SUPREME COURT OF QUEENSLAND

CITATION:	*Peat v Lin & ors* [2004] QSC 219
PARTIES:	**ROBERT EMMET PEAT** (plaintiff/respondent) and **YANCHUN LEONA LIN** (first defendant) and **RENNIE JACK BARNES** (second defendant) and **GEORGE STATHOPOLOUS** (third defendant) and **STATE OF QUEENSLAND** (fourth defendant/applicant)
FILE NO/S:	SC 1007 of 2001
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	3 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2004
JUDGE:	Atkinson J
ORDER:	**1. Application allowed** **2. The clauses of the statement of claim that allege liability in the State of Queensland for the acts or omissions of the three named off-duty police officers be struck out**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGILIGENCE – DUTY OF CARE – IN GENERAL – where three off-duty police officers at nightclub – where plaintiff injured by a patron of the nightclub – where injury caused by a third party – whether off-duty police officers

liable for failure to prevent injury – whether State vicariously liable

Police Service Administration Act 1990 (Qld), s 2.3, s 10.5

Alexandrou v Oxford [1993] 4 All ER 328, cited
Ancell v McDermott [1993] 4 All ER 355, cited
Bryan v Maloney (1995) 182 CLR 609, cited
Costello v Chief Constable of the Northumbria Police [1998] EWCA Civ 1898, cited
Cran v State of New South Wales [2004] NSWCA 92, cited
Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1, cited
Darling Island Stevedoring Lighterage Co Ltd v Long (1957) 97 CLR 36, cited
Dorset Yacht Co Ltd v Home Office [1970] AC 1004, cited
Duncan v Jones [1936] 1 KB 218, cited
Gala v Preston (1990 – 1991) 172 CLR 243, cited
Commissioner of Police [2000] QCA 33, cited
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, cited
Hawkins v Clayton (1988) 164 CLR 539, cited
Hill v Chief Constable of West Yorkshire [1989] AC 53, considered
Hill v Van Erp (1997) 188 CLR 159, cited
Hocken v Pointing [1993] 2 Qd R 659, cited
Hood v State of Queensland [2003] QCA 408, cited
Horne v Coleman (1929) 46 WN (NSW) 30, cited
Jaensch v Coffey (1984) 155 CLR 549, cited
Modbury Triangle Shopping Centre v Anzil (2000) 205 CLR 254, cited
Osman v Ferguson [1993] 4 All ER 344, cited
Preston v Star City Pty Ltd (1999) NSWSC 1273, cited
Quintano v The State of New South Wales [2002] NSWSC 766, cited
R v Commissioner of Police of the Metropolis, Ex-parte Blackburn [1968] 2 QB 118, cited
San Sebastian Pty Ltd v The Minister (1986) 162 CLR 340, cited
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, cited
Sullivan v Moody (2001) 207 CLR 562, considered
Sutherland Shire Council v Heyman (1985) 157 CLR 424, cited
Tame v New South Wales (2002) 211 CLR 317, considered
Wilson v State of New South Wales (2001) 53 NSWLR 407, cited
Woolcock Street Investments Pty Ltd v LDG Pty Ltd [2004] HCA 16, considered

COUNSEL: RJ Douglas SC for the applicant/fourth defendant
PF Mylne for the respondent/plaintiff

SOLICITORS: Crown Law for the applicant/fourth defendant
Gabriel Ruddy & Garrett for the respondent/plaintiff

[1] The plaintiff, Robert Peat, alleges that he suffered personal injuries as a result of being stabbed in the back by Lorne Campbell outside Shenanigan's Nightclub (the "nightclub") in Hervey Bay in the early morning of 18 February 1998. Three off-duty police officers were present at the nightclub at various times during the night of 17 February and the early morning of 18 February 1998 ("the night"). Senior Constable Smith went to the nightclub with some friends at about 10.00pm on the night. Some time after midnight, Constable Jones arrived and later Senior Constable Triggs. All three of them were present at the same time for a brief period. None of them was in possession of the equipment that each would use if he was on duty such as a police baton, torch, police radio, handcuffs, holster and firearm. None was in possession of capsicum spray.

[2] The plaintiff commenced action against the proprietors of the nightclub and the State of Queensland. The liability of the State of Queensland is said to derive from the vicarious liability for the alleged negligence of the three off-duty police officers and from its liability for alleged negligent treatment of the Hervey Bay Hospital. Only the allegations with regard to the off-duty police officers are the subject of this application.

[3] It is alleged in para 4 of the statement of claim filed on 31 January 2001, that Mr Triggs and/or Mr Jones and/or Mr Smith knew or ought to have known that there was a risk of Mr Campbell injuring one of the patrons of the nightclub. Particulars given are as follows:

"(a) Prior to Campbell assaulting the plaintiff:-

(i) When Triggs and Jones were standing near a bar in the nightclub, Campbell approached them and said "What the fuck are you looking at mate?";

(ii) Campbell assaulted Triggs by punching him in the face in the toilets of the nightclub;

(iii) Campbell threw glasses against the wall in the nightclub causing them to smash whilst looking in the direction of Jones and Triggs and shouting "fucking dog cunts";

(iv) Campbell was arguing violently with either the third defendant or the bar attendant in the presence of Smith;

(v) Campbell threw a stool towards the dance floor from near the entrance of the nightclub."

