SCR 615, an ultimately unsuccessful claim brought by plaintiffs injured in an accident, caused by a police officer firing during a car chase, still resulted in stricter rules for the use of fire-arms by police: Bailey, above n 49, 962.

54 *Ticehurst v Skeen* (1986) 3 MVR 307; *Zalewski v Tucarolo* (1994) Aust Torts Reports ¶ 81-280.

55 (1986) 3 MVR 307.

56 The plaintiff, a motorcyclist, collided with a stationary car which had broken down on an unlit highway. Police had attended the scene shortly after the car broke down, but failed to warn of the hazard or take steps to have it removed. The plaintiff brought an action against the motorist and the police, alleging breach of statutory duty and common law negligence against the latter.

fail,[57] but the trial judge nevertheless found that police did owe a common law duty to warn road-users of hazardous conditions on the highway, and to take 'reasonable care to protect [road-users] from that hazard'.[58] Relying on the Canadian case of *O'Rourke v Schact*,[59] Woods J stated that the *customary* duty of police to 'prevent accidents and to preserve the safety of road users' gave rise to a *legal* duty of care as a 'matter of common sense':[60]

> I am well satisfied that the functions of police in the enforcement of traffic laws ... encompass a common law duty to give proper notification to possible road users of a danger [on the road].[61]

The dicta in *Ticehurst*, however, faces two problems which may detract from its application in the current Australian context. Firstly, its is pre-*Hill*, and therefore may not be regarded as a particularly current or authoritative statement of law. More importantly, the reasoning in *Ticehurst* takes the unusual step of conflating a 'customary' or 'conventional' duty with a positive legal duty, which appears to be in conflict with both English and Australian authorities. In *Haynes v Harwood*,[62] the English Court of Appeal recognised that police have a 'general duty to protect life and property', but went on to hold that 'no positive legal duty' could be inferred from this.[63] Similarly, modern Australian requirements of a duty of care demand that the elements of 'foreseeability', 'proximity', and the absence of overriding policy concerns be demonstrated before a duty is found;[64] a simple leap from 'convention' to 'legal duty' is untenable.

Perhaps more pertinent is the very recent case of *Zalewski v Tucarolo*,[65] in which the Full Court of the Supreme Court of Victoria canvassed at length the recent English authorities.[66] Their Honours' decision suggests that the policy arguments favouring immunity articulated in *Hill* and *Ancell* will not be applied as expansively. The material facts in *Zalewski* bear little resemblance to *Hill* or *Ancell*,[67] but the case is significant for the court's rejection of the appellant's claim that police were *prima facie* immune from liability in negligence for public policy reasons.[68] In its consideration of *Hill*, the court held that the case did *not* provide authority for the argument that police are entitled to an unqualified immunity, nor that public policy grounds favouring immunity are necessar-

[57] *Ticehurst v Skeen* (1986) 3 MVR 307, 319.
[58] Ibid.
[59] [1976] 55 DLR (3d) 96.
[60] *Ticehurst v Skeen* (1986) 3 MVR 307, 319.
[61] Ibid.
[62] [1935] 1 KB 146.
[63] Ibid 162 (Maugham LJ).
[64] *Jaensch v Coffey* (1984) 155 CLR 549, 587-8 (Deane J).
[65] (1994) Aust Tort Reports ¶ 81-280 (Brooking, Hansen and J D Phillips JJ).
[66] Ibid 61,408-10 (Brooking J); 61,418-21 (Hansen J).
[67] The plaintiff, a paranoid schizophrenic, alleged negligence and assault and battery against police when he was shot in a confrontation with police in his home. At trial, the jury found that the officers involved had acted negligently, and awarded damages of $116,000. The police appealed.
[68] *Zalewsksi v Tucarolo* (1994) Aust Torts Reports ¶ 81-280, 61,419-21 (Hansen J).

ily supervening in all circumstances.[69] Rather, public policy arguments must be considered in conjunction with other factors affecting the existence of a duty of care, and the individual circumstances of the case. Hansen J reiterates the trial judge's conclusion that '[t]here are difficulties about according to the police an immunity which would extend to manifestly careless acts and omissions.'[70] Furthermore, while the court does not expressly apply the policy/operation distinction in its judgment, it does acknowledge that 'there are many examples of decisions recognising that police officers may be liable for negligent acts or omissions in [the course of] ... *"on the spot" operational activities.*'[71]

Hence, while *Zalewski* does not provide any clear indication of how a case such as *Ancell* may be decided in Australia, it demonstrates that Australian courts are unwilling to accept a blanket immunity, and are unlikely to follow the expansion of police immunity entailed in decisions such as *Ancell*.

NEHAL BHUTA*

[69] Ibid 61,419. Indeed, the court considered that the public policy arguments evinced in *Hill* were only *obiter*. Cf *Osman* (1993) 4 All ER 344, 353-4, where McCowan LJ reached the opposite conclusion, arguing that public policy reasons constituted a separate and independent part of the *ratio* in *Hill*.

[70] *Zalewsksi v Tucarolo* (1994) Aust Torts Reports ¶ 81-280, 61,418.

[71] Ibid 61,408-9 (Brooking J) (emphasis added).

* Student of Law, University of Melbourne. I would like to thank Ian Malkin for his assistance with earlier drafts of this case note.