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Mendelson, Danuta 2009-05, Prevention of suicide : police powers, parliamentary intent and judicial interpretation, *Journal of law and medicine*, vol. 16, no. 5, pp. 728-744.

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Prevention of suicide: Police powers, parliamentary intent and judicial interpretation

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The article will appear in the 17 *Journal of Law & Medicine* (May, 2009)

*While in most countries suicide is no longer a crime, it is also acknowledged that the state has an interest in the preservation of human life, prevention of suicide, and protection of vulnerable persons from harming themselves. In a civil, secular and democratic society, however, the public law principle of state protective powers has to be balanced against the private law principle of personal autonomy (personal self-determination).¹ Under the doctrine of autonomy, competent adults of sound mind can make legally binding voluntary choices, including the so-called ‘death-choice’ (refusal of life-sustaining or life-prolonging treatment as well as suicide). To add to the complexity, whereas the powers of the state in relation to suicide and its prevention have been codified, the concepts of personal autonomy and personal liberty are grounded in common law. *Stuart v Kirkland–Veenstra* [2008] VSCA 32, which is at present being considered by the High Court of Australia, exemplifies tensions that arise in the suicide-prevention area of jurisprudence. This article explores powers and duties of police officers in relation to suicide prevention and the notion of mental illness by reference to the *Kirkland–Veenstra* case, the relevant statutory framework and the common law.*

Introduction

According to the most recent Australian Bureau of Statistics data, in 2006 there were 1,799 registered deaths from suicide in Australia. Intentional self-harm or suicide was ranked 15th of all causes of death registered in Australia in 2006, and 1.3% of all deaths for that year were due to suicide.² A 2002 study based on data from World Health Organisation³ showed that in some countries, suicide was among the top three causes of

¹ See for example: *Perre v Apand Pty Ltd* (1999) 198 CLR 180, per McHugh J at 223 [114]: ‘One of the central tenets of the common law is that a person is legally responsible for his or her choices. It is a corollary of that responsibility that a person is entitled to make those choices for him or her self without unjustifiable interference from others. In other words, the common law regards individuals as autonomous beings entitled to make, but responsible for, their own choices.’

² http://www.auseinet.com/files/factsheets/suicidestats_mar08.pdf However, the Australian Bureau of Statistics’ report noted that ‘the percentage of deaths due to suicide in relation to the total number of deaths from all causes differs greatly among some age groups and between males and females. In particular, in the 20 to 24 year age group in 2006, suicide accounted for approximately 21% of all male deaths and 14% of all female deaths for the 20 to 24 year age group. It also accounted for 19% of all male deaths and 12% of female deaths for the 25 to 29 year age group in 2006.

³ Bertolote JM, Fleischmann A, ‘Suicide and psychiatric diagnosis: a worldwide perspective’ (2002) 1 *World Psychiatry* 181-185, at 181. See generally Freckelton I, ‘Untimely Death, Law and Suicide’ (2005) 12(2) *Psychiatry, Psychology and Law* 265.

death for the 15-34 age group.⁴ Consequently, the rate of suicide has been referred to as being of epidemic proportions.⁵

Yet, in a secular, democratic society, which legally protects personal autonomy, suicide and its prevention present complex legal, emotional, and socio-political problems. The conflict to be resolved involves three fundamental principles: (1) the doctrine of personal autonomy in the sense that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body";⁶ (2) the right to be free from interference with one's person and liberty, which is considered the 'most elementary and important of all common law rights';⁷ and (3) the equally important duty of the state to protect the most vulnerable members of the community, including the mentally ill against harm and suicide. At what point does the state – in its protective capacity – have the right to interfere with an individual's right to liberty?

Recently, Lord Scott of Foscote in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, at [11] provided the following answer to this question:

As to persons known to be a suicide risk, the State has no general obligation, in my opinion, either at common law or under article 2(1) [of the European Convention on Human Rights],⁸ to place obstacles in the way of persons desirous of taking their own life. ... Children may need to be protected from themselves, so, too, may mentally ill persons but adults in general do not. Their personal autonomy is entitled to respect subject only to whatever proportionate limitations may be placed by the law on that autonomy in the public interest. The prevention of suicide, no longer a criminal act, is not among those limitations.

As will become apparent from the discussion below, in *Kirkland-Veenstra* the majority of the Victorian Court of Appeal took a different approach. There are cogent arguments in

⁴ Id. In 1998, suicide represented 1.8% of the global burden of disease.

⁵ Historically, in Australia, the number of registered suicide deaths peaked in 1997, when 2,720 suicide deaths were registered. www.auseinet.com/suiprev/statistics.php

⁶ *Schloendorff v Society of New York Hospital* 105 NE 92 at 93 (1914); See also: *Rosenberg v Percival* [2001] HCA 18, Kirby J at [142] observed that fundamental to the formulation of duty (to warn of inherent risks) adopted by the High Court of Australia *Rogers v Whitaker* (1992) 175 CLR 479 was 'a recognition, expressed much earlier in the United States cases, that a patient 'has a right to determine what shall be done with his own body.'

⁷ *Trobridge v Hardy* (1955) 94 CLR 147, Fullagar J at 152. See also: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523, 528; *Ruhani v Director of Police* [2005] HCA 43 at [63].

⁸ The European Convention on Human Rights is incorporated into the United Kingdom's domestic law by the *Human Rights Act 1998* (UK). Article 2(1) guarantees the right to life: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ...".

favour of each view;⁹ and in a casuistic system of law, they are contingent in some measure on the interpretation of facts in the case at the bar, and, more importantly, on the attitude towards the way the judiciary should treat and interpret Acts of Parliament.

Facts in *Stuart v Kirkland–Veenstra*

At about 5.40am on 22 August 1999, while on a routine patrol, checking for stolen cars and anti-social behaviour, two police officers, Stuart and Woolcock (the defendants) approached a lone vehicle parked at a public carpark of a remote beach on the Mornington Peninsula in Victoria. There was a hose running from the exhaust pipe of the car through to the rear window, but with the driver's side window open. The car's engine was not running and the bonnet and radiator were cold; the driver was writing a note. The officers asked what he was doing, the driver said that he was recording his private thoughts and refused to hand over the note.¹⁰

Having inspected the vehicle and its contents, the officers found no medication, alcohol, or drugs. There was a vacuum cleaner on the floor of the rear of the car, but no indication of exhaust fumes. Stuart and Woolcock checked over the police radio that the driver, 37-year-old Ronald Hendrik Veenstra, was not listed either as missing or a wanted person, and that the information in the police system matched that provided by him.

When asked about the tubing into the vehicle, Mr Veenstra confirmed that he had contemplated doing 'something stupid', which the officers understood as a reference to suicide. Mr Veenstra told them that he arrived at the carpark about 3.40am, that "he was in a 'loveless' marriage and was writing these thoughts to his mother".

However, Mr Veenstra would not allow the police officers to look at the note he had written. In the Court of Appeal, Warren CJ held that 'Mr Veenstra was writing what appeared to be a suicide letter, but the respondents [police officers] did not consider that they had sufficient power to seize the notes'. It is unclear whether the speculation about character of the note was made at the time by the defendants, or by her Honour from a position of hindsight. There may have been a number of reasons, including the fundamental right to privacy, for a refusal to disclose one's personal notes.

Then, having 'described himself as an intelligent person', Mr Veenstra said that he realised 'that there were other options open to him other than that which he had been contemplating', and that he 'was going to return home and discuss matters with his wife'. [11] Significantly, Mr Veenstra 'showed no signs of mental illness; he was rational, cooperative and very responsible the entire time'. According to the trial judge:

⁹ See for example: Freckelton I, 'Liability for Failure by Police to Detain Potentially Suicidal and Dangerous Persons', (2008) 15 *Psychiatry, Psychology and Law* 175 — 187.

