Stuart

v.

Kirkland-Veenstra

High Court of Australia
22 April 2009
[2009] HCA 15

FRENCH CJ.

Introduction

1 Between mid-morning and 2.30 pm on 22 August 1999, Ronald Hendrik Veenstra committed suicide at his home in Somerville, Victoria by sitting in his car with the engine running. A hose connected the exhaust pipe to the interior of the vehicle.

2 Earlier that day, at about 5.40 am, two police officers had observed Mr Veenstra in his vehicle in a car park on the Mornington Peninsula with a hose leading from the exhaust pipe to the interior of his vehicle. The engine was not running. Upon being questioned, Mr Veenstra persuaded the officers that although he had been about to do something stupid he had changed his mind and was going home to talk to his wife. He sounded rational and was responsive to their questions. He declined their various offers of assistance. He removed the hose from the exhaust. The officers let him proceed from the car park.

3 Mr Veenstra's widow, Mrs Kirkland-Veenstra, sued the officers and the State of Victoria before a judge and jury in the County Court alleging that the officers had breached their duty of care towards her husband and herself by failing, inter alia, to apprehend him under s 10 of the *Mental Health Act* 1986 (Vic) ("the 1986 Act"). At the close of the evidence the trial judge ruled that there was no duty of care and gave judgment for the defendants. Mrs Kirkland-Veenstra appealed to the Court of Appeal which, by majority, allowed the appeal, set aside the trial judge's decision and remitted the matter for retrial[1]. The officers were granted special leave to appeal to this Court.

4 This is not a case about moral or ethical obligations or what commonsense might or might not have dictated as an appropriate course of action for the officers. Those questions may be open to debate and there may be different views about what more the officers could have done in the situation in which

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1 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936.

they found themselves. Their power to apprehend Mr Veenstra was limited and conditional. The case is about whether they owed a legal duty to Mr Veenstra and his wife, breach of which could expose them and the State of Victoria to liability for damages for negligence. Mr Veenstra's death was a tragedy for him and his wife. That sad fact does not answer the legal question for decision.

5 In my opinion the trial judge was correct, there was no legal duty of care and the appeal should be allowed. The existence of a power to apprehend Mr Veenstra under s 10 of the 1986 Act was critical to the reasoning of the Court of Appeal and to the case as presented in this Court. However, it was a power which was never enlivened. The officers said, and the trial judge held, that they did not think Mr Veenstra was mentally ill. Although findings by the trial judge that Mr Veenstra showed no signs of mental illness were under challenge in the Court of Appeal, the finding as to the officers' opinions about him was not the subject of any ground of appeal. There was no suggestion that the officers' opinions were not held in good faith. While attempted suicide may be indicative of mental illness, it is not necessarily so. Moreover, it seems clear that while Mr Veenstra had taken preliminary steps in contemplation of suicide, he had not "attempted" suicide within the meaning of s 10. The officers, after talking with him, did not believe that he was going to take his own life. In the circumstances they could not have apprehended him unless they believed him to be mentally ill and likely to attempt suicide. The case for a duty of care depended upon the existence of the power to apprehend. That power did not exist in this case.

Factual history as found by the trial judge

6 At about 5.40 am on 22 August 1999, Ronald Hendrik Veenstra was observed by two members of Victoria Police to be sitting in a car at the Sunnyside Beach public car park on the Mornington Peninsula. The two officers were Acting Senior Sergeant Stuart and Detective Senior Constable Woolcock. Both were experienced officers, both held the rank of Detective Senior Constable. DSC Stuart had been a police officer for 17 years and DSC Woolcock for 12 years.

7 DSC Stuart saw Mr Veenstra in the driver's seat. He also saw a light-coloured corrugated tube running from the rear of the vehicle to its left side. He inferred that the driver was contemplating suicide. He told DSC Woolcock what he had noticed and what he thought. Both officers approached the driver's side of the vehicle. The window was fully open. The engine was not running. As they approached the car they saw Mr Veenstra put a notepad into a briefcase inside the car.

8 Mr Veenstra gave the officers his name and address. He told them that he had been in the car park for about two hours before they had arrived. The officers asked him about the tube secured to the exhaust of his car. He said he had been contemplating doing something stupid but had changed his mind. He

said he was in a loveless marriage. He had been writing down some thoughts for his mother and was about to leave the scene when they arrived. He was going to go home and discuss things with his wife. He said that he was an intelligent person and that there were other options open to him. He did not use the word "suicide", nor expressly state that he had been thinking about killing himself.

9 The officers felt the bonnet and radiator of the vehicle, both of which were cold. They asked Mr Veenstra about his employment and asked whether he had prior dealings with the police. They asked whether he wanted them to contact his wife or to take him to see a doctor or to drive him home. He declined their offers of assistance. He said he would see his own doctor later on. Mr Veenstra told DSC Stuart that he wanted to go home and speak to his wife about his marital problems. The two officers had observed a vacuum cleaner in the rear of the car. There were no exhaust fumes in the car. They checked, through police radio, on the vehicle, the licence and Mr Veenstra's personal history. Neither the vehicle nor the driver had been recorded as missing. It was the fact that arrangements had been made with Mr Veenstra through his solicitor for police to serve him, on the afternoon of that day, with papers relating to fraud charges arising out of his former employment as financial manager of a car dealership. There is no suggestion that either of the two officers was aware of those arrangements or of the fact that there were charges pending against Mr Veenstra.

10 Both officers were of the opinion that Mr Veenstra showed no signs of mental illness. He appeared to them to be rational, cooperative and very responsible the entire time. During their conversation he removed the hose from the exhaust and placed it in the vehicle. He did this of his own initiative and not as a result of any suggestion made to him by the officers.

11 The two officers were aware that they had a power under s 10 of the 1986 Act to apprehend a person who appeared to have a mental illness and to have attempted or to be likely to attempt suicide. They did not exercise that power. They allowed Mr Veenstra to leave the car park. In a patrol log which they wrote up at the end of the shift they recorded that Mr Veenstra was depressed and had contemplated suicide but would seek help and return home. They recorded also that he did not want police intervention and did not want his family informed. The trial judge found:

> "When interrupted, the objective evidence was consistent with voluntary withdrawal by Mr Veenstra from his plan."

12 All told, the officers were at Sunnyside Beach car park for about 15 minutes. It was 6 am when Mr Veenstra left to return to his home. The officers left shortly after him and returned to the police station.

13 Mrs Kirkland-Veenstra saw her husband at about 9 am that morning when she awoke. She said he was "a little bit quiet". She was planning to go out to a

dog show. Mr Veenstra said he would not come with her as he didn't feel well. She offered to stay home. He told her that she had to give a message to a colleague about a forthcoming meeting of dog breeders. She went off by herself.

14 At some time between mid-morning and 2.30 pm Mr Veenstra committed suicide by asphyxiation outside his home by connecting a hose to the exhaust of his vehicle, putting the other end into his car and starting the engine. He had left a suicide note. His father-in-law found him at about 2.30 pm and tried unsuccessfully to revive him. His wife returned home very shortly afterwards. She also tried to revive Mr Veenstra but was unsuccessful.

The proceedings in the County Court of Victoria

15 On 2 May 2003, Mrs Kirkland-Veenstra issued a writ out of the County Court of Victoria naming the two officers and the State of Victoria as defendants. She claimed to have suffered injury, loss and damage including nervous shock arising from learning of her husband's suicide. She alleged that the two officers had owed her and her late husband a duty of care, which they had breached.

16 In her amended statement of claim Mrs Kirkland-Veenstra alleged that:

- At the time of speaking to her husband at Sunnyside Beach the two officers knew or ought to have known that he was:

  (a) mentally ill;

  (b) in the process of committing suicide; and

  (c) likely to attempt suicide or to cause serious bodily harm to himself.

- At all material times they owed him and her a duty to take reasonable care to protect his and her health and safety. This duty was said to arise pursuant to:

  (a) common law;

  (b) the effect and operation of s 10 of the 1986 Act; and

  (c) the operation of the Victoria Police Manual.

She also alleged that the two officers owed her a duty to prevent foreseeable psychiatric injuries to her resulting from breach of the duty of care they owed to the deceased.

17 The pleaded breaches of the duty of care, which were various, included the failure by the two officers to arrest the deceased and arrange for him to be examined by a medical practitioner pursuant to s 10 of the 1986 Act.

18 Mrs Kirkland-Veenstra also pleaded the existence of a "statutory duty" by the two officers and that they breached that duty. There was, however, no relevant statutory duty and that contention was not pressed on the appeal to this Court.

19 Mrs Kirkland-Veenstra alleged that as a consequence of the breaches of duty by the two officers she had suffered injury, loss and damage, particularised as depression, post-traumatic stress disorder, nervous shock, and pain, shock and suffering. Section 23 of the *Crown Proceedings Act* 1958 (Vic) was relied upon to establish the liability of the State of Victoria for the alleged breaches of duty by the two officers. The proceedings were brought by Mrs Kirkland-Veenstra for her own benefit, at common law and pursuant to the provisions of Pt III of the *Wrongs Act* 1958 (Vic).

The trial judge's decision

20 The trial of the action was heard in the Victorian County Court before a judge and a six person jury. After the close of the evidence and following submissions by counsel, the trial judge held that:

> "the plaintiff is not owed a duty of care either under the Wrongs Act by the defendants or for her personal injuries in the form of nervous shock and post-traumatic stress disorder which she alleges she suffered by reason of the negligence of the defendants".

In his reasons for judgment, the trial judge proceeded on findings of fact which he himself made. They form the basis of the factual outline set out earlier in these reasons.

21 The trial judge held that s 10 of the 1986 Act confers a statutory power but imposes no duty. There was no relevant statutory duty imposed upon the officers which would assist in formulating a common law duty of care. He said:

> "In the knowledge of the provision of s 10 of the [1986 Act] and the Victoria Police manual, [the officers] made a considered judgment; that is, that Mr Veenstra did not manifest signs that he had a mental illness such as to justify his detention and conveyance to a doctor for examination. The temptation to reason that Mr Veenstra subsequently suicided by the same method that he set in train at Sunnyside [Beach] carpark at his home about six hours later and that, applying the but for test of causation, had the officers detained him he may not or would not have suicided later is an argument based not on foreseeability of harm, but on hindsight. Equally, it may be said Mr Veenstra did as he said he would do. He went home and spoke with his wife. He tricked her and committed suicide in her absence."

His Honour said:

> "For these reasons I am of the opinion that neither a common law duty of care nor a statutory duty of care in favour of Mr Veenstra was owed by the [officers]. Consequently, no liability can attach to the [State of Victoria] in such circumstances."

His Honour also found that there was no duty of care owed by the officers to Mrs Kirkland-Veenstra.

22 On 21 July 2006, the trial judge made an order giving judgment for the defendants and consequential costs orders. His Honour's decision was appealed to the Court of Appeal of Victoria. On 29 February 2008, the Court ordered that the appeal be allowed, the decision of the trial judge be set aside and that the proceeding be remitted to the County Court constituted by a different judge for retrial. Orders were made that the two officers and the State pay Mrs Kirkland-Veenstra's costs of the appeal and that the costs of the first trial should abide the result of the retrial.

Reasons for judgment in the Court of Appeal

23 Warren CJ and Maxwell P were both of the opinion that the appeal should be allowed. Chernov JA dissented.

24 Key elements of the Chief Justice's reasoning were:

(i) The case concerned "a specific power vested in a special category of persons to prevent self-harm of the gravest kind". These persons have the authority and the capacity to intervene[2].

(ii) Whether a duty of care exists in a novel case is to be decided according to a multi-factorial or "salient features" approach[3].

(iii) The officers were aware of the danger faced by Mr Veenstra. They had the power, under s 10 of the 1986 Act, to apprehend him and take him to hospital or to call for medical assistance[4].

(iv) The officers owed a duty of care at common law to Mr Veenstra. It arose independently of statute. There were no supervening policy reasons to

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2 (2008) Aust Torts Reports ¶81-936 at 61,304 [39].

3 (2008) Aust Torts Reports ¶81-936 at 61,307 [56].

4 (2008) Aust Torts Reports ¶81-936 at 61,305 [44].

deny it on the facts[5]. It was enlivened at the time that the officers realised that Mr Veenstra was contemplating suicide[6].

(v) The duty of care required the officers to exercise their statutory power reasonably to protect those whom the Act sought to protect[7].

(vi) The class of persons to whom the duty was owed consisted of those in clear and obvious contemplation of suicide. The scope of the duty extended to assessment of the situation and possibly the provision of assistance as provided for in the Act[8].