¹⁰ *Stuart & Anor v Kirkland-Veenstra & Anor* [2008] HCATrans 397 (3 December 2008) Mr J Ruskin QC reading from the trial transcript at <http://www.austlii.edu.au/au/other/HCATrans/2008/397.html>

‘both officers said that Mr Veenstra presented no indication of significant disturbance of thought or perception, memory or mood. However, they considered him to be depressed, which Mr Stuart [one of the officers] later qualified as being unhappy.’¹¹

The trial judge further found that:

Both officers were of the same opinion. Mr Veenstra showed no sign of mental illness; he was rational, cooperative, very responsible the entire time. During this time, Mr Veenstra removed the hose from the exhaust and placed it in the vehicle. It was a voluntary act on his part and not the product of a suggestion by the police.¹²

Stuart and Woolcock testified that while Stuart considered that ‘Mr Veenstra was contemplating suicide and was a current threat of deliberate self harm’, Woolcock believed ‘that Mr Veenstra had contemplated suicide and had changed his mind’. To quote Warren CJ at [15], both were ‘experienced officers at the time, ... familiar with the *Mental Health Act 1986* (Vic) and their power to apprehend a person who appeared to have a mental illness and to have attempted, or to be likely to attempt, suicide’. Rather than apprehend him, the police officers ‘offered to make contact with a doctor, Mr Veenstra’s family or the CAT team. Mr Veenstra refused these offers and stated that he would see his own doctor later on’ (at [12]).

Mr Veenstra then left the carpark and, as it transpired, drove home. The incident at the beach lasted approximately 15 minutes, and upon return to their police station Stuart and Woolcock recorded that ‘Mr Veenstra was depressed and made reference to suicide but took no steps’ (at [15]).

At the time Stuart and Woolcock did not know, and were not told by Mr Veenstra, that he had been under police investigation relating to fraudulent business transactions he had allegedly committed when working as an accountant.¹³ Nor did the two officers know that on 20 August 1999, the investigating police officer informed Mr Veenstra that he would be served with a hand-up brief¹⁴ on 22 August 1999. The claimant, Mr Veenstra’s

¹¹ *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32 at [13] Warren CJ quoting from trial transcript, p 6, lines 8-12.

¹² *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32 at [14] Warren CJ quoting from trial transcript, p 6, lines 8-12.

¹³ At the time of his death Mr Veenstra worked as a business manager with John Drake, as a delivery driver for a fish and chip shop, and as a cleaner for a cleaning firm at McDonalds.

¹⁴ A legal document which provides outline and main contentions that the prosecution intends to rely on (together with supporting evidence and documentation) at a committal hearing.

wife, Tania Kirkland-Veenstra (the couple married in 1998), knew of the charges and the 22 August arrangements.¹⁵

Mrs Kirkland-Veenstra testified (at [16]) that she woke at 9am on 22 August, and found her husband lying on a sofa in the lounge room. Since he did not wish to attend a dog show, she went to the show alone. Mrs Kirkland-Veenstra returned home at 2.30pm, and found her father and the police officer who came to serve the hand-up brief trying to revive her husband. Mr Veenstra committed suicide sometime between mid-morning and 2.30pm by securing a hose from the exhaust pipe of his vehicle and starting the engine. He left a suicide note. Tania Kirkland-Veenstra was unsuccessful in administering CPR and ‘immediately went into shock’ (at [16]).

Proceedings

Mrs Kirkland-Veenstra brought a common law claim against police officers Stuart and Woolcock for pure mental harm (nervous shock), which she apparently suffered as a result of her husband’s death, and a claim for wrongful death of her husband against the police officers under Part III of the *Wrongs Act 1958* (Vic).¹⁶ She alleged that Stuart and Woolcock: (a) owed her a duty to take reasonable steps to protect her from reasonably foreseeable risk of harm in the form of psychiatric injury; (b) owed her late husband a duty of care at common law to take reasonable steps to protect him from reasonably foreseeable risk of injury by way of suicide;¹⁷ and (c) that these duties arose at common law and pursuant to s10 of the *Mental Health Act 1986* (Vic) [*Mental Health Act*].¹⁸

At the County Court, the trial judge dismissed the proceedings and discharged the jury after eight days of hearing ‘on the ground that the duties of care alleged to be owed to Mr Veenstra and ... [Mrs Kirkland-Veenstra] by the defendants did not exist at law’.¹⁹ Mrs Kirkland-Veenstra appealed to the Court of Appeal of the Supreme Court of Victoria, where the majority (Warren CJ at [94]; Maxwell P concurring at [95]) upheld the appeal, finding that the defendant police officers:

(1) ‘owed Mr Veenstra a common law duty of care to take reasonable steps to protect him from reasonably foreseeable injury, being suicide’. Warren CJ at [92]

¹⁵ Mrs Kirkland-Veenstra testified that her husband ‘was very upset by the charges and that he would contest them’ (*Kirkland-Veenstra v Stuart & Ors* at [7]).

¹⁶ A claim for breach of statutory duty under s10 of the *Mental Health Act 1986* (Vic) was abandoned. Mrs Kirkland-Veenstra also sued the State of Victoria alleging that the State was vicariously liable for the conduct of the police officers, pursuant to s 23 of the *Crown Proceedings Act 1958* (Vic) or alternatively liable pursuant to s 123 of the *Police Regulation Act 1958* (Vic).

¹⁷ Maxwell P at [99].

¹⁸ Maxwell P at [98] formulated the claim as follows: ‘The existence of the statutory power in s 10 of the *Mental Health Act 1986* ... was relied on to support the existence of common law duties of care, independent of the statute, owed separately to Mr Veenstra and to the appellant’.

¹⁹ *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32 at [3].

specifically decided that the common law duty arose ‘in part because the ...[police officers] "entered the field" by virtue of provisions of the *Mental Health Act*’);

(2) owed Mrs Kirkland-Veenstra ‘a duty to take reasonable steps to protect her from reasonably foreseeable injury, being psychiatric injury resulting from the suicide of Mr Veenstra’; and

(3) the trial judge erred in discharging the jury on the ground that the duties of care alleged to be owed to Mr Veenstra and Mrs Kirkland-Veenstra by the defendants did not exist at law.

Chernov JA in dissent, held at [120] that the police officers did not owe the deceased and Mrs Kirkland-Veenstra, respectively, a common law duty of care to protect him from committing suicide and his wife from consequential psychiatric injury, for ‘the imposition of the claimed duty of care would be incompatible with the framework of the *Mental Health Act 1986*’.

The High Court of Australia has granted the police officers leave to appeal. The matter for determination centered on compatibility between police officers’ common law duty of care in relation to apprehension of persons contemplating or taking preliminary steps towards self-destruction and discretionary powers vested in the police by virtue of the *Mental Health Act 1986* (Vic). The specific questions included:

1. Whether a common law duty of care should be imposed on police officers to take reasonable care to protect a member of the public from the risk of suicide, by reason of the existence of a discretionary statutory power of apprehension under s10 of the *Mental Health Act 1985* (Vic);
2. Whether the existence of a discretionary statutory power of apprehension under the *Mental Health Act 1985* (Vic) imposes upon police officers a common law duty that requires them to take reasonable care to protect a member of the public from a *risk* of suicide.
3. Whether (a general) statutory power of apprehension under the s 10 of the *Mental Health Act 1985* (Vic) should be interpreted as requiring a police officer to regard any and every person who attempts suicide as a person who is mentally ill and therefore liable to apprehension by the police officer.

These points will be discussed in turn. Arguments presented before the full bench of the High Court focused on the nature of powers granted to the police officers under s 10 of the *Mental Health Act*. Counsel for Mrs Kirkland-Veenstra made concessions in relation to duties of police officers under common law; consequently, less emphasis was placed on the issue of the defendants’ liability for causing pure mental harm to Mrs Kirkland-Veenstra. However, the scope of the duty to take reasonable steps to protect third parties from reasonably foreseeable risk of harm in form of psychiatric injury is important, and will be discussed in the final part of this article.