(vii) It was reasonably foreseeable that a failure to apprehend Mr Veenstra and take him to hospital or arrange for medical assistance might result in his suicide. The officers had noticed that he was depressed and had observed all facets of his preparations to commit suicide, including the hose, its connection to the car exhaust and the making of a note[9].

(viii) It was also reasonably foreseeable that if the officers failed to exercise reasonable care in their dealings with Mr Veenstra, Mrs Kirkland-Veenstra would suffer the kind of injury which she did. It was reasonable to expect the officers to have had Mrs Kirkland-Veenstra in contemplation as a person "closely and directly affected" by their acts and omissions in relation to her husband[10].

25 Maxwell P agreed with the Chief Justice and also made the following key points:

(i) Emphasis was to be placed on the degree of danger to which Mr Veenstra was exposed, the limited opportunity he had to protect himself given his mental state and the absence of any cost or inconvenience to the officers in exercising the power[11].

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5 (2008) Aust Torts Reports ¶81-936 at 61,307 [56] and 61,309 [69].

6 (2008) Aust Torts Reports ¶81-936 at 61,309-61,310 [72].

7 (2008) Aust Torts Reports ¶81-936 at 61,307 [54].

8 (2008) Aust Torts Reports ¶81-936 at 61,310 [76].

9 (2008) Aust Torts Reports ¶81-936 at 61,308 [61].

10 (2008) Aust Torts Reports ¶81-936 at 61,313 [90].

11 (2008) Aust Torts Reports ¶81-936 at 61,314 [100].

(ii) The officers had legal authority to exercise direct, immediate and complete control over the risk that Mr Veenstra might commit suicide. They were able, under s 10, to do what no other person could do without risking civil liability for assault or false imprisonment, namely apprehend Mr Veenstra and use "such force as may be reasonably necessary"[12].

(iii) The imposition of a duty of care would not "significantly and impermissibly" constrain the discharge by police officers of their duty to consider whether or not the power under s 10 was exercisable and should be exercised[13].

(iv) The policy of the Act was that there should be intervention to prevent suicide when there was an identified risk that it might occur. A precautionary approach responsive to, rather than dismissive of, indicia of risk must be seen as conducive to the achievement of the statutory purpose[14].

26 Both the Chief Justice and Maxwell P were of the view that the case was not about the exercise of policing powers. It was more closely analogous to cases about the exercise of powers vested in statutory authorities generally[15]. Both of their Honours proceeded on the basis that the two officers had the power to apprehend Mr Veenstra in the car park. That was, with respect, a conclusion which could not be supported having regard to the necessary pre-conditions for the exercise of the power that Mr Veenstra should appear to the officers to be mentally ill and that they should have reasonable grounds for believing that he was likely to attempt suicide. The non-satisfaction of those conditions is addressed later in these reasons.

27 Chernov JA dissented. His Honour held that there was no duty of care of the kind propounded by the majority. The essential reason for his conclusion was that the imposition of the claimed duty of care was incompatible with the framework of the 1986 Act[16]. In reaching that conclusion his Honour held:

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12 (2008) Aust Torts Reports ¶81-936 at 61,315 [103].

13 (2008) Aust Torts Reports ¶81-936 at 61,316 [110].

14 (2008) Aust Torts Reports ¶81-936 at 61,317 [116].

15 (2008) Aust Torts Reports ¶81-936 at 61,302 [29] per Warren CJ, 61,316 [112] and 61,317 [115] per Maxwell P.

16 (2008) Aust Torts Reports ¶81-936 at 61,318 [120].

(i) In deciding whether to exercise the discretion under the Act, the relevant officer was subject to a number of constraints. They required a "fine line" decision not only determining whether the requirements of s 10(1) were made out, but also taking into account competing policy considerations expressed in the Act. The officer was to exercise the discretion in the context of a duty to maintain public order, a duty owed to the public generally and not to individual members[17].

(ii) The imposition of a common law duty on such an officer would amount to a "distorting" influence on the discretionary power and be inconsistent with the legislative scheme[18].

(iii) The control and vulnerability which might give rise to a duty of care did not exist in the present case. The control able to be exercised by the officers was of a limited nature. It was not apparent that the exercise of the power could have removed the risk to the deceased. There was no relevant vulnerability or dependence by the deceased on the officers[19].

28 A number of the trial judge's findings of fact were challenged in the amended notice of appeal in the Court of Appeal, including the finding that Mr Veenstra did not manifest signs that he had a mental illness such as to justify his detention and conveyance to a doctor for examination. There was no challenge to the finding as to the officers' opinions about Mr Veenstra's mental condition. The grounds challenging the trial judge's findings of fact were not dealt with by the Court of Appeal. Her Honour, the Chief Justice, said[20]:

> "Mostly, the matters were properly matters to be determined by the jury in any event, as was acknowledged by counsel for the [officers]. Doubtless his Honour proceeded to determine these matters as part of his decision on the duty point."

Grounds of appeal

29 The grounds of appeal in this Court involved one proposition variously justified, namely that the majority in the Court of Appeal erred in holding that the officers owed a duty of care to Mr Veenstra.

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17 (2008) Aust Torts Reports ¶81-936 at 61,319 [126].

18 (2008) Aust Torts Reports ¶81-936 at 61,319 [127].

19 (2008) Aust Torts Reports ¶81-936 at 61,321 [131].

20 (2008) Aust Torts Reports ¶81-936 at 61,313 [94].

Statutory history and framework

30 From the 19th century until 1943, a series of statutes known as *Lunacy Acts* made provision for the apprehension, examination, commitment and treatment of mentally ill persons in Victoria[21]. In 1943 the *Lunacy Acts* still in force were renamed *Mental Hygiene Acts*[22]. The *Mental Hygiene Acts* and an unproclaimed *Mental Deficiency Act* 1939 (Vic) were consolidated into the *Mental Health Act* 1959 (Vic) ("the 1959 Act"). It provided for the involuntary admission to institutions of "mentally ill or intellectually defective"[23] persons. The process of commitment involved bringing such persons before justices, their examination by medical practitioners and their commitment where various conditions were met[24]. That process, in one form or another, had been in place for many years.

31 Section 45 of the 1959 Act empowered a justice to make orders requiring police officers to apprehend, and bring before two justices, persons who appeared to be mentally ill or intellectually defective, without sufficient means of support or wandering at large, or thought to be contemplating the commission of an offence. Section 45(2) was the closest equivalent to the present s 10. It provided:

> "Any member of the police force finding any such person so wandering or under such circumstances as aforesaid may without any such order apprehend him and take him before two justices."

32 The Mental Health Bill, introduced into the Parliament in May 1985, was based upon recommendations contained in the report, published in December 1981, of a Consultative Council established by the Minister for Health to review mental health legislation in Victoria ("the Myers Report")[25]. The Consultative

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21 *Lunacy Act* 1890 (Vic), *Lunacy Act* 1903 (Vic), *Lunacy Act* 1915 (Vic), *Lunacy Act* 1928 (Vic), *Lunacy Act* 1941 (Vic) and *Lunacy Act* 1943 (Vic).

22 *Mental Hygiene (Mode of Citation) Act* 1943 (Vic), ss 1(2) and 2(1)(a)-(c).

23 1959 Act, s 45(1).

24 1959 Act, ss 45-51.

25 Victoria, Consultative Council on Review of Mental Health Legislation, *Report of the Consultative Council on Review of Mental Health Legislation*, December 1981, known as the Myers Report after the Chairman, Dr D M Myers. See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 71.

Council proposed a new statute to replace the 1959 Act[26]. The recommended aim of the new legislation was to minimise[27]:

> "(a) restrictions upon the liberty of any person with mental illness, and
>
> (b) interference with his civil rights, privacy, dignity, self-respect, and cultural, moral or religious beliefs,
>
> so far as is consistent with his proper protection and care and, in the case of his mental illness constituting a threat to the public safety, with the protection of the public".

The recommendation was reflected in the Second Reading Speech in May 1985, in which the Bill was said to be based on the "fundamental principle" of the "least restrictive alternative"[28]. The recommended aim of the new Act and the fundamental principle referred to in the Second Reading Speech were embodied in cl 4(2)(b) of the Bill in relation to the care and treatment of persons who are mentally ill.

33 The Bill was described in the Second Reading Speech as concentrating on involuntary patients[29]. In the Explanatory Memorandum it was said that the Bill recognised that the classification of a person as an involuntary patient involved a curtailment of civil liberties[30]. It took the approach that such action should only be contemplated if absolutely necessary for the safety and wellbeing of the person, or for the protection of the community.

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26 Victoria, Consultative Council on Review of Mental Health Legislation, *Report of the Consultative Council on Review of Mental Health Legislation*, December 1981 at 13 (Recommendation 26) and 147 [13.3(i)].

27 Victoria, Consultative Council on Review of Mental Health Legislation, *Report of the Consultative Council on Review of Mental Health Legislation*, December 1981 at 147-148 [13.3(vi)].

28 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 71.

29 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 73-74.

30 Victoria, Legislative Assembly, Mental Health Bill 1985, Explanatory Memorandum at 1; see also Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 74.

34 Under the heading "APPREHENSION BY POLICE", the Minister acknowledged the school of thought that police should not have a role to play in the admission of apparently ill persons. He said[31]:

> "Nevertheless, it is a fact of life that the police are usually the first to be summoned to some antisocial incident, and no one else is better trained or equipped to provide the assistance which may be required to deal with a difficult situation."

After referring to the existing "archaic" provisions requiring an inquiry by two justices, he said[32]:

> "In an emergency situation where, for example, an apparently mentally ill person has gone berserk, or is about to commit suicide, the police will have the power to enter any premises without the need for a warrant, and to use such force as may be reasonably necessary to apprehend the person for the purpose of immediately bringing him or her before a medical practitioner."

Clause 10, as it appeared in the Bill at that time, conferred a power upon police to apprehend persons apparently mentally ill in a wider range of circumstances than those set out in the section as enacted. These included circumstances in which the police had reasonable grounds to believe that the person was "likely to commit an offence against the law"[33].

35 The Bill was withdrawn and public comment invited. It was re-presented with amendments as the Mental Health Bill (No 2) in November 1985. The Minister, in his Second Reading Speech for the revised Bill, said its objectives and fundamental principles were the same as those embodied in the earlier version[34]. The Minister made specific comment about cl 10[35]:

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31 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 76.

32 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 1985 at 77.

33 Mental Health Bill 1985, cl 10(1)(d).

34 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 November 1985 at 2611.

35 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 November 1985 at 2612.

> "Some concern was expressed by several organizations at the powers to be vested in the police in clause 10 of the earlier Bill. The aim of this clause is to give the police a capacity to take an apparently mentally ill person into custody in an emergency situation. The Government accepts that the earlier clause may have been too broadly worded, especially to the extent that it would give police more powers to apprehend apparently mentally ill persons than they currently have under the criminal law. The revised clause 10 will limit police powers of entry without warrant to those situations where an apparently mentally ill person is in danger of suiciding, or doing serious harm to himself."

36 The *Mental Health (Amendment) Act* 1995 (Vic) ("the 1995 Amending Act") amended the 1986 Act. As appears from the Second Reading Speech, the 1995 amendments to the Act followed upon recommendations incorporated into a Discussion Paper prepared by the Psychiatric Services Division of the Victorian Department of Health and Community Services in February 1995[36]. The amendments were also informed by the report of a consultancy commissioned by the Australian Health Ministers Advisory Council (AHMAC) Working Group on Mental Health Policy in 1994 to draft model clauses for the use of States and Territories in the development of nationally consistent mental health legislation[37].

37 Section 11 of the 1995 Amending Act introduced a new sub-s (1A) into s 8 of the 1986 Act. That sub-section provided a definition of "mental illness". Section 8 sets out the criteria for admission and detention of persons as involuntary patients. The definition in s 8(1A) was also incorporated by reference in the list of definitions of general application to the Act which are set out in s 3. The definition is in the following terms:

> "Subject to sub-section (2), a person is mentally ill if he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory."

Section 8(2) excludes a number of classes of behaviour as reasons for considering a person to be mentally ill. None of these is, or was, said to be material for present purposes.

38 According to the Second Reading Speech for the Mental Health (Amendment) Bill in 1995, the definition of "mental illness" would "provide

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36 Victoria, Department of Health and Community Services, Psychiatric Services Division, *Victoria's Mental Health Services: Proposed Amendments to the Mental Health Act 1986*, Discussion Paper, (1995).

37 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 5 October 1995 at 424.

guidance to consumers, practitioners and the broader community about the grounds for detention"[38].

39 Section 10, itself, was the subject of amendments in 1990 and 1994, as well as in the 1995 Amending Act. The 1990 amendment inserted sub-s (4) in its relevant form save for the word "registered" before "medical practitioner" which was introduced in 1994[39]. The 1995 amendments introduced sub-s (1A) into s 10. It made clear that a police officer forming an opinion about whether a person was mentally ill was not required to exercise a clinical judgment. This amendment coincided with the introduction of the definition of "mental illness" by the enactment of s 8(1A). In 1999, at the time of Mr Veenstra's death, s 10 provided:

> "***Apprehension of mentally ill persons in certain circumstances***
>
> (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
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> (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.
>
> (1A) A member of the police force is not required for the purposes of sub-section (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.
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> (2) For the purpose of apprehending a person under sub-section (1) a member of the police force may with such assistance as is required –
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> (a) enter any premises; and

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38 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 5 October 1995 at 425.

39 *Mental Health (General Amendment) Act* 1990 (Vic), s 5; *Medical Practice Act* 1994 (Vic), Sched 1, Item 38.4.

(b) use such force as may be reasonably necessary.

(3) A member of the police force exercising the powers conferred by this section may be accompanied by a registered medical practitioner.

(4) A member of the police force must as soon as practicable after apprehending a person under sub-section (1) arrange an examination of the person by a registered medical practitioner.

(5) The registered medical practitioner may examine the person for the purposes of this Act."

40 Section 10 appears in Div 2 of Pt 3 of the 1986 Act. The other provisions of that Division form the statutory scheme of which s 10 is part. As they stood at the time of Mr Veenstra's death those other provisions included:

- Section 8 setting out the criteria for admission and detention as an involuntary patient.
- Section 9 providing for involuntary admission of persons upon a recommendation in the prescribed form by a registered medical practitioner.
- Section 11 providing for the issue by a magistrate of a special warrant authorising and directing a member of the police with a registered medical practitioner to visit and examine a person appearing to be mentally ill and incapable of caring for herself or himself.
- Section 12 providing for the admission and detention of involuntary patients upon a request and recommendation by a medical practitioner pursuant to s 9.

Other provisions of Div 2 are not material for present purposes.

41 The apprehension of a person under s 10 does not necessarily lead to that person's admission or detention as an involuntary patient. The 1986 Act, as it stood in 1999, required a person apprehended by police officers under s 10 to be brought to a registered medical practitioner for examination[40]. A person so examined could only be admitted and detained as an involuntary patient according to the criteria and procedures set down in the other provisions of Div 2 of Pt 3 of the 1986 Act. Unless the person met the criteria set out in s 8, including that of mental illness, there was no basis for further coercive action

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40 1986 Act, s 10(4).

following upon examination by the practitioner. These provisions of the Act give nobody the legal power to prevent a person from taking his or her own life. That is not to say that timely interventions and counselling will not avert suicide or serious self-harm. There was evidence about the effects of intervention on short term and long term survival given at trial by Mr Jeffrey Cummins, a clinical and forensic psychologist called as an expert witness on behalf of Mrs Kirkland-Veenstra. But those questions are not before this Court which is concerned, in this appeal, only with the existence of a legal duty of care, breach of which gives rise to liability for damages.

42 Section 122 of the 1986 Act provides immunity from suit in the following terms:

> "No civil or criminal proceedings lies [sic] against any person for anything done in good faith and with reasonable care in reliance on any authority or document apparently given or made in accordance with the requirements of this Act."

This immunity has no application to action taken by police officers under s 10. The authority to act under s 10 is given by that provision. The trial judge noted that although s 122 was initially relied upon, it was not pressed at trial and was eventually formally abandoned.

43 It should also be noted that any person may use reasonable force to prevent a person from committing suicide. Section 463B of the *Crimes Act* 1958 (Vic) states:

> "Every person is justified in using such force as may reasonably be necessary to prevent the commission of suicide or of any act which he believes on reasonable grounds would, if permitted, amount to suicide."

This provision confers legal immunity on a person committing what might otherwise be an assault, in order to prevent somebody from committing suicide. Its full scope was not debated on the appeal. It was not suggested that it had any part to play in determining whether officers Stuart and Woolcock owed a legal duty of care to the deceased and his wife.

Mental illness and suicide

44 Section 10 does not assume a necessary linkage between mental illness and attempted suicide. This accords with the long-standing resistance of the common law to the proposition that such a connection necessarily exists[41]. That

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41 Ray, *A Treatise on the Medical Jurisprudence of Insanity*, (1838) at 383 [286].

resistance no doubt has its origins in the historical treatment of suicide as a crime designated "*felo de se*". The requirements of criminal responsibility for the commission of such an offence assumed a mind capable of choosing to do or not to do the prohibited act. Blackstone, writing in the 18th century, described suicide as "self-murder" and said "[t]he party must be of years of discretion, and in his senses, else it is no crime"[42]. But he criticised the merciful tendency of coronial juries to find that suicide was itself evidence of insanity. Such findings avoided the harsh legal consequences that followed for the family of the deceased of forfeiture of his property to the Crown[43].

45 Suicide and attempted suicide are no longer criminal offences. This has been the case since 1961 in England and 1967 in Victoria[44]. Suicide and attempted suicide are seen as reflective of psychological or psychiatric issues which may or may not involve "mental illness" according to established diagnostic conventions. State intervention to prevent suicide may now be seen, at least in part, as the exercise of a *parens patriae* role and the interest of the State in protecting the life of its own citizens[45].

46 The common law does not even support the general proposition that attempted suicide or suicide gives rise to a presumption of mental illness, at least not to the extent that would amount to testamentary incapacity. A testator's suicide, following shortly upon the making of a will, does not raise a presumption of testamentary incapacity[46]. The Supreme Court of New South Wales came to that conclusion in 1988 in a case involving the suicide of a young

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42 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 189, and see generally Bloch, "The Role of Law in Suicide Prevention: Beyond Civil Commitment – A Bystander Duty to Report Suicide Threats", (1987) 39 *Stanford Law Review* 929 at 930-931.

43 Bloch, "The Role of Law in Suicide Prevention: Beyond Civil Commitment – A Bystander Duty to Report Suicide Threats", (1987) 39 *Stanford Law Review* 929 at 931-932. See also the discussion and references in the plurality judgment of Gummow, Hayne and Heydon JJ at [94]-[97].

44 *Suicide Act* 1961 (UK), ss 1-2; *Crimes Act* 1967 (Vic), s 2.

45 Bloch, "The Role of Law in Suicide Prevention: Beyond Civil Commitment – A Bystander Duty to Report Suicide Threats", (1987) 39 *Stanford Law Review* 929 at 935-936.

46 *Burrows v Burrows* (1827) 1 Hagg Ecc 109 at 113 [162 ER 524 at 525-526]; *Brooks v Barrett* 24 Mass 94 at 97 (1828).

testator who shot himself apparently within hours of making a form of will[47]. Not having been referred to, and unable to discover, any English or Australian authority on the point, Powell J accepted a number of propositions based on case law from the United States. Those propositions were that post-testamentary suicide "does not give rise to a presumption of testamentary incapacity", is not "at all conclusive on the issue" and "is not judicially regarded as proof per se of insanity"[48]. As noted earlier, there was in fact at least one old English authority on the point[49]. The test of testamentary incapacity which his Honour applied was drawn from the 19th century judgment of Cockburn CJ in *Banks v Goodfellow*[50]. It was considerably narrower than the definition of mental illness in s 8(1A). Nevertheless, the construction of s 10, which would not treat attempted suicide as necessarily reflecting mental illness, is consistent with the long-standing caution of the common law about that proposition. Given the complexity and variety of factors which may lead to suicidal behaviour, it would be a bold legislative step indeed to sweep it all under the rubric of mental illness, however widely defined[51]. That step has not been taken in the 1986 Act.

The statute and the common law

47 This case is about alleged actionable negligence on the part of officers Stuart and Woolcock. It therefore requires consideration of whether they owed a duty of care to Mr Veenstra and his wife in circumstances in which there was a reasonably foreseeable risk of harm to them in the event of a breach of that duty. If such a duty existed, it would then require consideration of whether the officers breached that duty and whether harm resulted.

48 The claim that the officers were repositories of a statutory power and that the scope of the asserted duty of care related to the discretion whether or not to exercise that power does not place the case into a distinct field of actionable tort. It is a claim for damages for injury caused by negligence. That is so, and remains so, notwithstanding the considerable body of jurisprudence on the tortious liability arising out of the exercise or non-exercise of statutory powers. The Court at all times is concerned with the application of "private law notions of

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47 *Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges* (1988) 14 NSWLR 698.

48 (1988) 14 NSWLR 698 at 707.

49 *Burrows v Burrows* (1827) 1 Hagg Ecc 109 [162 ER 524].

50 (1870) LR 5 QB 549 at 565; see (1988) 14 NSWLR 698 at 705.

51 There was evidence at trial from Professor Diego De Leo characterising suicide as "a behaviour" and not "a mental disease".

duty", albeit they are applied in the field of the exercise of powers under public statutes[52]. As Gaudron J said in *Crimmins v Stevedoring Industry Finance Committee*[53]:

> "In the case of discretionary powers vested in a statutory body, it is not strictly accurate to speak, as is sometimes done, of a common law duty superimposed upon statutory powers. Rather, the statute pursuant to which the body is created and its powers conferred operates 'in the milieu of the common law'." (footnotes omitted)

49 A claim for damages for breach of a duty of care may be made against the repository of a statutory power in circumstances in which:

(i) a decision has been made not to exercise the power; or

(ii) a decision has been made to exercise the power and the claim relates to the manner of its exercise.

Bennion puts it thus at s 14 of his Code of statutory interpretation[54]:

> "(16) It constitutes the tort of negligence if a person purporting to perform a statutory requirement, or exercise a statutory authority, contravenes a duty of care which arises at common law, and is not intended to be overridden by the statute, and damage results. The case is similar with other torts such as nuisance. The reason is that the statutory power, duty or authority is then taken not to excuse malfeasance or misfeasance in its purported exercise.
>
> …
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> (17) Liability under the tort of negligence (as opposed to the breach tort) may arise where a statutory power is conferred on a person and that person carelessly fails to exercise the power, or exercises it in a careless manner, and damage results."

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52 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 35 [82] per McHugh J (Gleeson CJ agreeing), 78-79 [218] per Kirby J, 96 [270] per Hayne J (Gummow J relevantly agreeing at 56 [149], see also at 59 [159] and following); [1999] HCA 59.

53 (1999) 200 CLR 1 at 18 [26], citing *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 487; [1995] HCA 47.

54 *Bennion on Statutory Interpretation*, 5th ed (2008) at 82 and 84.

50 There are classes of case in which the statute conferring a power also imposes, expressly or by necessary implication, a duty to exercise the power. In that case the duty is statutory and a failure to exercise it may give rise to an action in tort for breach of statutory duty. That is not this case. It is not now suggested that s 10 or any other part of the 1986 Act conferred a statutory duty on the officers to exercise the power of apprehension in any circumstances, however pressing. Nor, therefore, can it be suggested that it gives rise to a cause of action for breach of statutory duty. But to say of a statute that it does not "create" a cause of action for breach of duty does not necessarily mean "that there is no room for the operation of the principles of negligence"[55].

51 The duty asserted in this case was a common law duty of care. It was said, in the Court of Appeal, to be supported by a number of connected circumstances, including the foreseeable risk of suicide, the officers' awareness of circumstances indicating that risk, the existence of the statutory power and the claimed capacity of the officers, by using that power, to do something to prevent Mr Veenstra's suicide. The existence of the statutory power was central to the argument put on behalf of Mrs Kirkland-Veenstra.

52 Gummow J pointed, in *Pyrenees Shire Council v Day*[56], to criteria by which the courts in Australia and England were said to have applied principles of negligence to local authorities with respect to the discharge of their statutory functions. They involved distinctions between decisions taken at a policy level and decisions of an operational character, between misfeasance and non-feasance and between statutory powers and statutory duties. But as his Honour said[57]:

> "Some of these distinctions and doctrines are entrenched in the common law of Australia, others are not. All of them … tend to distract attention from the primary requirement of analysis of any legislation which is in point and of the positions occupied by the parties on the facts as found at trial. This analysis is of particular importance where … the facts do not fall into one of the classes … already recognised by the authorities as attracting a duty of care, the scope of which is settled."