Prevention of suicide: statutory powers

As noted above, lawmakers in liberal democracies have to find the legal, political and moral equipoise between the function and the public duty of the state to safeguard its citizens from self-destruction²⁰ by intervening at the earliest possible stage to prevent it, and the private right of competent adults to commit suicide. A 2002 study based on data reported to World Health Organisation by its member States, reported that ‘on the one hand, suicide is found associated with a variety of mental disorders’, ... on the other hand, no single mental disorder is found in association with suicide with such a magnitude as to have any significant impact in national suicide rates, should its treatment be even at an impossible 100% of effectiveness’.²¹ A 2009 study,²² which analysed data from a community-based sample of 7485 randomly selected individuals residing in Canberra and its environs, concluded that:

‘despite research indicating the extent to which suicidality and depression co-exist, the present study shows that people can experience suicidal thoughts and behaviours independently of depression, just like people can also experience depression without anxiety or suicidal symptoms.’²³

Moreover, memoirs, diaries, documentary literature and *belles lettres* suggest that the majority of those who contemplate suicide, or even make some preparations to kill themselves, change their mind before committing the final act that would result in certain death. Oftentimes such a change of mind is spontaneous, sometimes it is consequent upon timely intervention.²⁴

The Statutory Background: other Australian jurisdictions

The focus of the foregoing discussion will be primarily on s 10 of the *Mental Health Act* 1986 (Vic); however, within Australian Federation, the approach to police power to

²⁰ *Superintendent of Belchertown State School v Saikewicz* (370 NE 2d 417 (Mass. 1977)); *Cruzan v Director, Missouri Department of Health* (497 US 261 (1990)). The State’s interest in the preservation of life is enshrined in the American Declaration of Independence and the Constitution of the United States, but the principles are equally applicable to Australia. See also: *Rodriguez v. British Columbia*, (1993) 107 D.L.R. (4th) 342 (1993).

²¹ Bertolote JM, Fleischmann A, ‘Suicide and psychiatric diagnosis: a worldwide perspective’ (2002) 1 *World Psychiatry* 181-5. See also: Harris EC, Barraclough B, ‘Suicide as an outcome for mental disorders: a meta-analysis’ (1997) 170 *British Journal of Psychiatry* 205–28.

²² Fairweather-Schmidt KA, Anstey K, & Mackinnon AJ, ‘Is Suicidality distinguishable from depression? Evidence from a community-based sample’, (2009) 43 *Australian and New Zealand Journal of Psychiatry* 208-215.

²³ Fairweather-Schmidt KA, Anstey K, & Mackinnon AJ, ‘Is Suicidality distinguishable from depression? Evidence from a community-based sample’, (2009) 43 *Australian and New Zealand Journal of Psychiatry* 208-215, at 212-3.

²⁴ For example, Simon RI in ‘Imminent suicide: the illusion of short-term prediction’ (2006) 36 *Suicide and Life-Threatening Behavior* 296–301 argues that ‘there are no evidence-based “imminent” suicide risk factor(s) that can predict when, or even if, patients at acute high risk for suicide will attempt or complete suicide.’

detain or apprehend persons at a risk of committing suicide has not been uniform. Both the similarities and differences in approach taken by other State and Territory Parliaments are instructive, providing a wider perspective to the questions of statutory police powers under consideration.

Apart from Victoria, *Mental Health (Treatment and Care) Act 1994* (ACT), s 37 provides that the police officer may apprehend a person for emergency detention and care, if he or she has ‘reasonable grounds for believing that a person is mentally dysfunctional or mentally ill and has attempted or is likely to attempt ... to commit suicide’. In the Northern Territory, s 163 of the *Mental Health and Related Services Act 2005* (NT) vests in police officers discretionary power to apprehend specifically in relation to attempted suicide: ‘if the member believes, on reasonable grounds, that (a) the person may be mentally ill or mentally disturbed; (b) the person (i) has, within the immediately preceding 48 hours, attempted to commit suicide or to harm himself or herself or another person; or (ii) is about to attempt to commit suicide or to harm himself or herself or another person’.

South Australia²⁵ and Tasmania,²⁶ which have almost identical provisions, do not refer to suicide; they vest a discretionary power to apprehend ‘where a member of the police force has reasonable cause to believe (a) that a person has a mental illness; and (b) that the conduct of that person is or has recently been such as to cause danger to himself or herself or to others’. Under their respective Mental Health Acts, in New South Wales,²⁷ Queensland,²⁸ and Western Australia,²⁹ police officers have no independent power to apprehend and/or detain any person - they need authorisation to do so.

Policy considerations: *Mental Health Act 1986* (Vic), s 10

Where should the balance lie?

In Victoria, like in all common law jurisdictions, suicide was decriminalised in the mid-20th century by virtue of s 6A of the *Crimes Act 1958* (Vic.), which provides that no criminal liability under the law attaches to a person who attempts to or succeeds in committing suicide.³⁰ However, by removing legal sanctions from the act of suicide or its

²⁵ *Mental Health Act 1993* (SA), s 23.

²⁶ *Mental Health Act 1996* (Tas), s 15.

²⁷ *Mental Health Act 2007* (NSW), s 21.

²⁸ *Mental Health Act 2000* (Qld), s 25.

²⁹ *Mental Health Act 1996* (WA), s 34.

³⁰ In England, following the *Suicide Act 1961*(UK), c 60, s 1, suicide ceased to be a crime. In Australia, see for example, *Crimes Act 1900* (ACT), s 16, *Crimes Act 1900* (NSW), s 31A (effective since 3 August 1984); *Criminal Law Consolidation Act 1935* (SA), s 13A. In other jurisdictions, the definition of ‘homicide’ and related offences require the killing of another person: *Criminal Code* (NT) s 156; 161; *Criminal Code 1899* (Qld) s 293, 300; *Criminal Code Amendment Act 1957* (Tas) s 153; *Criminal Code 1913* (WA), s 277.

attempt, the state has not abdicated its public duty of safeguarding the community's welfare by discouragement and prevention of suicide. This is emphasised in some jurisdictions, including Victoria, by prohibition on aiding and abetting suicide,³¹ and by furnishing statutory justification to 'every person' who uses:

'such force as may be reasonably necessary to prevent the *commission* of suicide, or of *any act* which he believes on reasonable grounds would, *if committed*, amount to suicide.'³²

The immunity from criminal prosecution appears to be directed towards circumstances where the person is actually in the process of committing suicide: having slashed his or her wrists, standing – ready to jump - on the rail of a high bridge, or a ledge of an upper-story window, about to inhale or swallow a poisonous substance, etc. Such interpretation of statutory justification is in harmony with the common law doctrine of necessity,³³ which provides full immunity from criminal and civil liability to a person who commits either criminal or civil assault, battery and/or false imprisonment in the course of preventing the commission of suicide. For the defence to operate, the defendant has to prove that he or she had reasonable grounds to honestly believe that the otherwise wrongful conduct was reasonably necessary to preserve the suicidal person's life and health from a situation of *actual* and *imminent* danger or harm.³⁴ It is also an integral element of the defence that "the evil inflicted by it [the defendant's conduct] was not disproportionate to the evil avoided".³⁵ These notions form the guiding principles and the content of the legislative provision.

Section 463B was not pleaded in the *Kirkland-Veenstra* case presumably because, when the two defendants approached Mr Veenstra at 5.30am, he was not in the process of

³¹ In Australia, see: *Crimes Act 1958* (Vic.), s. 6B; *Crimes Act 1900* (ACT), s 17; *Criminal Code Act 2008* (NT), s 162; *Criminal Code 1899* (Qld), s 311; *Crimes Act 1900* (NSW), s 31C; *Criminal Law Consolidation Act 1935* (SA), s 13A(5) & (6); *Criminal Code* (Tas), s 163; *Criminal Code 1913* (WA), s 288. *Criminal Code Act 1995* (Cth) s 474.29A makes it an offence to use a carriage service to access, transmit or otherwise make available suicide related material, and possession, production, supplying or obtaining suicide related material for use through a carriage service (suicide related material offences).

³² See also *Crimes Act 1900* (ACT), s 18.

³³ *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 310, per McHugh J.

³⁴ *R v Loughnan* [1981] VR 443; *Murray v McMurchy* [1949] 2 DLR 442; *Bayley v Police* (SA) (2007) 99 SASR 413 at 427-8 [53]; In the United Kingdom, in criminal context, the defence is referred to as 'duress of circumstances': see *R v Martin* [1989] 1 All ER 652; *R v Z & R v Hasan* [2005] UKHL 22, [2005] 2 AC 467 per Lord Bingham at [21].

³⁵ *A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 234, per Brooke LJ.

committing suicide or engaged in an act that if committed, would amount to suicide.³⁶ Rather, at the time Mr Veenstra was writing a note, and in the course of the conversation with the officers got out of the car, dismantled the hose, placed it on the back seat, and having indirectly admitted that he did contemplate suicide, described it as ‘something stupid’.