It is the statutory provision in question, s 10 of the 1986 Act, that requires first consideration.

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55 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 541 [58] per Gaudron, McHugh and Gummow JJ; [2001] HCA 29.

56 (1998) 192 CLR 330 at 376-377 [125]; [1998] HCA 3, see also his Honour's observations on the significance of the relevant statutory scheme in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 59 [159].

57 (1998) 192 CLR 330 at 377 [126].

The operation of s 10

53 In considering whether, having regard to s 10, the officers, Stuart and Woolcock, owed the propounded duty of care to Mrs Kirkland-Veenstra and her late husband, it is necessary to examine the operation of the section and the statutory scheme of which it is a part. The power which the section confers on police officers is subject to two necessary conditions. The first requires that a person "appears to be mentally ill". This is the language which was used in s 45(1) of the 1959 Act and might be taken as requiring that the person to be apprehended exhibit objectively ascertainable indicia of mental illness. However, in the context in which the term is used in s 10, before a person can be apprehended it is clear that he or she must appear *to the apprehending officer* to be mentally ill. That is to say, the officer must form the opinion that the person is mentally ill. This requires a subjective opinion by the officer[58].

54 The preceding construction is reinforced by the language of s 10(1A) and the definition of "mentally ill" in s 8(1A). The requisite opinion is an opinion formed, having regard to the behaviour and appearance of the person, that the person has a mental condition characterised by a significant disturbance of thought, mood, perception or memory. This does not require "clinical judgment" by the officers. A layman's opinion conforming with the broad definition of "mentally ill" in s 8(1A) would suffice. As is apparent from the structure of s 10, and consistently with the common law history discussed earlier, the fact that a person has attempted suicide or prepared to attempt suicide is not of itself sufficient to support an inference that the person is mentally ill.

55 Given its proper construction and the emergency situations with which s 10 is concerned, there is no scope for argument, in deciding whether the power to apprehend was enlivened, that, contrary to the opinion formed by the officer, there were indicia of mental illness which should have been apparent to him or her. The power is not enlivened by objective circumstances but by the opinion of the officer.

56 The second condition relevant to the present case that must be satisfied, before the power to apprehend a person under s 10 is enlivened, is that the officer has reasonable grounds for believing that the person is likely, by act or neglect,

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58 *Robinson v Sunderland Corporation* [1899] 1 QB 751 at 757 per Channell J; *St James's Hall Company v London County Council* [1901] 2 KB 250 at 255 per Channell J and see *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 120-123 and authorities there cited; *George v Rockett* (1990) 170 CLR 104 at 111-113; [1990] HCA 26 considering the term "if it appears to a justice" in s 679 of the *Criminal Code* (Q).

to attempt suicide. The term "has reasonable grounds for believing", when conditioning the exercise of a statutory power by reference to the person upon whom the power is conferred, is generally construed as meaning that the person must form the requisite belief and the belief must be based on reasonable grounds[59]. The term may sometimes be used in a statutory setting which does not require the requisite belief to be held so long as reasonable grounds for such a belief exist. This Court so held in *George v Rockett*[60] in relation to the power of justices to issue a search warrant under s 679 of the *Criminal Code* (Q). But that construction appears to have turned upon the particular structure of that section and the place in it of the words "reasonable grounds for believing" not linked directly to the state of mind of the justices. They were there used as part of an attribute of things which might be seized under the warrant.

57 In my opinion, the power of apprehension conferred by s 10, in the circumstances of this case, required the officers, before exercising that power, to form a subjective belief, albeit it had to be based upon reasonable grounds, that Mr Veenstra was likely to attempt suicide. What had occurred prior to the intervention of the officers, while indicative of preparations to commit suicide, did not indicate that an attempt had been undertaken. That is to say, the alternative necessary condition under s 10(1)(a) for the exercise of the power had not been satisfied. The section does not state the time interval over which the likelihood of an attempt is to be assessed. It is apparent from the Second Reading Speech of May 1985, however, that the section was intended to enable a response to what the Minister described as "an emergency situation". This suggests that the relevant likelihood is that the person is about to or will shortly attempt suicide unless apprehended.

58 In the present case it is clear from the findings of fact by the primary judge, accepting the testimony of the officers, that they did not think Mr Veenstra was mentally ill. That was an opinion they were entitled to form. The fact that a person has decided to commit suicide may indicate deep unhappiness or despair. It does not mean that the person is mentally ill within the meaning of s 8(1A). Mr Veenstra's rational and cooperative responses observed by the officers supported their opinion. The facts as found exclude the possibility that the

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59 *Lloyd v Wallach* (1915) 20 CLR 299 at 304 per Griffith CJ (Powers J agreeing at 314), 308-309 per Isaacs J, 312-313 per Higgins J; [1915] HCA 60; *Moreau v Federal Commissioner of Taxation* (1926) 39 CLR 65 at 68 per Isaacs J; [1926] HCA 28; *Boucaut Bay Co Ltd (In liq) v The Commonwealth* (1927) 40 CLR 98 at 106 per Isaacs ACJ (Gavan Duffy, Powers and Rich JJ agreeing at 108); [1927] HCA 59; *W A Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 566-567 per Brennan J, 569-572 per Lockhart J (Bowen CJ agreeing at 562).

60 (1990) 170 CLR 104 at 112.

officers had formed a belief, after their conversation with Mr Veenstra, that he was likely, shortly, to attempt suicide. On this basis neither of the conditions necessary for the exercise of the power of apprehension was satisfied.

The duty of care

59 The primary duty said to be owed to Mr Veenstra and Mrs Kirkland-Veenstra by the two officers was pleaded in the widest terms as "a duty to take reasonable care to protect his and her health and safety".

60 The duty of care identified by the Chief Justice in the Court of Appeal was a duty "to exercise reasonably the statutory power for the purpose of protecting those whom the Act seeks to protect"[61]. The scope of that duty was said to be "comparatively narrow"[62]. Her Honour went on to support her finding that the duty of care existed by saying that[63]:

> "By the conferral of powers by the [1986 Act], the purpose of which was to protect the mentally ill from situations such as this, they had control over the situation."

The scope of the duty as her Honour found it "extended to the assessment of the situation and possibly the provision of assistance as provided for in the Act"[64].

61 Maxwell P diverged from the Chief Justice in his formulation of the duty of care. His Honour formulated it in the terms pleaded in the amended statement of claim as a duty to take reasonable care to protect Mr Veenstra and Mrs Kirkland-Veenstra against reasonably foreseeable risks of harm[65]. Whether the discharge of the duty required the exercise of the power under s 10 was said to be a matter for the jury. His Honour placed emphasis on the "issues of control and knowledge", which he regarded as "particularly significant in this case"[66]. Like the Chief Justice, however, he proceeded on the basis that the power under s 10 was enlivened[67]:

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61 (2008) Aust Torts Reports ¶81-936 at 61,305 [39] and 61,307 [54].

62 (2008) Aust Torts Reports ¶81-936 at 61,307 [54].

63 (2008) Aust Torts Reports ¶81-936 at 61,310 [76].

64 (2008) Aust Torts Reports ¶81-936 at 61,310 [76].

65 (2008) Aust Torts Reports ¶81-936 at 61,314 [99].

66 (2008) Aust Torts Reports ¶81-936 at 61,314 [102].

67 (2008) Aust Torts Reports ¶81-936 at 61,315 [103], referring to s 10(2)(b).

> "In the present case, the [officers] 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. 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'." (footnotes omitted)

62 The judgments of both the Chief Justice and the President turned upon the availability to the officers of the power to apprehend persons under s 10. On the unchallenged fact as found by the trial judge, that they believed that Mr Veenstra was not mentally ill, the power to apprehend him was never enlivened. And on the facts they did not believe, when they decided to let him drive home, that he would be likely, shortly afterwards, to attempt to take his own life. Absent that belief, the power could not be enlivened.

63 The duty of care which the majority in the Court of Appeal found to exist could not have existed because the critical statutory power conferred by s 10, which was in the end the foundation of the duty of care in the circumstances of the case, did not exist.

Conclusion

64 For the preceding reasons, in my opinion, this appeal should be allowed. I agree with the orders proposed in the plurality judgment of Gummow, Hayne and Heydon JJ.

65 GUMMOW, HAYNE AND HEYDON JJ. At about 5.40 on the morning of 22 August 1999 two police officers saw a motor car parked in a beachside car park on the Mornington Peninsula. One of the officers saw a tube leading from the exhaust into a rear window of the car and concluded that someone in the car was "contemplating suicide". The officers spoke to the occupant of the car, Ronald Hendrik Veenstra. Mr Veenstra told the officers that he had been sitting in the car park for two hours and when the officers asked Mr Veenstra about the tube into the car, he said that he had contemplated doing "something stupid".

66 The officers checked the car and its contents. No medication, alcohol or drugs were in the car; the engine was not running and was cold. The officers spoke to Mr Veenstra for about 15 minutes. He told them he had put his thoughts on paper but he would not show them what he had written. One of the officers later said that Mr Veenstra "had a mindset that he wanted to go home and speak to his wife about his marital problems".

67 The officers offered to contact a doctor, to contact Mr Veenstra's family, or to contact the psychiatric Crisis Assessment and Treatment service ("the CAT service"), but Mr Veenstra refused all these offers, saying that he would see his own doctor. The officers concluded that Mr Veenstra showed no sign of mental illness; that he was rational, co-operative and responsible. The officers allowed Mr Veenstra to leave. Later that same day Mr Veenstra took his own life by securing a hose from the exhaust of his car and starting the engine.

68 Mr Veenstra's widow (the plaintiff) brought proceedings in the County Court of Victoria against the two officers and against the State of Victoria (which it is alleged would be responsible for any damages awarded against the officers[68]). She claimed damages under Pt III of the *Wrongs Act* 1958 (Vic) for the wrongful death of her husband, and damages for personal injuries in the form of nervous shock and post-traumatic stress disorder that she alleged she had sustained by reason of the alleged negligence of the officers.

69 In her amended statement of claim, the plaintiff alleged that the officers owed her late husband and her a duty to take reasonable care to protect his and her health and safety. The duties were alleged to have arisen pursuant to "common law ... the effect and operation of section 10 of the *Mental Health Act* [1986 (Vic)] ... [and] the operation of the Victoria Police Manual". The plaintiff alleged her late husband's suicide was caused or contributed to by the officers'

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68 This was said to follow from the application of either s 23 of the *Crown Proceedings Act* 1958 (Vic) or s 123 of the *Police Regulation Act* 1958 (Vic). It is not necessary, however, to examine this question further.

breach of those duties. Many particulars were given of the alleged breach. At trial, however, chief weight was put upon two allegations. First, it was alleged that the officers breached their duty of care by failing to apprehend Mr Veenstra and arrange for him to be examined by a medical practitioner pursuant to s 10 of the *Mental Health Act*. Secondly, it was alleged that, contrary to procedures laid down in the Victoria Police Manual, the officers did not contact the nearest CAT service and stay with Mr Veenstra until he was assessed by that service. (This second way of putting the case was not pressed in this Court. It may be put aside from further consideration.)

70 In her amended statement of claim, the plaintiff also made an alternative claim for breach of statutory duty. It was alleged that the police officers were under a statutory duty to "arrest [Mr Veenstra] and arrange for him to be examined by a medical practitioner pursuant to section 10 of the *Mental Health Act*" or to follow procedures laid down in the Victoria Police Manual about contacting the CAT service. This alternative claim for breach of statutory duty was not pressed at trial.

71 The action was tried in the County Court before a judge and a jury of six. At the conclusion of the evidence, the trial judge (Judge Wood) entered judgment for the defendants, holding that the officers did not owe either the plaintiff or her late husband a duty of care.

72 On appeal to the Court of Appeal of the Supreme Court of Victoria that Court (Warren CJ and Maxwell P; Chernov JA dissenting) held[69] that the police officers owed both Mr Veenstra and his wife a duty of care. The Court set aside the judgment entered for the defendants and remitted the proceeding for retrial.

73 By special leave, the police officers now appeal to this Court. The State of Victoria was joined as the second respondent to the appeal but made submissions in support of the officers' appeal.

74 The appeal should be allowed and the judgment entered at trial in favour of the defendants restored.

The statutory framework

75 All parties to the appeal in this Court recognised the need to begin examination of the issues by reference to the relevant statutory framework. Although closest attention must be given to the relevant provisions of the *Mental*

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69 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,297.

Health Act (and s 10 in particular) it is necessary to notice not only some other statutory provisions, but also some matters of history that lie behind them.

76 The proposition that, at common law, suicide was a "felony equivalent to murder"[70] has been seen[71] as requiring some amplification or qualification. But the proposition was generally accepted in Australia for many years and it is not necessary to consider whether it is complete or accurate. By the time of the events giving rise to this proceeding, suicide was no longer a crime in any State or Territory but it was a crime[72] to incite, aid, abet, counsel or procure commission of suicide.

77 Suicide was not a crime under the *Criminal Codes* of Queensland, Western Australia or Tasmania. In 1967, the Victorian Parliament enacted that "[t]he rule of law whereby it is a crime for a person to commit or to attempt to commit suicide is hereby abrogated"[73]. Inciting or counselling suicide, or aiding or abetting suicide or attempted suicide, were made[74] offences and special provision was made[75] in respect of suicide pacts. And in the same Act[76], a new section, s 463B, was inserted in the *Crimes Act* 1958 (Vic) ("the Victorian Crimes Act") providing that:

> "Every person is justified in using such force as may reasonably be necessary to prevent the commission of suicide or of any act which he believes on reasonable grounds would, if committed, amount to suicide."

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70 Howard, *Australian Criminal Law*, 2nd ed (1970) at 123.

71 Barry, "Suicide and the Law", (1965) 5 *Melbourne University Law Review* 1; Mikell, "Is Suicide Murder?", (1903) 3 *Columbia Law Review* 379.

72 *Crimes Act* 1900 (NSW), s 31C; *Crimes Act* 1958 (Vic), s 6B(2); *Criminal Law Consolidation Act* 1935 (SA), ss 13A(5), 13A(7); *Criminal Code* (Q), s 311; *The Criminal Code* (WA), s 288; *Criminal Code* (Tas), s 163; *Criminal Code* (NT), s 168; *Crimes Act* 1900 (ACT), s 17.

73 *Crimes Act* 1967 (Vic), s 2, inserting s 6A in the *Crimes Act* 1958 (Vic).

74 *Crimes Act* 1958, s 6B(2) as inserted by the *Crimes Act* 1967, s 2.

75 *Crimes Act* 1958, s 6B.

76 *Crimes Act* 1967, s 3.

In 1983 legislation was enacted in New South Wales[77] and South Australia[78] abolishing the rule of law that it is a crime to commit or attempt to commit suicide. And by the same legislation, provision was made in both New South Wales and South Australia justifying the use of force to prevent suicide. Like provisions were made in the Australian Capital Territory in 1990[79] and in the Northern Territory in 1996[80].

78 It is to be noted that provisions like s 463B of the Victorian Crimes Act did not permit apprehension or arrest of a person who had threatened or was threatening suicide. The provisions authorised the application of force to prevent suicide.

79 That s 463B of the Victorian Crimes Act did not authorise apprehension or arrest was apparent from its text. If reinforcement for this construction was necessary (and it most likely was not) it was provided, in Victoria, by s 457 of the Victorian Crimes Act[81] which since 1972 has provided (in effect) that no person may be arrested without warrant except pursuant to the provisions of that Act or some other Act expressly giving power to arrest without warrant.

80 It is against this background that, in 1986, provision was made in Victoria, by s 10 of the *Mental Health Act*, for a police officer to have power if certain conditions are met to apprehend a person who appears to be mentally ill. Section 10 of the *Mental Health Act* (as in force in August 1999) provided:

> "**10.** ***Apprehension of mentally ill persons in certain circumstances***
>
> (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

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77 *Crimes (Mental Disorder) Amendment Act* 1983 (NSW).

78 *Criminal Law Consolidation Act Amendment Act* 1983 (SA).

79 *Crimes (Amendment) Ordinance (No 2)* 1990 (ACT).

80 *Criminal Code Amendment Act* 1996 (NT).

81 As amended by the *Crimes (Powers of Arrest) Act* 1972 (Vic).

(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.

(1A) A member of the police force is not required for the purposes of sub-section (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 sub-section (1) a member of the police force may with such assistance as is required—

(a) enter any premises; and

(b) use such force as may be reasonably necessary.

(3) A member of the police force exercising the powers conferred by this section may be accompanied by a registered medical practitioner.

(4) A member of the police force must as soon as practicable after apprehending a person under sub-section (1) arrange an examination of the person by a registered medical practitioner.

(5) The registered medical practitioner may examine the person for the purposes of this Act."

Some aspects of s 10 should be noticed.

81 First, s 10(1) gives a member of the police force the power to apprehend a person "who appears to be mentally ill" if the member has reasonable grounds for believing one or more matters. What is meant by "appears to be mentally ill" is explained in s 10(1A), a sub-section that directs attention to the behaviour and appearance of the person, and the definition of mental illness in s 8(1A). Section 8(1A) provides that, subject to s 8(2) (which gives a long list of what is *not* sufficient to demonstrate mental illness), mental illness is "a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory".

82 For present purposes, however, the critical observation that must be made about s 10(1) is that it gives *power* to police officers: "[a] member of the police

force *may* apprehend ..." (emphasis added). The sub-section does not in terms impose on police officers an obligation to exercise that power of apprehension if a person appears mentally ill and there are reasonable grounds for the officer to believe that the person has recently attempted or is likely to attempt suicide or to cause serious bodily harm to that person or to some other person. And there may very well be circumstances in which a police officer acting reasonably would not exercise the power even if the conditions for its exercise were met.

Framing the duty of care

83 As noted earlier, the case which the plaintiff pleaded and sought to make at trial was that the officers owed both her late husband and her a duty which was identified as a duty to take reasonable care to protect his and her health and safety. Argument in this Court focused upon whether the officers owed Mr Veenstra a duty of care. It was accepted in this Court (as it had been in the Court of Appeal) that if no duty was owed to Mr Veenstra, the officers owed no duty to the plaintiff. And it was further accepted in this Court that if a duty was owed to Mr Veenstra, and if it was breached and that breach was a cause of psychiatric injury to the plaintiff, the plaintiff would also have an action for damages for that injury[82].

84 The duty which was allegedly owed to Mr Veenstra was defined in oral argument in this Court in slightly different terms from those found in the pleading. Nothing turns on those differences. In this Court, the duty was said to be to take reasonable steps to prevent foreseeable harm to Mr Veenstra at his own hand. The scope of the duty was described as including apprehension and taking him to a medical practitioner for assessment. But it was accepted that the duty was not absolute. That is, it was accepted that there may be cases in which it would be reasonable to do nothing, or to take some step short of apprehension.

85 The framing of the case in this way tended to obscure the distinction between the existence of a duty of care and the considerations which arise in a determination of what a reasonable man would do by way of response to the risk of injury to the plaintiff[83]. In part, this reflects the special nature of the posited duty as a duty to prevent harm to the deceased at his own hand, not at the hand of another.

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82 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

83 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

86 The duty thus posited is novel. It has two particular features which require more detailed examination. First, although framed as a duty to take reasonable steps to prevent foreseeable harm, the particular kind of harm to be prevented is harm at the hand of the person to whom the duty is owed. Secondly, although the duty is framed in general terms (to take reasonable steps to prevent foreseeable harm) it is evident that central to the concept of "reasonable steps" is exercise of an identified statutory power.

A duty to prevent self-harm?

87 The duty which the plaintiff alleged the police officers owed her late husband was a duty to control *his* actions, not in this case to prevent harm to a stranger, but to prevent him harming himself. On its face, the proposed duty would mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy, for its performance would have the officers control conduct of Mr Veenstra deliberately directed at himself.

88 Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law[84]. As Dixon J said in *Smith v Leurs*[85], "[t]he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third"[86]. It is, therefore, "exceptional to find in the law a duty to control another's actions to prevent harm to strangers"[87]. And there is no general duty to rescue. In this respect, the common law differs sharply from civil law. The common law has been described as "individualistic", the civil law as "more socially impregnated"[88].

89 It may be said that the notion of personal autonomy is imprecise, if only because it will often imply some notion of voluntary action or freedom of choice.

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84 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596 [145]; [2002] HCA 54.

85 (1945) 70 CLR 256 at 262; [1945] HCA 27.

86 See also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61.

87 *Smith v Leurs* (1945) 70 CLR 256 at 262.

88 Markesinis and Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed (2002) at 90.

And, as Windeyer J pointed out in *Ryan v The Queen*[89], albeit in a different context, words like "voluntary" are ambiguous. But expressed in the most general way, the value described as personal autonomy leaves it to the individual to decide whether to engage in conduct that may cause that individual harm[90]. As Lord Hope of Craighead put it in *Reeves v Commissioner of Police of the Metropolis*[91], "[o]n the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury"[92].

90 When a duty to control the actions of another is found it will usually be because the person to be controlled is not autonomous. Thus, the duty of care which a gaoler owes a prisoner[93] is owed because the prisoner is deprived of personal liberty and the gaoler has assumed control of the prisoner's person. The prisoner does not have autonomy.

91 Is the duty postulated in this case to be justified on the basis that the person to whom the duty is owed is not capable of exercising personal autonomy? The majority in the Court of Appeal concluded[94] that it was to be inferred from s 10 of the *Mental Health Act* that it was the legislative view "that to attempt suicide is to be mentally ill". If that were right, it may be said that finding the alleged duty of care would not encroach upon the autonomy of the individual because autonomy presupposes full capacity to make choices. But the inference which the Court of Appeal drew is not open. Section 10 does not reveal any legislative view that to attempt suicide is to be mentally ill. Nor, as explained below, has that been the unqualified position of the common law.

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89 (1967) 121 CLR 205 at 244; [1967] HCA 2. See also *Tofilau v The Queen* (2007) 231 CLR 396 at 404-405 [6], 417-418 [49]-[52]; [2007] HCA 39.

90 *Agar v Hyde* (2000) 201 CLR 552 at 583-584 [88]-[90]; [2000] HCA 41.

91 [2000] 1 AC 360 at 379-380.

92 See also *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 477 [14]; [2004] HCA 29; *Tomlinson v Congleton Borough Council* [2004] 1 AC 46; *R (L) v Home Secretary* [2008] 3 WLR 1325 at 1338 [39], 1342 [53].

93 *Howard v Jarvis* (1958) 98 CLR 177 at 183; [1958] HCA 19; *New South Wales v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76.

94 (2008) Aust Torts Reports ¶81-936 at 61,308 [64].

92 That s 10 does not reveal that legislative view is demonstrated by the requirement of s 10 that two conditions be met in order to enliven the power of apprehension: first, that the person appear to be mentally ill and second, that the person has recently attempted or is likely to attempt suicide, or has recently caused or is likely to attempt to cause serious bodily harm, whether to that person or to another. Perhaps an inference of the kind drawn by the majority might have been available if there were no separate requirement that the person concerned appear to be mentally ill, but even then it would be a bold inference to draw that the Victorian legislature assumed that threatening serious harm to oneself or another will in every case suggest mental illness.

93 It is nonetheless important to acknowledge that suicide is often associated with disturbance of "the balance of the mind" or with being of "unsound mind". This was not always so.

94 Bracton, writing in the 13th century, recognised the complexity of suicide. Bracton contrasted[95] the case of "a man [who] slays himself in weariness of life or because he is unwilling to endure further bodily pain" from one who "lays violent hands upon himself without justification, through anger and ill-will, as where wishing to injure another but unable to accomplish his intention he kills himself". The former might have "a successor, but his movable goods are confiscated. He does not lose his inheritance, only his movable goods". On the other hand, the latter "is to be punished and shall have no successor"[96]. But by the 16th century distinctions of this kind were lost in the general condemnation[97] of suicide as "an offence against nature, against God, and against the King. Against nature, because it is contrary to the rules of self-preservation ... Against God, in that it is a breach of His commandment, *thou shalt not kill* ... Against the King in that hereby he has lost a subject, and ... he being the head [of the body politic] has lost one of his mystical members."[98] And of these three causes for condemnation, it was the religious that may be seen as having had chief influence on the later development of the law.

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95 Bracton, *De Legibus et Consuetudinibus Angliae* (Woodbine ed, Thorne trans, 1968) ("Bracton"), vol 2, f 150 at 424.

96 Bracton, vol 2, f 150 at 424.

97 *Hales v Petit* (1562) 1 Plowden 253 at 261 [75 ER 387 at 400].

98 This reflected the notion of the "body politic" current at the time *Hales v Petit* was decided: *Thomas v Mowbray* (2007) 233 CLR 307 at 362 [142]; [2007] HCA 33.