Though suicide, as Mr Veenstra put it, may be ‘stupid’, it is not illegal, for the existence of s6A of the *Crimes Act 1958* (Vic) must be taken to underpin the whole regulatory framework relating to suicide and its prevention in Victoria.³⁷ This includes s10 of the *Mental Health Act 1986* (Vic), which vests police officers with discretionary power to apprehend persons attempting suicide in certain circumstances. Statutory construction of s10 was one of the major issues in *Kirkland-Veenstra*. It provides that:

‘(1) A member of the police force *may apprehend* a person who *appears to be mentally ill* if the member of the police force has reasonable grounds for believing that –

- a) the person has *recently attempted suicide* or attempted to cause serious bodily harm to herself or himself or to some other person; or
- b) the person *is likely by act or neglect to attempt suicide* or to cause serious bodily harm to herself or himself or to some other person.’

By virtue of s 10(1A):

A member of the police force is *not* required for the purposes of subsection (1) to exercise any clinical judgment as to whether a person is mentally ill but *may exercise the powers* conferred by this section *if*, having regard to the behaviour and appearance of the person, the person *appears* to the member of the police force to be *mentally ill*.

(2) For the purpose of apprehending a person under subsection (1) a member of the police force may with such assistance as is required ... (b) use such force as may be reasonably necessary.

The MHA is a complex statute: many of its provisions are closely inter-related as they seek to strike a balance between the rights to liberty and personal autonomy that are accorded to all adults of sound mind on the one hand, and the timely clinical treatment needed by people with mental illness, even if it involves a degree of interference with these rights, on the other. In 1995, during parliamentary debates on amendments to the MHA, including s 10, Mr Thwaites, Member for Albert Park, articulated the sentiments of both the opposition and the government when he observed that ‘detention of citizens, whether or not they are mentally ill, is one of the most fundamental sanctions the state

³⁶ The fact that subsections 10 (a) and 10(b) of the *Mental Health Act 1986* (like *Mental Health (Treatment and Care) Act 1994* (ACT), s 37 and *Mental Health and Related Services Act 2005* (NT), s 163), while employing past and future tenses, omit the present tense continuous (‘is attempting suicide’), suggests that the respective legislatures were satisfied that the doctrine of necessity would adequately cover actions of police officers who apprehend a person who is about to self-destruct.

³⁷ On coherence of legal principles see: *Sullivan v Moody* (2001) 207 CLR 562 at 581-582 [55]-[62].

has. It is a sanction and a power that ought to be very limited and constrained'.³⁸ As a result of this concern, s4(2) was inserted into the MHA as part of the amending legislation. It reads:

‘It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that ...

(b) in providing for the care and treatment of people with a mental disorder and the protection of members of the public any restriction upon the liberty of patients and other people with a mental disorder and *any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances.*’ [emphasis by the author]

Consequently, s 10, which vests police officers with discretionary power to apprehend and if necessary to ‘use such force as may be reasonably necessary’, thereby infringing the right to physical inviolability, liberty, and dignity of the restrainee, has to be interpreted in the light of s 4(2). The latter provision reflects a long line of jurisprudence on interpretation of statutes which interfere with common law rights.³⁹ For example in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, McHugh J at [118] reiterated that: ‘A basic principle of statutory construction is the presumption that legislatures do not intend to abrogate or curtail fundamental common law rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.’⁴⁰

Section 10 was drafted to promote the purpose and object of legislation,⁴¹ and needs to be construed ‘in its natural and ordinary meaning, having regard to its context and the purpose of the enactment.’⁴² The context and purpose of a law includes the history of the enactment and the state of the law when it was enacted’.⁴³ The trigger for the power is the police officers’ opinion that the person to be apprehended ‘appears to be mentally ill’. The grant of the power is discretionary – the officers ‘may’, rather than ‘must’,

³⁸ *Hansard*, Parliament of Victoria, the House of Assembly, 25 October 1995, at p 814.

³⁹ See *Coco v The Queen* (1994) 179 CLR 427 at 437, per Mason CJ, Brennan, Gaudron and McHugh JJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30], per Gleeson CJ.

⁴⁰ Though see: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (2003) 214 CLR 269 at 284[36] per McHugh J.

⁴¹ *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96, Kirby J at 211-212.

⁴² *Heydon's case* (1584) 3 Co. Rep. 7a at 7b; 76 ER 637 at 638, per Sir Roger Manwood CB.

⁴³ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 285 [37] per McHugh J. See also: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; quoted with approval by Kirby J in *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96 at 113 [39].

apprehend persons who appear to be ‘mentally ill’.⁴⁴ It is also conditional (‘if’) on the police officers having ‘reasonable grounds for believing’ that suicide has been recently, or is likely to be, attempted. Thus vital to the interpretation the scope of the police power to apprehend in s10 are two statutory phrases: ‘mental illness’, and ‘attempted suicide’.

In the Court of Appeal, Warren CJ interpreted (at [64]) thus interpreted s10:

‘It may be inferred from s 10 of the *Mental Health Act* that Parliament’s view was that to attempt suicide is to be mentally ill. There is little other way to interpret its phrasing.’⁴⁵

Yet, when read in the context of the whole Act and the relevant historical materials, it is difficult to construct this provision as equating attempted suicide with mental illness.

Mental illness

Who should come within the scope of the police power to intervene by way of apprehension?

Section 3 of MHA directs that the definition of ‘mental illness’ should be construed by reference to s 8, and in particular s 8(1A), which describes it as ‘a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory’. At least some of these features refer to observable demeanour, and s 10(1A) makes it clear that for the purpose of apprehension, police officers are to assess the ‘appearance of mental illness’ in subjective, non-clinical terms, with the focus on the person’s mien (‘behaviour and appearance’). During the 1995 Parliamentary Debates on the amendment, which inserted s 10 (1A) into the *Mental Health Act 1986* (Vic), Mr Doyle,⁴⁶ speaking on behalf of the government, emphasised that:

‘we do not expect police officers who find themselves in difficult situations that require immediate decisions to exercise clinical judgment. Police officers would be able to continue to act on appearance ... we are talking about judgments, but they would not need to decide whether a person falls within the definition [of mental illness in s 8 (1A)]. The government is not expecting policemen and women to be clinicians. We all want the most apposite responses to what can be very trying and difficult circumstances.’

These ‘apposite responses’ are encapsulated in Part 2 (Objects, Objectives, Functions and Principles): s4 (Objects), which was amended in 1995 to ensure that the legislation was consistent with the Australian Health Ministers’ *Mental Health Statement of Rights and*

⁴⁴ *Stuart & Anor v Kirkland-Veenstra & Anor* [2008] HCA Trans 397 (3 December 2008) Gummow J: ‘Somehow “may apprehend” in section 10 becomes “must” [in the Court of Appeal majority’s approach]; Hayne J made a similar comment <http://www.austlii.edu.au/au/other/HCATrans/2008/397.html>

⁴⁵ Her Honour observed that: ‘The appropriateness or otherwise of this construction was not addressed on appeal, nor does it appear to have been raised at trial’, but appears to have accepted it.

⁴⁶ *Hansard*, Parliament of Victoria, the House of Assembly, 25 October 1995, at p 817.

Responsibilities (1994), and the United Nations' *Principles for the Care and Protection of People with a Mental Illness and for the Improvement of Mental Health Care* (1991).⁴⁷ According to s 4(1), the objects of the MHA, are:

- ‘(a) to provide for the care, treatment and protection of mentally ill people who do not or cannot consent to that care, treatment or protection; and
- (ab) to facilitate the provision of treatment and care to people with a mental disorder; and
- (ac) to protect the rights of people with a mental disorder.’

Notably, each of the enumerated objectives specifically refers to persons who are ‘mentally ill’ or suffer ‘mental disorder’, thus excluding all those who do not fall into either one of these categories. As noted earlier, the trial judge accepted that Mr Veenstra ‘showed no signs of mental illness; he was rational, cooperative and very responsible the entire time’. In other words, once they had concluded that Mr Veenstra did not appear to be mentally ill, the defendant police officers did not have statutory power to apprehend him under s 10, even if they had reasonable grounds to believe that he had attempted suicide or was ‘likely by act or neglect to attempt suicide’.⁴⁸ The only way in which Mr Veenstra could have been considered ‘mentally ill’ was by construing legislation as equating suicidal behaviour with mental illness, which is just what majority of the Court of Appeal did.⁴⁹ Though, no doubt, well meaning in its concern for emotionally vulnerable people, such unrefined interpretation is medically inappropriate,⁵⁰ while being incompatible with the objects and principles of the MHA.

⁴⁷ Hon CJ Hogg, *Hansard*, Parliament of Victoria, the Legislative Council, 14 November 1995, at 460; Hon Louise Asher at 467-8.

⁴⁸ Conversely, persons who appear to be mentally ill and there are reasonable grounds for believing that they have attempted or will attempt to harm others, will come within the scope of s10 even if they are not suicidal in any way.

⁴⁹ *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32, Maxwell P at [103]: ‘In the present case, the respondents had the legal authority to exercise direct, immediate and complete control over the risk that Mr Veenstra might, in his current frame of mind, commit suicide.[reference to *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, per Kiby J at 630-1 [249]]. Clothed with the authority of s 10, they were in a position to do what no other person could do without risking civil liability for assault or false imprisonment, namely, to apprehend Mr Veenstra and, for that purpose, to ‘use such force as may be reasonably necessary’[s10(2)(b)]’.

⁵⁰ See for example Wang AG & Stórá T, ‘Core features of suicide. Gender, age, alcohol and other putative risk factors in a low-incidence population’, (2008) *Nordic Journal of Psychiatry*, URL: <http://dx.doi.org/10.1080/08039480802429458> This study, which covered all suicides and undetermined deaths from 1945 to 2004 in the Faroe Islands (population of 48,000), showed that of those who committed suicide, 29% had a history a former suicide attempt, but 39% had ‘no diagnosis’, ie no apparent mental disorder.

In the course of the 1995 debates on the amendments to the MHA, both parties agreed that ‘the civil rights of the mentally ill should be fundamental’,⁵¹ and that interference with the civil rights of people suffering from mental illness should be kept to the minimum compatible with provision of adequate care and appropriate treatment. Hence, s4(1)(a) limits the category of mentally ill persons whose civil rights can be overridden for the purpose of ‘care, treatment and protection’ to those ‘who do not or cannot consent to that care, treatment or protection’. Section 4(1)(a) is similar to s8(1)(d), which stipulates as one of the five cumulative necessary preconditions for involuntary treatment that ‘the person has refused or is unable to consent to the necessary treatment for the mental illness’.⁵² Although neither s4(1)(a) nor s8(1)(d) refers to apprehension by the police, both provisions concern mentally ill people who refuse or are incapable of making decisions for their own welfare. This suggests that the legislators drew a distinction between persons who suffer from mental illness that destroys or impairs their capacity to provide valid consent and those capable of consenting to treatment, care, or protection. Their capacity to consent may not be nullified by a reasonable qualified refusal. For example, even if it were reasonable to assume that Mr Veenstra appeared to suffer from mental illness, his refusal of the police officers’ offer to summon a crisis assessment team or to take him to a hospital was qualified by the indication that he would see his medical practitioner later that day. In this situation, by letting him go, the police acted within the spirit and directions of the MHA expressed in s4(2)(b), that ‘any restriction upon the liberty’ of people with a mental disorder, and ‘any interference with their rights, privacy, dignity and self-respect’ be ‘kept to the minimum necessary in the circumstances’.

Attempted suicide

At which point should actions of an adult person be defined as falling within the definition of ‘attempted suicide’?

Two of the criteria for the exercise of the power to detain under s10 refer to a ‘recently attempted suicide’ or a likelihood of an attempted suicide. However, neither the MHA nor the *Crimes Act* provide a statutory definition of attempted suicide. The common law jurisprudence regarding the meaning of this concept is also meagre,⁵³ but one way of elucidating it is by analogy with criminal attempt. When suicide was still a crime, attempted suicide would have been treated as the inchoate crime of an attempt. Lord Diplock in *DPP v Stonehouse* [1978] AC 55 at 68 distinguished ‘mere preparation’ from an attempt to commit an offence thus:

‘The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence. Acts that are merely

⁵¹ Hon BE Davidson, *Hansard*, Parliament of Victoria, the Legislative Council, 14 November 1995, at 470; see also Hon Louise Asher at 466.

⁵² However, s 8(1)(d) only deals with involuntary treatment, and thus is much narrower in its scope than s 4(1)(a).

⁵³ Though even before abrogation of the crime of suicide and attempted suicide there were very few prosecutions in respect of the latter, See: *R. v Commissioner of Police of the Metropolis Ex p. Blackburn (No.1)* [1968] 2 Q.B. 118, at 135.

preparatory to the commission of the offence ... not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so.⁵⁴

If Lord Diplock's distinction were to be applied to non-criminal circumstances of attempted suicide, it would follow, for example, that by driving the car to a remote location and placing the hose at the exhaust pipe, Mr Veenstra took preparatory steps to the commission of suicide. However, when the police officers approached the vehicle, the car engine was switched off, a car window was open, and he was writing a letter. In these circumstances it is arguable that his conduct fell short of an attempt as it did 'not indicate a fixed irrevocable intention' to commit suicide 'unless involuntarily prevented from doing so'. Given the preparatory steps, the predictive question whether there were reasonable grounds for believing that Mr Veenstra was 'likely by act or neglect to attempt suicide' would have had to be determined in the light of his calm composure, rational conduct, and what he said while talking to the police officers.⁵⁵

Mr Veenstra's conduct would have fallen with the definition of attempted suicide along the lines of Lord Diplock's reasoning, if the police officers had found him still alive inside the car, but with the vacuum cleaner hose attached to the exhaust pipe and placed inside the vehicle, its engine running, and all windows wound up. If the police officers broke into the car and dragged him out of it, their conduct would have been covered by the immunity provided under s463B of the *Crimes Act 1958*. At this point, Mr Veenstra would also fall within a definition of a 'person [who] has recently attempted suicide or attempted to cause serious bodily harm to ... himself' as defined in s10(1)(a) of the MHA. But would this be sufficient to entitle exercise of the discretionary power under s10?

Again, the opinion of the police officers regarding Mr Veenstra's mental state and future conduct would depend on whether, for instance, he told them that his actions were 'stupid', that he was grateful to them for the rescue, that he realised how unwell he was, and how urgent the need to see a medical practitioner. It would be quite different if he was agitated, irritated at being interrupted, or angrily told them that he intended to kill himself at the next opportunity. Though even at this point, the police officers would have had to satisfy themselves that he also appeared to be mentally ill before deciding whether or not to exercise their power to apprehend him under s10.⁵⁶

Common Law

⁵⁴ His Lordship referred to *Reg v Eagleton* (1855) Dears CC 515, 538; 169 ER 766. See also *R v De Silva* [2007] QCA 301; 176 A Crim R 238 at 245-6 [22]-[27].

⁵⁵ See for example: Simon RI, 'Behavioral Risk Assessment of the Guarded Suicidal Patient' (2008) 38 *Suicide and Life-Threatening Behavior* 517-522.

⁵⁶ See the exchange between Hayne J and Mr Ruskin QC in *Stuart & Anor v Kirkland-Veenstra & Anor* [2008] HCATrans 397 (3 December 2008) <http://www.austlii.edu.au/au/other/HCATrans/2008/397.html>

Should the courts impose an independent positive common law duty of care to apprehend those at risk of committing suicide?

Warren CJ (at [29]) averred to the submission by the counsel for the defendants ‘that to impose a duty of care with respect to a discretion to compulsorily detain another person would introduce a ‘distortive influence’ on the exercise of the discretion⁵⁷ or would result in a ‘detrimentally defensive frame of mind’.⁵⁸ However, in her Honour’s view, the ‘police cases’ were ‘a distraction’. Yet, in *State of Victoria v Horvath* (2002) 6 VR 326 at 343 [42], in a joint judgment, Winneke P, Chernov and Vincent JJA while discussing the requirement that members of the police force exercise independent discretion when acting in the course of their duties, wrote that:

‘the very nature of those duties and the circumstances under which they may need to perform them render police members peculiarly vulnerable to civil suit. . They are regularly called upon to make extremely difficult decisions as to the proper course to be adopted in the course of performing their important role in our community and, sometimes, in circumstances where the opportunity for mature or deliberate reflection may not be possible. Unless freed of unnecessary apprehension when going about their tasks in an appropriate fashion, their ability and preparedness to do so could be significantly reduced.