95 A suicide was buried at night, at a crossroads, and the corpse was defiled. The last recorded instance of this being done in England was in 1823[99]. In Victoria, the *Coroners Act* 1896, in a provision drawing upon English statutory sources[100], provided that upon a coroner's finding of a verdict of suicide (*felo de se*) it was not necessary that the interment of the body "take place between the hours of nine and twelve at night" and that the coroner could not forbid the performance of any of the rites of Christian burial.

96 The performance of the rites of Christian burial was not authorised on the interment of the remains of a person who had committed suicide, unless, significantly, the deceased was shown to have been *non compos mentis* at the time[101]. During the 20th century, perhaps even earlier, coroners or juries would often add to a verdict that the deceased had killed himself or herself, words to the effect "whilst of unsound mind" or "whilst the balance of [his or her] mind was disturbed". Riders to this effect were added even where there was no medical evidence to support the conclusion[102].

97 In these circumstances, the association that may have developed in the past between suicide and mental illness provides no certain foundation for a conclusion that a person threatening suicide will in every case lack the capacity to decide what to do. That is, the historical association between suicide and mental illness provides no sufficient basis upon which to impose a duty of care which denies the personal autonomy of the person to whom it is owed. And the provisions of the *Mental Health Act* not only do not provide such a basis, they reinforce the need to give effect to personal autonomy.

98 Contrary to the inference drawn by the majority in the Court of Appeal in this case, the premise for the provisions that now appear in s 10 of the *Mental Health Act* is that a person threatening suicide may or may not be suffering mental illness. Moreover, the central premises for the *Mental Health Act* are that its provisions are directed to "the care, treatment and protection of mentally ill people who do not or cannot consent to that care, treatment or protection"[103] and that "every function, power, authority, discretion, jurisdiction and duty conferred

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99 Barry, "Suicide and the Law", (1965) 5 *Melbourne University Law Review* 1 at 6.

100 4 Geo IV c 52; *Interments (felo de se) Act* 1882 (UK).

101 *Halsbury's Laws of England*, 1st ed, vol 9 at 592-593, par 1198.

102 *Jervis on The Office and Duties of Coroners*, 9th ed (1957) at 180, 484.

103 s 4(1)(a).

or imposed by [that] Act is to be exercised or performed" so that those suffering a mental disorder are given the best possible care and treatment in the "least possible intrusive manner" and so that restrictions on liberty and interference with rights, privacy, dignity and self-respect are kept "to the minimum necessary in the circumstances"[104]. That is, the *Mental Health Act* reinforces the importance of that value of personal autonomy which must inform the development of the common law.

99 The duty which is postulated in the present case is expressed in terms which, on their face, would require every person who knows (perhaps every person who *ought* to know) that another is threatening self-harm to take reasonable steps to prevent that harm. Presumably, performance of a duty described in those terms would require the person, in an appropriate case, to exercise the power given by s 463B of the Victorian Crimes Act (or equivalent provisions) and use reasonable force to prevent the commission of suicide or "of any act which he believes on reasonable grounds would, if committed, amount to suicide". Presumably it is a duty which would require the person to call for police so that they could exercise powers under s 10. And all this regardless of whether the person threatening self-harm is in fact mentally ill, or appears to be so. So expressed the duty would be a particular species of a general duty to rescue. The common law of Australia has not recognised, and should not now recognise, such a general duty of care.

100 No doubt it was with that in mind that, despite the general terms in which the postulated duty was described, the plaintiff submitted that the duty was one which should be understood as arising from the "peculiar relationship" created by s 10 of the *Mental Health Act*. That is, although the plaintiff submitted that the relevant scope of the duty in this case included but was not limited to exercising the powers given by s 10 of the *Mental Health Act*, the duty of care which the plaintiff alleged the police officers owed her late husband was a duty that they were alleged to owe *because* they were members of the police force. Thus, although expressed in general terms (as a duty owed to Mr Veenstra to take reasonable steps to prevent foreseeable harm to him at his own hand) it was not submitted that the duty was owed by anyone and everyone who came upon the scene in the car park and observed a tube leading into the car. Rather, the premise for the plaintiff's argument was that the officers owed the asserted duty because they, as members of the police force, had a particular power to intervene.

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104 s 4(2).

101 Understood in this way, the duty alleged is revealed as being a duty to exercise a statutory power. This aspect of the matter merits separate consideration.

A duty to exercise a statutory power?

102 The duty which it is said should be found is a duty to be expressed as part of the single and unified common law of Australia[105]. Yet it is a duty that is said to be owed only by those who have a specific statutory power, and it is a duty that is said to arise out of the "relationship" created by the existence of that power.

103 Whether the asserted duty exists is not determined by whether the conditions for exercise of the statutory power are shown to have existed in a particular case. The existence of facts satisfying those conditions would be a central part of the inquiry about breach. Rather, in deciding whether the officers owed the asserted duty it is necessary to consider what is the duty which it is said is owed by those who have a specific statutory power, and how is that duty said to arise out of the "relationship" created by the existence of that power. Both the specificity of the duty and the nature of the alleged "relationship" require further examination.

104 Argument of the present matter proceeded with little reference to the statute law of other Australian jurisdictions. Yet if the plaintiff is right to say that the police officers owed Mr Veenstra a common law duty of care, it is presumably a duty that finds at least some reflection and operation outside Victoria[106].

105 State and Territory legislation concerning mental health is not uniform. At the times relevant to this matter, however, all jurisdictions made some provision[107] permitting police officers to apprehend persons who appeared to be mentally ill and who appeared to present danger to themselves or others. Those

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105 *Lipohar v The Queen* (1999) 200 CLR 485; [1999] HCA 65.

106 See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-63 [23]-[25], 83 [91]; [1999] HCA 67.

107 See *Mental Health Act* 1990 (NSW), s 24; *Mental Health Act* 1993 (SA), s 23; *Mental Health Act* 1974 (Q), s 26; *Mental Health Act* 1996 (WA), s 195; *Mental Health Act* 1963 (Tas), s 100; *Mental Health Act* (NT), s 9; *Mental Health (Treatment and Care) Act* 1994 (ACT), s 37.

provisions can be said to be generally similar to s 10 of the *Mental Health Act* but they were not identical to s 10.

106 Although the duty asserted was, for the reasons given earlier, a duty to take reasonable care to protect from harm by exercising a statutory power, it was a duty to take care by exercising an *available* statutory power. So understood, it is apparent that the duty could not be confined to the particular power given by s 10 of the *Mental Health Act*.

107 First, the duty must be one that would require exercise of the powers given by equivalent provisions in other jurisdictions. Secondly, and more importantly, the duty of care alleged by the plaintiff could not be confined to a duty to take reasonable care to protect a person from self-harm by exercising statutory powers under applicable mental health legislation. The duty alleged could not be confined to cases of self-harm and could not be confined to cases in which powers under mental health legislation may be engaged. Rather, the duty alleged in this case would necessarily be a particular example of a more general duty of care owed by those who have statutory power to take action in exercise of that power, whenever two conditions are satisfied: it is reasonable to do so and acting will be likely to protect another from physical harm. And although the duty alleged in this case is said to have been owed to Mr Veenstra to take reasonable care to protect him from harm at his *own* hand, there is no basis upon which the relevant duty of care could be confined to cases of self-harm. If owed, the duty must extend to preventing harm to at least some others. For the reasons given earlier, no such general duty should be found to have been owed by the police officers.

108 Even if the duty could be confined to a more particular class of cases, of which this is an example, no such duty should be held to exist. The duty alleged in this case was said to arise out of the relationship created by the existence of the power given to police officers by s 10 of the *Mental Health Act*. Though not explored in any detail in either written or oral argument the "relationship" said to be created by the existence of the power must be understood as a reference to a relationship between Mr Veenstra and the police officers that followed from, or was created by, the existence of facts and circumstances which enlivened consideration of whether the statutory power was to be exercised. That is, the statutory power is said to be coupled with a common law duty of care that would require not only consideration of the exercise of the power but also its exercise whenever reasonable to do so.

109 The immediate answer to this proposition may be thought to be that this is not what s 10 of the *Mental Health Act* provides, and no other statutory source of such obligations was identified. But it is necessary to explain why s 10 itself

does not found the plaintiff's action and to examine further why the common law does not impose a duty of care.

110 As noted earlier, the plaintiff had pleaded a claim for breach of statutory duty but that claim was not pressed at trial. Because s 10 of the *Mental Health Act* confers power but does not impose a duty to exercise the power, the abandonment of the claim for breach of statutory duty derived from that Act was inevitable and right[108]. That is, the existence of such a cause of action is not to be inferred from "a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed [or in this case authorised], the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation"[109].

111 Why, then, does the common law not impose a duty of care?

112 There can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition. Statutory power to act in a particular way, coupled with the fact that, if action is not taken, it is reasonably foreseeable that harm will ensue, is not sufficient to establish a duty to take that action. Rather, as was pointed out in *Graham Barclay Oysters Pty Ltd v Ryan*[110], the existence or otherwise of a common law duty of care owed by a statutory authority (or in this case the holder of statutory power) "turns on a close examination of the terms, scope and purpose of the relevant statutory regime". Does that regime erect or facilitate "a relationship between the authority [here the holder of statutory power] and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence"[111]?

113 Evaluation of the relationship between the holder of the power and the person or persons to whom it is said that a duty of care is owed will require examination of the degree and nature of control exercised over the risk of harm

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108 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 404-405; [1967] HCA 31; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 457-461; [1995] HCA 24; *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 at 315-316 [27]-[29]; [2001] HCA 6.

109 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

110 (2002) 211 CLR 540 at 596-597 [146].

111 (2002) 211 CLR 540 at 596-597 [146].

that has eventuated[112], the degree of vulnerability of those who depend on the proper exercise of the relevant power[113], and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute[114]. Other considerations may be relevant[115].

114 In the present matter, as in a number of cases about the exercise of statutory power[116], it is the factor of control that is of critical significance. It was not the officers who controlled the source of the risk of harm to Mr Veenstra; it was Mr Veenstra alone who was the source of that risk. For the reasons that have been expressed in connection with consideration of the value of personal autonomy, this factor is of predominant importance.

115 The present case stands in sharp contrast to *Crimmins v Stevedoring Industry Finance Committee*[117]. In that case the Court held that the Australian Stevedoring Industry Authority owed a waterside worker a common law duty to take reasonable care to protect him from reasonably foreseeable risks of injury arising from his employment by registered stevedores. The conclusion reached by the majority of the Court was founded on considerations that were identified as finding close analogy with those which lead to an employer being responsible

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112 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 597 [149]. See also *Howard v Jarvis* (1958) 98 CLR 177 at 183; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-552, 556-557; [1994] HCA 13.

113 *Graham Barclay Oysters* (2002) 211 CLR 540 at 597 [149]. See also *Burnie Port Authority* (1994) 179 CLR 520 at 551; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-25 [44]-[46], 38-39 [91]-[93], 40-41 [100]; [1999] HCA 59.

114 *Graham Barclay Oysters* (2002) 211 CLR 540 at 597-598 [149]; *Sullivan v Moody* (2001) 207 CLR 562 at 581-582 [55]-[62]; [2001] HCA 59.

115 *Graham Barclay Oysters* (2002) 211 CLR 540 at 598 [149]; *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 16-17 [47], 23-24 [76]; [2001] HCA 19.

116 *Crimmins* (1999) 200 CLR 1 at 24-25 [43]-[46], 42-43 [104], 61 [166], 82 [227], 104 [304], 116 [357]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102]; [2001] HCA 29; *Graham Barclay Oysters* (2002) 211 CLR 540 at 598-599 [150]-[152]. See also *Burnie Port Authority* (1994) 179 CLR 520 at 551-552; *Agar v Hyde* (2000) 201 CLR 552 at 562 [16], 564 [21], 581-582 [81]-[83].

117 (1999) 200 CLR 1.

for providing a safe system of work and a safe place of work. The Authority had or should have had knowledge of the special risks to which the workers were subject and could control (or at least minimise) those risks by the exercise of its statutory powers. And it was the Authority that put the workers at risk of harm because it was the Authority that assigned the workers to particular stevedores. The Authority was held to control the source of the risk of harm to the workers.