To dismiss as a ‘distraction’ the influence that such ‘peculiar’ vulnerability to legal proceedings may exert on police conduct is to create a legal fiction. This is particularly so in the context of Victorian regulatory framework. For, although all Australian legislatures have been aware of this problem, some have dealt with it more fully than others. For example, the Victorian *Mental Health Act* does not contain an equivalent of a s 164 of the *Mental Health and Related Services Act 2005* (NT), which provides that ‘No proceedings, civil or criminal, may be commenced or continued against a person for anything done in good faith and with reasonable care by the person in reliance on any authority or document apparently given or made in accordance with this Act.’⁵⁹ By making failure to act ‘in good faith and with reasonable care’ prerequisite to any legal action, the Northern Territory legislation extends immunity from suit in negligence (and

⁵⁷ *Hunter Area Health Service v Presland* [2005] NSWCA 33; (2005) 63 NSWLR 22, [368], [378]-[379] per Santow JA.

⁵⁸ *Hill v Chief Constable of West* [1989] AC 53, 63, per Lord Keith. Warren CJ characterised the *Hill* and *Presland* cases as ‘concerned with police activities in the investigation of crime, the recording of information in the course of that investigation and the administration of the criminal justice system.’

⁵⁹ Under the doctrine in *Enever v The King* (1906) 3 CLR 969, which was endorsed in a number of subsequent cases, members of the police force were deemed to exercise an independent discretion when acting in the course of their duties; as such they were personally liable for their tortious acts or omissions. See *State of Victoria v Horvath* (2002) 6 VR 326 at 343 [42].

other unintentional torts)⁶⁰ to police officers who exercise (positively or negatively) their discretionary power to apprehend.

By contrast, in Victoria, police officers acting under the authority of the MHA have no immunity from suit in negligence. Instead, s123 of the *Police Regulation Act 1958* (Vic),⁶¹ as interpreted by Winneke P, Chernov and Vincent JJA in *State of Victoria v Horvath* (2002) 6 VR 326 at 343 [42], operates to transfer to the State liability ‘for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force’ but only after ‘persons who may be injured or incur loss and damage as a consequence of the tortious conduct of [police] members in the course of their duties were able to secure compensation’. In other words, once found liable in negligence, police officers may be indemnified by the State, though only if they can show that the relevant negligent acts or omissions were ‘necessarily or reasonably’ performed or omitted ‘in good faith’ and ‘in the course of duty’.⁶² The plurality in *Horvath* also held (at [62]) that ‘the terms of s123 of the Victorian Act do not make the State vicariously liable for the torts of police officers committed in the exercise of their independent discretion. Such officers are still recognized in this State as exercising powers and duties on their own responsibility.’

Enacted in 1999, s123 was meant to alleviate hardship occasioned by the doctrine in *Enever v The King* (1906) 3 CLR 969, which held that since members of the police force were deemed to exercise an independent discretion when acting in the course of their duties; they were personally liable for their tortious acts or omissions.⁶³ When in 1995 it created s10 of the MHA, the Parliament would have been even more acutely aware of personal legal (and financial risks)⁶⁴ associated with police officers’ responsibility to

⁶⁰ Negligence focuses on harm occasioned through breach of the duty of care, irrespective of whether the defendant acted in good faith. Such intentional torts as misfeasance in public office, action on the case for intentional infliction of harm, deceit, as well as actions for trespass to the person would probably fall within the prerequisite.

⁶¹ Section 123, misnamed ‘Immunity for members’ reads: ‘(1) A member of the force ... is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force ... (2) Any liability resulting from an act or omission that, but for subsection (1), would attach to a member of the force..., attaches instead to the State.’

⁶² *State of Victoria v Horvath* (2002) 6 VR 326 at 344 [47].

⁶³ *State of Victoria v Horvath* (2002) 6 VR 326 at 343 [42].

⁶⁴ Having lost the appeal, the two police officers sought an indemnity certificate in respect of costs pursuant to s 4 of the *Appeal Costs Act 1998* (Vic); however, the question arose whether s 38 of the Act, which stated that ‘A court must not grant an indemnity certificate in favour of the Crown or any person representing the Crown’ would prevent them from seeking reimbursement. In *Kirkland-Veenstra v Stuart* [2008] VSCA 211, Warren CJ agreed with Nettle JA, who at [27] held that ‘a police officer in that position [acting under a 10 of the MHA] is not representing the Crown. At least as the law stands, the powers of a constable, whether conferred by common law or statute, are exercised as a matter of original authority and not on behalf of the Crown.’ Maxwell P refused the

exercise discretionary powers. This may have been one of the reasons for the emphasis on the subjective test for assessment of ‘mental illness’ in s10(1A): a member of the police force ‘may exercise the powers conferred by this section if, having regard to the behaviour and appearance of the person, the person *appears to the member of the police force* to be mentally ill.’ Consequently, Warren CJ’s determination at ([67]) that ‘it was a question of fact for the jury as to whether Mr Veenstra was mentally ill’ appears to contradict the intentions of the legislature if the issue is litigated in terms of breach of statutory duty; however, parliamentary intentions and standards became ‘irrelevant’ if the matter of police officers’ liability is taken out its statutory context instead judged as breach of the common law duty of care.

This is exactly what the majority of the Court of Appeal did in the *Kirkland-Veenstra* case. For, although Warren CJ and Maxwell P acknowledged that s10 did not impose a duty on the police to interfere with another’s right to liberty (unless specified conditions were fulfilled), they found that the trial judge erred in discharging the jury because the statute provided basis for the creation of a common law duty to apprehend, which was applicable to the defendants. On several occasions, the High Court of Australia has admonished appellate courts for engaging in what the House of Lords called an ‘impermissible legislation or rewriting of the statute’ when determining private law cases.⁶⁵ In *Neindorf v Junkovic* [2005] HCA 75,⁶⁶ for instance, Kirby J at [42] reiterated that ‘it is the duty of Australian courts to start their analysis of the legal liability of parties affected not with the pre-existing common law but with the statutory prescription’— for, his Honour explained, ‘where Parliament has spoken, it is a mistake to start with common law authority.’⁶⁷ In *Kirkland-Veenstra*, the majority of the Court of Appeal used a different approach: they endeavoured to circumvent the MHA and impose a common law duty upon police officers to protect others from ‘ a reasonably foreseeable risk of suicide’ where no such duty was contemplated by the legislature. Warren CJ employed the common law doctrine of statutory authorities’ liability for non-feasance, whereby plaintiffs can recover damages for loss suffered thereby, providing they establish that the defendant authority was under a legal duty to act but failed to do so.⁶⁸ To this end,

officers’ application for Certificate on the basis (at [15]) that that they ‘are properly to be regarded as “representing the Crown”.’

⁶⁵ *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 at 30] cited in *Regina (Gillan and another) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at 321.

⁶⁶ Gleeson CJ, Hayne, Callinan and Heydon JJ; Kirby J in dissent.

⁶⁷ See also *Re Woolley; Ex parte Applicants M276/2003* (2003) 225 CLR 1 at 62-3 [173]: ‘If the law is clear and constitutionally valid, it is the duty of Australian courts to apply its terms. This is so whatever judges or others may think about the content and effect of the law. Under our constitutional arrangements, changes to the content of such laws normally depend upon the political process, particularly the regular election of representatives to legislatures of Australia: federal, State and Territory.’

⁶⁸ *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552, Gaudron, McHugh, Gummow and Hayne JJ at 578 [68]: ‘from the earliest times, the common law has drawn a distinction between a positive act causing damage and a failure to act which results in damage. The

through ‘legal magic’, the two police officers on a routine patrol acquired characteristics of ‘statutory authorities’ by virtue of approaching Mr Veenstra, inspecting his vehicle, engaging him in a conversation, and providing advice. Thus interpreted, *Kirkland-Veenstra* became ‘closely analogous’⁶⁹ to cases involving pure nonfeasance by statutory authorities,⁷⁰ in particular the case of *Pyrenees Shire Council v Day* (1998) 192 CLR 330.⁷¹ Following discussion of a long list of non-feasance cases,⁷² Warren CJ found at [56] that the two police officers ‘owed Mr Veenstra a duty of care’, which arose independently of s10 of the *Mental Health Act 1986*.

On appeal to the High Court of Australia, Mr Beach SC appearing for Mrs Kirkland-Veenstra, conceded that the majority in the Court of Appeal ‘misapplied the statutory authority cases’,⁷³ and also agreed that the majority failed to refer to the jurisprudence relating to the duties of police officers as members of the police force. The concession meant that neither the issue of equating the defendant police officers with statutory authorities nor the question of nonfeasance were argued at any length before the full bench of the High Court.

Nevertheless, it is important to discuss the majority’s reasons because the ‘misapplication’ related not only to the nature of the cases (nonfeasance of public authorities) but also to the test employed for finding duty of care in cases where police officers are aware that an adult is at a risk of suicide. Both Warren CJ and Maxwell P held that the police officers owed a common law duty of care to Mr Veenstra because (1) they were in control of the situation: ‘knew that he had very recently been contemplating

common law does not ordinarily impose a duty on a person to take action where no positive conduct of that person has created a risk of injury to another person.’ See also: *Stovin v Wise* [1996] AC 923, Lord Hoffmann at 943–4.

⁶⁹ *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32 at [22], and at [29]

⁷⁰ Pure nonfeasance involves passive inaction when there is no prior duty to act; plaintiffs who claim they were injured as a result of pure nonfeasance must first establish that the defendant was under an obligation or *duty to act*. See *Pyrenees Shire Council* (1998) 192 CLR 330, McHugh J at [101]; *Agar v Hyde*; *Agar v Worsley* (2000) 201 CLR 552, Gaudron, McHugh, Gummow and Hayne JJ at 578 [68]; and *Stovin v Wise* [1996] AC 923, Lord Hoffmann at 943–4.

⁷¹ Maxwell P took similar approach: see *Kirkland-Veenstra v Stuart & Ors* [2008] VSCA 32 at [102]-[104].

⁷² *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; *Halech v State of South Australia* [2006] SAS 29; *Cran v State of New South Wales* (2004) 62 NSWLR 95; *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; (1998) *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Agar v Hyde* (2000) 201 CLR 552; *Gandy v State of Victoria* [2006] VSC 480.

⁷³ <http://www.austlii.edu.au/au/other/HCATrans/2008/217.html>

suicide and had prepared his car accordingly' (at [101]); and (2) Mr Veenstra was in a position of special vulnerability.⁷⁴

The legal doctrine of control and special vulnerability in certain categories of case refers to a situation where one party knows of risks to the other's safety and/or interests, while the latter does not.⁷⁵ Under this doctrine, the party who has or ought to have knowledge of foreseeable risks of harm to others is deemed to be 'in control', whereas the party without the relevant knowledge is in a position of special vulnerability of exposure to these risks.

The notion of vulnerability (except as it applies to pure economic loss cases)⁷⁶ was criticised by Hayne J in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, who at [307] and [308] called it a 'legal fiction', and questioned the usefulness of this concept, particularly when determining the existence of a positive duty to exercise power by public authorities. In fact, the doctrine of vulnerability, when extended to the circumstances of the Kirkland-Veenstra case, sits uneasily with the statement of McHugh J in *Pyrenees Shire Council* (1998) 192 CLR 330 at [101], who emphasised that the common law does not 'impose any duty on a person to take steps to prevent harm, even very serious harm, befalling another ... The careless or malevolent person, who stands mute and still while another heads for disaster, generally incurs no liability for the damage that the latter suffers'.⁷⁷ More recently, In *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42, Gummow J at [51] having noted that the law of negligence imposes an obligation to exercise reasonable care, not 'an obligation to prevent harm occurring to others', stated:

'In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 266 [28], Gleeson CJ pointed to the remarks of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, and observed that "the common law distinguishes between an act affecting another person, and an omission to prevent harm to another. If people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable".'⁷⁸

⁷⁴ Maxwell P relied on cases involving statutory authorities, particularly the *Pyrenees*, when he found at [101] that 'the touchstone of the respondents' duty in the present case was their 'measure of control of the situation including [their] knowledge' of the risk to Mr Veenstra'.

⁷⁵ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520;

⁷⁶ See: *Woolcock St Invest v CDG Pty Ltd* (2004) 216 CLR 515, Gleeson CJ, Gummow, Hayne and Heydon JJ, at [23] noted that vulnerability is 'an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed'.

⁷⁷ See also: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, per Deane J at 501: 'The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury.'

⁷⁸ Gummow J added: 'In *Heyman* (1985) 157 CLR 424 at 478, Brennan J had emphasised that the common law recognises "a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to

It is arguable that by finding that the two defendants were under a legal duty to apprehend Mr Veenstra in order to prevent him from committing suicide, the majority in the Court of Appeal effectively imposed on members of the police force an ‘intolerable’ burden of a legally enforceable obligation to prevent harm occurring to others.

Even assuming that the two policemen could be considered ‘statutory authorities’, the majority’s reliance on the vulnerability doctrine in the *Pyrenees* case is surprising because pivotal to the liability of Pyrenees Shire Council was the fact that this local authority *knew* of a dangerous situation (unsafe fireplace), which unbeknown to the plaintiffs, existed on their premises. Yet having taken some preliminary steps, the Council failed to exercise its discretionary statutory power to ensure that the problem was eliminated (the fireplace repaired or bricked up). In the *Kirkland-Veenstra* case, although Mr Veenstra was undoubtedly emotionally very vulnerable, this of itself did not place him in a position of special vulnerability in the legal sense. Both the police officers and Mr Veenstra knew of the risk of suicide, but only Mr Veenstra knew of the police investigation into the fraud, and that the preparations for his committal were scheduled for 22 August – factors likely to have been critical to his ultimate decision to kill himself. Thus the better view is expressed in the dissenting judgment of Chernov JA, who wrote (at [131]):

‘...the control and vulnerability of the person to whom a duty is said to be owed of which Gummow and Hayne JJ spoke in *Graham Barclay Oysters*, and that existed in cases such as *Pyrenees Shire Council v Day* and *Brodie v Singleton Shire Council*, did not exist in the present case. To the extent that it could be said that the police officers here had control in respect of the relevant risk, such control was of a limited nature. In considering the question of control, it is relevant to compare the nature of the harm that potentially might have been prevented and the power that, it is said, ought to have been exercised by the police officer.

Chernov JA pointed out (at [131]) that, just because the police officers had the power under s10 to take Mr Veenstra to a medical practitioner, it did not mean that such power operated ‘directly’ to prevent a risk of self-inflicted harm; and he questioned ‘the degree to which it is possible to assume control over such a risk, particularly, as s10(1) itself implicitly contemplates, a person to whom such a duty is said to be owed might not appear to be mentally ill’. His Honour concluded that ‘given the deceased’s conduct in deceiving the police’ it was doubtful that the exercise of power could have removed the risk to him.⁷⁹

Pure Mental Harm

another by that other, by a third person, or by circumstances for which nobody is responsible”.

⁷⁹ *Kirkland-Veenstra v Stuart & Ors*, at [131].

The question whether the defendant police officers owed Mrs Kirkland-Veenstra ‘a duty to take reasonable steps to protect her from reasonably foreseeable [psychiatric] injury resulting from the suicide of Mr Veenstra’ was not argued before the High Court. Yet, the issue is important, and deserves a brief discussion.