116 No similar analogy with existing relationships giving rise to a duty of care can be drawn in the present case. More particularly, the police officers did not control the source of the risk to Mr Veenstra as would have been the case if he had been a prisoner in custody[118]. No doubt it can be said that the police officers knew of the particular risk to Mr Veenstra. They had, after all, observed the preparations Mr Veenstra had made at the car park. No doubt it can also be said that they were in a position to control or minimise the occurrence of the observed risk (in this case because they had the power given by s 10 of the *Mental Health Act*). But considerations of the same kind will almost always be present when a passer-by observes a person in danger. The passer-by can see there is danger; the passer-by can almost always do something that would reduce the risk of harm. Yet there is no general duty to rescue. And unlike the case in *Crimmins*, it was not the officers who put Mr Veenstra in harm's way. They came upon the scene which Mr Veenstra had created. Were they to intervene to prevent *his* conduct? That question is not answered by pointing to what was decided in *Crimmins*.

117 Contrary to the plaintiff's submissions, this was not a case in which principles of the kind examined in *Pyrenees Shire Council v Day*[119] are engaged. In that case, a public authority had entered upon[120] the exercise of its statutory

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118 cf *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360; *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115; [2009] 1 All ER 1053. As Lord Rodger of Earlsferry pointed out in *Savage* [2009] 2 WLR 115 at 125 [25]; [2009] 1 All ER 1053 at 1064, "under the domestic law of the United Kingdom there is no general legal duty on the state to prevent everyone within its jurisdiction from committing suicide". And the obligation of the State, under Art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, incorporated into United Kingdom domestic law by the *Human Rights Act* 1998 (UK), to protect everyone's right to life, requires steps to prevent suicide by prisoners, military conscripts, and hospital patients, not the population at large: [2009] 2 WLR 115 at 123-133 [18]-[50]; [2009] 1 All ER 1053 at 1062-1072.

119 (1998) 192 CLR 330; [1998] HCA 3.

120 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391 [177].

powers with respect to a particular subject-matter (fire prevention). The authority was held to have owed a duty to take reasonable care in exercising those powers. But the case was a particular example of the general proposition[121] that "when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered".

118 In the present matter, the complaint is not about the care with which a statutory power was exercised; it is a complaint that the power was *not* exercised. That is, the submission in the present case is that the existence of the statutory power, coupled with proof of the existence of facts that would have warranted its exercise, should be held to give the plaintiff a cause of action for the damage occasioned as a result of the power not being exercised. For the reasons that have been given, the characteristics of the relationship between the police officers (as holders of the power given by s 10 of the *Mental Health Act*) and Mr Veenstra (as the person against whom the power would be exercised) do not answer the criteria for intervention by the tort of negligence[122].

119 Whether the police officers acted reasonably in allowing Mr Veenstra to go home has never been decided in this litigation. The decisions in the courts below, and in this Court, turn only on the question of duty of care. We are therefore not to be taken as expressing a view about any question of breach, or whether the facts found at first instance demonstrated that s 10 of the *Mental Health Act* could have been engaged.

120 It is not necessary to consider the more general questions addressed in argument about the tortious liability of police[123] in other circumstances.

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121 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220; [1957] HCA 14.

122 *Graham Barclay Oysters* (2002) 211 CLR 540 at 596-597 [146], 597-598 [149].

123 cf *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; [2005] 2 All ER 489; *Smith v Chief Constable of Sussex Police* [2008] 3 WLR 593; [2008] 3 All ER 977; *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129; *Zalewski v Turcarolo* [1995] 2 VR 562.

Conclusions and orders

121 For these reasons, the trial judge was right to hold that the police officers did not owe Mr Veenstra the duty of care upon which the plaintiff's claim under the *Wrongs Act* depended. It was not disputed that it follows that the officers did not owe the plaintiff the duty of care upon which her action for damages for psychiatric injury depended.

122 The appeal should be allowed. The orders of the Court of Appeal (except in so far as they deal in par 4 with the costs of the appeal to that Court) should be set aside and in their place there should be orders that each party should bear its own costs of the proceedings at first instance, but that otherwise the appeal to the Court of Appeal is dismissed. Consistent with the terms on which special leave to appeal to this Court was granted, the appellants should pay the first respondent's costs of the appeal to this Court. The second respondent should bear its own costs.

123 CRENNAN AND KIEFEL JJ. The facts relevant to this appeal are set out in the reasons of French CJ and in the reasons of Gummow, Hayne and Heydon JJ. We agree that the appeal should be allowed. We have taken a different view from others of the essential reasoning of the majority in the Court of Appeal to the conclusion that the police officers came under a duty to exercise a common law duty of care consonant with the statutory power in question. It is evident from that reasoning, which the plaintiff sought to uphold, that the obligation to exercise the power derives entirely from the statute and is therefore apposite to an action for breach of statutory duty, which the plaintiff disclaimed. Such a cause of action has some features in common with the action upon which the plaintiff relied, which depended upon the existence of a duty of care at common law. Regardless of the true nature of the plaintiff's cause of action, we consider that the conditions necessary to engage the statutory power in question were not present.

124 The action brought by Mrs Kirkland-Veenstra ("the plaintiff") was based upon the existence of a common law duty of care which required the two police officers, who spoke to her husband on the morning of 22 August 1999, to take steps which would prevent him from taking his own life. The common law does not recognise a duty to rescue another person. The plaintiff's case therefore relied upon the power of apprehension contained in s 10(1) of the *Mental Health Act* 1986 (Vic) ("the Act"). It was alleged that the common law would consider the police officers to have been obliged to utilise that power.

125 Section 10(1) of the Act provides that a member of the police force "may apprehend a person who appears to be mentally ill" if they have reasonable grounds for believing that the person has recently attempted suicide or to cause serious bodily harm to herself or himself or some other person, or is likely to do so. The police officer is not required 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."[124] "Mental illness" is defined[125] as a "medical condition that is characterised by a significant disturbance of thought, mood, perception or memory."

126 The majority in the Court of Appeal discussed cases concerned with whether public authorities might come under a duty of care and the factors which have been identified as relevant to that inquiry. The control of the risk to the plaintiff's husband, provided by the power in s 10(1), together with the police

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124 *Mental Health Act* 1986 (Vic), s 10(1A).

125 *Mental Health Act* 1986, s 8(1A).

officers' knowledge of that risk was regarded as being of particular importance[126]. The duty was found to exist because of the police officers' awareness that the plaintiff's husband had taken steps preparatory to suicide and because they were considered to have a power which had as its purpose the protection of a class of persons of which the plaintiff's husband was a member[127]. That class was identified as persons who a police officer believes, on reasonable grounds, have recently attempted or are likely to attempt suicide[128]. In their Honours' view, "the necessary facts were present for the exercise of the power."[129]

127 The common law generally does not impose a duty upon a person to take affirmative action to protect another from harm[130]. Such an approach is regarded as fundamental to the common law and has as its foundation concepts of causation. The law draws a distinction between the creation of, or the material increase of, a risk of harm to another person and the failure to prevent something one has not brought about. The distinction may be seen as reflected in notions of misfeasance and non-feasance[131]. So far as concerns situations brought about by the action of the person at risk, it is the general view of the common law that such persons should take responsibility for their own actions[132]. In this, English

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126 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,310 [76] per Warren CJ, 61,314-61,315 [101]-[103] per Maxwell P.

127 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,308 [63], 61,309-61,310 [72], 61,310 [75] and 61,310 [76] per Warren CJ, Maxwell P agreeing.

128 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,308 [63] per Warren CJ, Maxwell P agreeing.

129 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,305 [39] per Warren CJ, Maxwell P agreeing.

130 *Smith v Leurs* (1945) 70 CLR 256 at 262 per Dixon J; [1945] HCA 27; *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J; [1963] HCA 56; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 444 per Gibbs CJ; [1985] HCA 41; *Stovin v Wise* [1996] AC 923 at 943 per Lord Hoffmann.

131 The significance of which in this sphere was questioned in *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29; cf *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 479 per Brennan J.

132 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 368 per Lord Hoffmann; Weinrib, "The Case for a Duty to Rescue", (1980) 90 *Yale Law Journal* 247 at 268.

law has been seen to have an affinity with Roman law, in its reluctance to interfere or to encourage interference with the freedom of the individual[133]. The common law does recognise that some special relationships may require affirmative action to be taken by one party[134] and are therefore to be excepted from the general rule. Examples of such relationships are employer and employee, teacher and pupil, carrier and passenger, shipmaster and crew.

128 The refusal of the English common law to impose a general duty to act has been criticised[135]. Civil law countries impose criminal sanctions where a person fails to assist[136]. German law imposes such an obligation in circumstances where there is imminent peril and a person can act without danger to themselves. Even so, that obligation does not arise in the case of a person attempting suicide because the peril is viewed as an act of will, at least in cases where the person is not insane[137].

129 In principle a public authority exercising statutory powers should not be regarded by the common law any differently from a citizen. It should not be considered to have an obligation to act[138]. But the position of a public authority is not the same as that of a citizen and the rule of equality is not regarded as wholly applicable[139]. It has public functions and it has statutory powers which the citizen does not. Some powers might be effective to avert or minimise a risk

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133 Zimmermann, *The Law of Obligations*, (1996) at 1044.

134 As Gummow J observed in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 61 [165]; [1999] HCA 59.

135 See Weinrib, "The Case for a Duty to Rescue", (1980) 90 *Yale Law Journal* 247 at 250.

136 See Feldbrugge, "Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue", (1966) 14 *American Journal of Comparative Law* 630.

137 Gordley and von Mehren, *An Introduction to the Comparative Study of Private Law*, (2006) at 369-370.

138 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459-460 per Mason J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 580 [91] per McHugh J; [2002] HCA 54.

139 See Allars, "Tort and Equity Claims Against the State", in Finn (ed), *Essays on Law and Government: Volume 2, The Citizen and the State in the Courts*, (1996) 49 at 49.

of harm to particular persons or their property, but the statute might not oblige their use. The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way[140].

130 The common law duty in question is to be distinguished from one arising under the statute which provides the public authority's powers. The action for breach of statutory duty, although itself a tort, is regarded as distinct from the tort of negligence. It will be necessary to return to the elements of this action in more detail later in these reasons. In a case where a general duty of care is alleged, it is said that the statute cannot itself be regarded as the source of the duty; rather it is the foundation or setting for it[141]. The duty of care is said to arise independently of the statute[142]. The existence of statutory powers is necessary, but not sufficient, to give rise to a duty of care[143].

131 No guiding principle, by which an authority might be considered to be obliged to exercise its powers at common law, has been identified; the search continues[144]. There is agreement that the statutory powers in question must be directed towards some identifiable class or individual, or their property, as distinct from the public at large[145].

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140 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 60 [162] per Gummow J.

141 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 434 per Gibbs CJ, 459-460 per Mason J; and see *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 60 [163] per Gummow J.

142 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 575 [80] per McHugh J.

143 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 434 per Gibbs CJ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 622 [289] per Hayne J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 575-576 [80]-[81] per McHugh J.

144 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 630 [316] per Hayne J.

145 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 40 [99] per McHugh J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633 [326] per Hayne J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 562 [32] per Gleeson CJ, 575 [79] per McHugh J.

132 Different factors have been identified, from time to time, as relevant to the existence of a duty of care. Not all have continued to be regarded as useful. Notions of proximity and general reliance are no longer considered to provide the answer to the question of whether an authority should be considered to have been obliged to exercise its powers. In this case the majority in the Court of Appeal identified as of particular relevance the vulnerability of the plaintiff's husband and the control that the officers had over the risk of harm which eventuated, because of the powers given by s 10. The majority emphasised that the Act intended those powers to be used to protect a person such as him.

133 The vulnerability of a plaintiff was referred to in *Pyrenees Shire Council v Day*[146] as an aspect of the plaintiff's supposed reliance upon an authority to use its powers[147]. A focus on vulnerability may in part explain the decision in *Crimmins v Stevedoring Industry Finance Committee*[148]. It has not been universally accepted as a useful analytical tool[149]. In *Graham Barclay Oysters Pty Ltd v Ryan*, Gummow and Hayne JJ treated the degree of a plaintiff's vulnerability as part only of an evaluation as to whether a relationship may be seen to exist between a statutory authority and the class of persons in question[150]. Establishing the existence of a relationship between a plaintiff and a public authority has the advantage of coherence with the exceptions, already recognised by the common law, to the general rule that there is no duty of affirmative action.

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146 (1998) 192 CLR 330; [1998] HCA 3.

147 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 361 [77] per Toohey J, 372-373 [116] per McHugh J. And see also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24 [43] per Gaudron J and the cases therein cited, in particular *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; [1994] HCA 13; *Hill v Van Erp* (1997) 188 CLR 159 at 186 per Dawson J, 216 per McHugh J; [1997] HCA 9; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [11] and 195 [13] per Gleeson CJ, 202 [41]-[42] per Gaudron J, 236 [149]-[151] per McHugh J, 259 [216] per Gummow J, 289 [296] per Kirby J and 328 [416] per Callinan J; [1999] HCA 36. See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 577 [84] per McHugh J, 631-632 [254] per Kirby J and 664 [321] per Callinan J.