The nature and content of the common law duty to protect third parties from pure mental harm

Warren CJ (with Maxwell P concurring) was persuaded that the case involved a ‘novel situation’ (at [20]), namely that at common law, ‘the duty of care alleged to be owed to the appellant [Kirkland-Veenstra] could not exist without a finding that there was a duty owed to Mr Veenstra’ (at [17]). In other words, if it were found that the police officers owed the decedent a duty of care, then his wife would have a claim against them for negligent infliction of pure mental harm. This curious formulation of the law meant that, to quote Warren CJ, ‘allegations and issues relating to the other elements of negligence were therefore not decided’ (at [3]). The majority in the Court of Appeal appears to have assumed that a duty of care owed to those who suffer pure mental harm is derivative from, or ‘secondary’ to, a duty that is owed to the original ‘casualties’ of the defendant’s conduct.⁸⁰ Yet, as Gleeson CJ noted in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (2003) 214 CLR 269 at 280 [22], it is “an outmoded or unorthodox view” to speak of “the common law as involving primary and secondary liability”.⁸¹ Likewise McHugh J at 281 [26] emphasised that, amongst other things, the question in *Gifford* was whether the duty of ‘care for the safety of their father during the course of his employment include a *separate duty* to the children to protect them from suffering nervous shock by reason of a breach of the duty owed to their father?’ [author’s emphasis]

⁸⁰ *Chester v Waverley Corporation* (1939) 62 CLR 1 at 44 per Evatt J (dissenting): “The secondary duty is cast upon A [a hypothetical person] because a reasonable person in his position would have foreseen the probability of injury being sustained (a) by those who are already present at or in the immediate vicinity of the scene of the actual or apprehended casualty, and (b) by those who will also be brought to the scene for the purpose either of preventing the casualty altogether, or of minimising its injurious consequences, or in the course of a search to discover and rescue or aid any person who is feared on reasonable grounds to have been injured in the casualty.” But see: *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, per Gleeson CJ at [13] in which his Honour noted that in *Jaensch v Coffey* (1983) 155 CLR 549, the High Court preferred Evatt J’s dissenting conclusion, but not ‘his analysis in terms of primary and secondary liabilities [which] was criticised by Professor Fleming in the first edition of his work on the law of torts’ (Fleming, J, *The Law of Torts*, The Law Book Co, 1957 at p 180).

⁸¹ In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, the defendant employer admitted liability in negligence for the death of its employee, who was the father of three children (claimants). The case involved the interpretation of section 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), which has no equivalent in Victoria.

The fastening of the police officers' duty not to violate Mrs Kirkland-Veenstra's right to mental integrity onto the duty they owed to Mr Veenstra is not supported by modern theories of negligence. For, as Cardozo CJ observed in *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99 at 100, the fact that the defendant owes the duty of care not to injure one person does not mean that this 'primary' duty of care can be simply extended (as a 'secondary' duty) to another:

'The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another ... he sues for breach of a duty owing to himself.'⁸²

Mrs Kirkland-Veenstra had to show that the defendants were under a separate duty of care to protect her, as a foreseeable person or a member of a class, from suffering pure mental harm. To establish such a separate duty, the claimant would have had to show that apart from a reasonable foreseeability of harm, which of itself is not sufficient to establish a duty of care in pure mental harm cases,⁸³ the following considerations articulated in *Sullivan v Moody* (2001) 207 CLR 562 were met:⁸⁴

(a) that the suggested duty of care imposed on the police officers 'would [not] so cut across other legal principles as to impair their proper application' (at [53]);

(b) that such duty was reconcilable with other duties of the police, both statutory and at common law. In other words, the court would have to consider whether the proposed duty would give rise to inconsistent obligations, such as subjecting police officers 'to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations' (at [60]);

(c) the extent of such duty, and its potential to subject police officers to indeterminate liability (at [61]); and

(d) that the new duty would not impair the principle of the coherence of the law.

Though highly relevant, the majority judgment in *Sullivan v Moody* was not discussed by the Court of Appeal in relation to the finding that the police officers owed Mrs Kirkland-Veenstra a duty to protect her from the reasonably foreseeable risk of psychiatric injury. If it had been, the question, for example, of the extent of such duty would have had to

⁸² See also: *Bourhill v Young* (1943) AC 92, per Lord Macmillan at 105:

if ... the appellant has a cause of action, it is because of a wrong to herself. She cannot build on a wrong to someone else. Her interest, which was her own bodily security, was of a different order from the interest of the owner of the car'. In this case, Mrs Bourhill, was alighting from a tram when she heard the noise of the collision; having crossed the road to inspect what happened, she saw the debris of a collision in which Young was killed (through his own negligence). Though those involved in the collision were strangers to her, Mrs Bourhill suffered nervous shock, and sued Young's estate.

⁸³ *Sullivan v Moody* (2001) 207 CLR 562 at 583 [64].

⁸⁴ In *Sullivan v Moody*, the plurality of the High Court ((Gleeson CJ, Gaudron, McHugh, Hayne, and Callinan JJ) unanimously determined that doctors, social workers, hospitals, and departmental officers were not liable to the claimants who suffered pure nervous shock and consequential personal and financial loss as a result of being informed that they were accused of sexually abusing their children.

arise for consideration. What happens to police officers' duty not to cause pure mental harm to a wife once they are told by the suicidal husband of his loveless marriage? What should be the approach of the law to claims for pure mental harm where the marital relationship between the parties is unloving and destructive?

Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 stated at 600 that: 'the most important explanation of nervous shock [pure mental harm] resulting from injury to another is the existence of a close, constructive and loving relationship with that person ("close relative")'.⁸⁵ This statement was further elucidated by McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd*, at 288 [47]:

"So common and so widely known is the phenomenon that a wrongdoer must be taken to have it in mind when contemplating a course of action affecting others. Accordingly, for the purpose of a nervous shock action, the neighbour of a wrongdoer in Lord Atkin's sense⁸⁶ includes all those who have a close and loving relationship with the person harmed. They are among the persons who are likely to be so closely and directly affected by the wrongdoer's conduct that that person ought reasonably to have them in mind when considering if it is exposing the victim to a risk of harm."

His Honour added at 289 [48] that:

"It is the closeness and affection of the relationship - rather than the legal status of the relationship - which is relevant in determining whether a duty is owed to the person suffering psychiatric harm... In a claim for nervous shock at common law, the reasonable foresight of the defendant extends to all those with whom the victim has or had a close and loving relationship."

In *Gifford*, Gleeson CJ, Hayne J and Callinan J also noted the importance of evidence of a close and loving ('special') relationship between the victim and the claimant as vital to the imposition duty of care on the defendant.⁸⁷ It is arguable that in *Kirkland-Veenstra* the existence of the duty of care would need to be determined not by the notions of 'secondary' or 'derivative' duty of care, but in accordance with the test of reasonable

⁸⁵ *Jaensch v Coffey* (1984) 155 CLR 549 at 600. His Honour added that in such cases, 'it is largely immaterial whether the close relative is at the scene of the accident or how he or she learns of it'. Dean J's statement was adopted by Gummow and Kirby JJ in *Tame v NSW* (2002) 211 CLR 317 at [231]. See also Gibbs CJ at 555: "Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery."

⁸⁶ McHugh J is referring to Lord Atkin's test of reasonable foreseeability as determinant of the duty of care articulated in *Donoghue v Stevenson* [1932] AC 562 at 580.

⁸⁷ Gleeson CJ at [11] and [12]; Hayne J at [98], [101]-[102], and Callinan J at 309 [118]. See also *Tame v New South Wales* (2002) 211 CLR 317, per Gummow and Kirby JJ at 392 [218].

foreseeability of pure mental harm based on the quality of the relationship between the husband and wife.⁸⁸

Conclusion

The tragedy of suicide is undoubtedly a major public health concern⁸⁹, and in some circumstances members of the police force have a role to play in its prevention. However, in a representative democracy, once the Parliament has allocated powers and duties to police officers in relation to protecting competent adults from self-harm and self-destruction, the judiciary may review the validity of the statute and its provisions, but not sabotage it by converting discretionary statutory powers into common law duties, and imposing upon police officers burdens that the legislature clearly did not intend. For, as Kirby J noted when providing reasons for purposive construction of statutes in *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2008) 234 CLR 96 at 212, ‘in recognition of the constitutional advance of universal suffrage’ respect must ‘be accorded to the “will” of Parliament, once it is ascertained’.⁹⁰

⁸⁸ By virtue of s 73(2)(b) of the *Wrongs Act 1958* (Vic), the plaintiff in the position of Mrs Kirkland-Veenstra ‘is not entitled to recover damages for pure mental harm unless’ she ‘was in a close relationship with the victim’. The courts are yet to interpret the meaning of this phrase.

⁸⁹ See generally Freckelton, 2005.

⁹⁰ His Honour referred to *R v Lavender* (2005) 222 CLR 67 at 97 [94].