148 (1999) 200 CLR 1 at 24-25 [43]-[44] per Gaudron J, 40-41 [100] per McHugh J, 85 [233] per Kirby J.

149 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 627 [308] per Hayne J.

150 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 597-598 [149].

134 Reference was made in the judgment of Warren CJ in the Court of Appeal to a class of persons, which included the plaintiff's husband, who might be described as "especially vulnerable"[151]. But her Honour did not connect that vulnerability to a concept such as reliance or to the existence of a relationship. The point made by her Honour was that the Act had a specific class in contemplation as the object of the power provided for in s 10, which is an exercise in statutory interpretation.

135 A relationship might be seen to arise when an authority has commenced exercising its powers towards a class of individuals. In *Pyrenees Shire Council v Day*[152] McHugh J referred to the Council's "entry into the field of inspection" as connected with the reliance of persons upon the Council to protect them from danger[153]. Warren CJ referred to the police officers in this case as having "entered the field"[154]. This overlooks the fact that the allegation and the evidence in this case were that the power in question was not used at all.

136 The measure of control which may be provided by a statute, with respect to the safety of persons or property, has been considered to be indicative of a duty of care[155]. It was influential to the reasoning of both Warren CJ and Maxwell P in the Court of Appeal. Maxwell P in particular emphasised that the police officers had legal authority to exercise control over the risk that the plaintiff's husband might commit suicide and could do that which no other person could, without exposure to civil liability, namely apprehend a person, using such force as was necessary[156].

137 In *Pyrenees Shire Council v Day*[157] Gummow J considered that the measure of control which the Council had with respect to the prevention of fire, and which included its knowledge of the risk to the plaintiff's property, was the

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151 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,309 [64].

152 (1998) 192 CLR 330.

153 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 372 [115].

154 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,305 [44].

155 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 389 [168] per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 61 [166] per Gummow J.

156 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,315 [103].

157 (1998) 192 CLR 330.

touchstone of its liability[158]. In *Brodie v Singleton Shire Council*[159] it was said that, whatever be the significance now of the distinction between misfeasance and non-feasance, powers may give a public authority such a significant and special measure of control regarding the safety of persons as to impose a duty on the authority to exercise them[160]. The importance of control as a basis for the existence of a duty of care was adverted to by Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan*[161] and was referred to by Gummow and Hayne JJ as a factor of fundamental importance in discerning a duty of care on the part of a public authority[162].

138 Questions about the degree of a public authority's control over the risks to which a plaintiff was exposed will usually be answered by reference to the statute providing for those measures. Where a statute provides significant and special measures, which may be seen to be directed towards the risk of harm to a class of persons or property, attention is directed to the purpose for which the measures have been provided. If part of the rationale for excepting a public authority from the general rule of the common law, that no affirmative action is required, is the availability of statutory powers, their purpose must necessarily be considered. In the present case the majority in the Court of Appeal clearly considered it to be a matter of importance. The issue, as stated by Warren CJ, was whether a duty of care exists to exercise the statutory power for the purpose of protecting those whom the Act seeks to protect[163]. Maxwell P described the Act as one which contained health and safety powers to safeguard mentally ill people against the gravest of risks[164].

139 The evident purpose of statutory provisions, which might be utilised to prevent or minimise harm, has been identified as relevant to the existence of a duty of care in cases in this Court. The powers given to the Council in *Pyrenees Shire Council v Day* were considered by Gummow J to have been provided to

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158 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 389 [168].

159 (2001) 206 CLR 512.

160 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 559 [102] per Gaudron, McHugh and Gummow JJ.

161 (2002) 211 CLR 540 at 558 [20].

162 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 598 [150].

163 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,305 [39].

164 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,317 [115].

further the legislative purpose of fire prevention[165]. In *Crimmins v Stevedoring Industry Finance Committee* and again in *Graham Barclay Oysters Pty Ltd v Ryan*, McHugh J observed that some powers are clearly enough conferred because the legislature intends that the power will be exercised, in appropriate circumstances, to protect the specific class of persons or property[166]. His Honour considered that the judgment of Lord Hoffmann in *Stovin v Wise*[167] should be understood in this way[168].

140 The duty alleged to arise in this case can be seen as referable entirely to the Act. In such a case factors such as control are neither independent of, nor external to, the statute. They are features of the statutory scheme itself. Putting to one side, for the moment, any distinction between power and duty, as the subjects of the two different causes of action, it may be observed that this case is analogous to one for breach of statutory duty. In particular, on the view taken by the Court of Appeal, the act to be performed is directed by the statute towards an identifiable class of persons which the Act intends to protect. The action for breach of statutory duty was described in *Byrne v Australian Airlines Ltd*[169] in these terms:

> "A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection."

141 A comparison may be drawn between this action and that arising under German law. There a duty to take affirmative action, on the part of a public official or body, may arise from the protective purpose of a legislative rule which was created to prevent the mischief that occurred[170]. The focus of the German

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165 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391 [175].

166 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 40 [99]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 576 [82].

167 [1996] AC 923.

168 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 576 [82].

169 (1995) 185 CLR 410 at 424 per Brennan CJ, Dawson and Toohey JJ; [1995] HCA 24.

170 Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology*, (2001), vol 2 at 262.

courts is accordingly on the relevance and meaning of the official duty and the purpose it is to serve[171]. The principal control of actionability lies in the requirement that the duty be owed to an individual, as a member of a protected group. It is explained that this requirement is viewed much more strictly than in English law[172].

142 The requirement of legislative intention concerning the availability of a cause of action has been regarded as the defining feature of the action for breach of statutory duty. The difficulty, in most cases, of discerning an intention on the part of the legislature, that a remedy be provided to the persons to whom the statute might be seen as directed, was referred to by Dixon J in *O'Connor v S P Bray Ltd*[173]. His Honour observed that the legislature will rarely express such an intention. Resort has therefore often been had to presumptions or policy to supply the intention[174].

143 In cases where a statute provides significant and special measures for the protection of classes of persons or of property, the difficulty with ascertaining legislative intention may not be so acute, at least where it may be discerned that the legislature would have expected the powers to have been exercised in the circumstances which prevailed. Cases such as *R v Deputy Governor of Parkhurst Prison; Ex parte Hague*[175] which state that an intention to protect individuals is not of itself sufficient to support an action for breach of statutory duty might be distinguished on this basis. The provisions in *Pyrenees Shire Council v Day* provide an example of a case where a legislative intent may have been inferred, although it was not necessary to resort to it in that case. There the plaintiffs did not rely upon breach of statutory duty to uphold the finding of liability, on the part of the Council, on the appeal to this Court, although they had pleaded that cause of action, in the alternative[176].

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171 Markesinis and Unberath, *The German Law of Torts*, 4th ed (2002) at 895; and see case note 132 at 953-956.

172 Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology*, (2001), vol 2 at 234, 235.

173 (1937) 56 CLR 464 at 477-478; [1937] HCA 18; and see *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; [1967] HCA 31.

174 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 478; and see *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J.

175 [1992] 1 AC 58 at 170-171 per Lord Jauncey of Tullichettle.

176 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 350 [40] per Toohey J.

144 The existence of a power coupled with a discretion may not suffice for an action for breach of statutory duty. The statute must oblige the exercise of those powers in the circumstances which prevail. In *Sutherland Shire Council v Heyman*[177] Gibbs CJ observed that the relevant statutory provisions conferred powers on the Council but did not place it under a statutory duty which was required to be performed. The power given by s 10(1) of the Act is not expressed to oblige a police officer to apprehend a person who fulfils the description there provided – a mentally ill person who has recently attempted to suicide or to harm themselves or some other person or is likely to do so. There may be circumstances where those indicia are present but an officer is nevertheless justified in not apprehending a person[178]. This may account for the choice implied by the word "may" in the sub-section. The common law may not interfere with the exercise of a discretion[179]. No factors relevant to the exercise of such a discretion were said to be present in this case, if the power was enlivened.

145 In *Pyrenees Shire Council v Day*[180] Brennan CJ said that the existence of a discretion to exercise a power is not necessarily inconsistent with a duty to exercise it[181]. The case to which his Honour referred, *Julius v Lord Bishop of Oxford*[182], whilst concerned with a matter of public law, the issue of a writ of mandamus, also involved the construction of a statutory provision which included the words "it shall be lawful" in connection with the exercise of power. The nature and object of a power, and the persons for whose benefit it is intended to be exercised, were matters which Earl Cairns LC considered might "couple the power with a duty" so as to oblige its exercise[183].

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177 (1985) 157 CLR 424 at 447.

178 As the reasons of Gummow, Hayne and Heydon JJ observe at [82].

179 See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 575 [80] per McHugh J.

180 (1998) 192 CLR 330.

181 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 346 [23].

182 (1880) 5 App Cas 214.

183 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223 and see also at 225 and 227, 229-230 per Lord Penzance and 235 per Lord Selborne.

146 The discussion to this point may not suggest as inappropriate the cause of action for breach of statutory duty where a statute contains special measures directed towards a class of persons, where its evident purpose is their protection and when it may be inferred that the legislature expects that the powers will be used in particular circumstances, although exercise of a discretion may impact upon the lastmentioned feature. The reasoning of the majority in the Court of Appeal may be seen as directed to the majority of these considerations. It is not necessary to determine whether all such features were present in this case, but not for the reason that the plaintiff eschewed reliance upon such an action. Regardless of which cause of action was appropriate to this case both required the power in s 10(1) to have been available for the police officers' use. A consideration of that sub-section, which was not undertaken by the majority, reveals that the power of apprehension was not enlivened.

147 The power of apprehension in s 10(1) required, critically, that there be an opinion, held by a police officer, that the plaintiff's husband was mentally ill when he was observed. Depending on the circumstances, a person who has attempted, or is likely to attempt, suicide may or may not satisfy the criteria of mental illness in s 8. The majority were not correct to hold that s 10 is to be read as equating a person who has attempted or may attempt suicide with a person who is mentally ill[184]. The terms of s 10 and the definition of mental illness suggest to the contrary. It is not a sufficient condition that an officer be aware that the plaintiff's husband had recently contemplated suicide. The purpose of s 10(1) is to allow officers lawfully to apprehend a person who appears to be mentally ill and is also at risk of harm. Its purpose is not to prevent suicide. In this regard the Act does not deviate from the common law view of autonomy.

148 The plaintiff's case was that the police officers should have formed the view that her husband was mentally ill, because it was apparent to them that he had taken steps towards suicide. An inquiry as to what the officers should have done may be relevant to whether there was a breach of a common law duty of care which has been found to exist. We are concerned with the anterior inquiry, whether a duty arose. From that point consideration may be given as to its content and to its breach. The latter issue, logically, does not answer those before it.

149 The question of whether there was a duty at common law in this case requires, as a minimum, a power given by the statute. This is because it is the existence of a power, to avert the risk of harm, which would set the police officers apart from persons generally and the common law rule that no action is

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184 *Kirkland-Veenstra v Stuart* (2008) Aust Torts Reports ¶81-936 at 61,308 [64] per Warren CJ, Maxwell P agreeing.

required to protect others. It is the availability of such a power which may inform considerations as to the existence of a relationship and the ability to control the risk of harm which may be relevant to the existence of a duty. However, it is not the common law which determines whether the power is enlivened. It is the *Mental Health Act* which is the sole source of the power. That Act, by s 10, requires that a police officer hold an opinion that a person is mentally ill before the power of apprehension is available to the officer. In the present case neither officer held such an opinion. There was no issue raised as to the fact that such opinions were held[185]. It is difficult to see what such an issue might be, on the facts of this case. The opinions held by the police officers were considered and reasoned. The statute requires no more.

150 Absent the holding of an opinion that the plaintiff's husband was mentally ill, the power to apprehend was not available. A condition necessary to the power did not exist in law[186]. It follows that, in the circumstances of this case, the statutory provisions supplied no relevant statutory power to which a common law duty could attach[187].

151 We agree with the orders proposed in the reasons of Gummow, Hayne and Heydon JJ.

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185 As French CJ observes at [5].

186 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1179 [73] per McHugh and Gummow JJ; 198 ALR 59 at 76; [2003] HCA 30.

187 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183] per Gummow and Hayne JJ.