[4] The plaintiff alleged in paras 1(f) and (g) of the statement of claim that Mr Triggs, Mr Jones and Mr Smith were constables in the Queensland Police Service acting in the execution of duty as police officers, and were under a duty to prevent breaches of the peace and/or to keep the peace. It is alleged in para 1(h) of the statement of claim that pursuant to s 10.5 of the *Police Service Administration Act* ("PSA"), the State of Queensland is liable for the negligence of Mr Triggs and/or Mr Jones and/or Mr Smith whilst acting or purporting to act in the execution of duty as a police officer. It is also alleged in para 1(m) of the statement of claim that the State

of Queensland owed a non-delegable duty of care to the plaintiff, although it is by no means clear whether this refers to both its liability for the alleged negligence of the off-duty police officers and the hospital, or only the latter. Particulars of negligence against Mr Triggs, Mr Jones and/or Mr Smith are said in para 9 of the statement of claim to be "failure to prevent a breach of the peace and/or to keep the peace in the circumstances which have been particularised herein".

[5] The State of Queensland has applied pursuant to r 171 of the *Uniform Civil Procedure Rules* to strike out those paragraphs of the statement of claim which allege that it is liable as a result of the alleged omission to act by each of Mr Triggs, Mr Jones and Mr Smith. There are essentially two grounds on which the State of Queensland says it cannot be held liable: firstly, none of the police officers was acting or purporting to act in the execution of his duty as a police officer, and so the occasion for liability under s 10.5 of the PSA has not arisen; and secondly, in any event, the police officers and the State of Queensland are entitled to immunity from the imposition of liability if their actions or omissions concerned the suppression of crime. If the applicant is correct in either of those submissions, then it would be appropriate to strike out the clauses of the statement of claim relating to the alleged liability of the State of Queensland for the acts or omissions of the police officers as the claim could not succeed.[1]

[6] Section 10.5 of the PSA provides, so far as is relevant:

> "**Liability for Tort generally**
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> **10.5(1)** The Crown is liable for a tort committed by any officer, staff member, recruit or volunteer, acting, or purporting to act, in the execution of duty as an officer, a staff member, recruit or volunteer, in like manner as an employer is liable for tort committed by the employer's servant in the course of employment.
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> …
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> **(4)** For the purposes of this section, an action done or omission made by an officer acting, or purporting to act, in the capacity of a constable is taken to have been done or made by the officer acting, or purporting to act, in the execution of duty as an officer."

[7] Section 10.5(1) of the PSA provides that the State of Queensland is vicariously liable for negligence committed by a police officer acting or purporting to act in the execution of his or her duty. This liability is extended by subsection (4) in that it provides that any action done or omission made by an officer acting, or purporting to act, in the capacity of a "constable", is taken to have been done or made by the officer acting, or purporting to act, in the execution of his or her duty as an officer. Was an officer in this case acting, or purporting to act, in the capacity of a "constable"? A constable in this context must be understood to mean a constable at common law.

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1 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125; *Preston v Star City Pty Ltd* [1999] NSWSC 1273.

[8] There appears little doubt that an off-duty police officer may act in the capacity of a constable when off-duty. If he or she does so, then he or she is entitled to the protection offered by s 10.5(4) of the PSA. A police officer may indeed be considered under a duty to act as a constable even when off-duty in certain situations.[2] As Davidson J held in *Horne v Coleman*:[3]

> "… whether a constable is in uniform, or not, and whether he is outside his ordinary working hours, or not, he has a continuing duty to prevent, or assist, in preventing, disturbances, or breaches of the peace."

[9] Relying on this authority, Williams J observed in *Hocken v Pointing*[4] that "the oath taken by a police constable…in essence requires a police officer to be on duty at all times." In my view, that proposition is stated rather too widely. A police officer has a duty to the public which can not be discarded just because the police officer is not officially on duty. This does not, however, require an off-duty police officer to intervene in any situation to which police who are on duty might be called. Nor does it justify a police officer using his or her public powers or office when acting in a private capacity. These off-duty police officers are not alleged to have done anything which meant that they were acting or purporting to act in the capacity of a constable. In truth, the plaintiff's claim is that each failed to act as a constable to prevent a breach of the peace, rather than a claim that each acted or purported to act as a constable, and in the course of so doing, failed, through a negligent omission, to prevent a breach of the peace. The State of Queensland can only be liable under s 10.5(4) of the PSA for a negligent act or omission once the officer is acting, or purporting to act, in the capacity as a constable. That was not the case here so the State of Queensland can not be liable under s 10.5(4).

[10] There is however a more fundamental reason why the State of Queensland can not be held vicariously liable in these circumstances. Vicarious liability depends on the primary liability of individual police officers. If none of the police officers has a duty to the plaintiff in a case such as this, then the State has nothing for which it can be held vicariously liable.[5] A police officer's duty to the public has now found expression in s 2.3 of the PSA which provides that amongst the functions of the police service are:

> "(b) the protection of all communities in the State and all members thereof –
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> (i) from unlawful disruption of peace and good order that results, or is likely to result, from –
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> (A) actions of criminal offenders;
>
> (B) actions or omissions of other persons;
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> (ii) from commission of offences against the law generally."

[11] To say that a constable has a duty to the public, however, is not to answer the question of whether he or she has a duty in tort, for which the State will be held

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2 *Duncan v Jones* [1936] 1 KB 218 at 223.

3 (1929) 46 WN (NSW) 30 at 31.

4 [1993] 2 Qd R 659 at 660.

5 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1956) 97 CLR 36 at 63.

vicariously liable, to an individual member of the public to prevent a crime happening to a particular person.

[12] The trend of authority is comprehensively against such a proposition. In *Hill v Chief Constable of West Yorkshire*,[6] the House of Lords held that the police did not owe a duty to individual members of the public for any negligent failure to investigate or suppress a particular crime. That case concerned an action by the mother of a young woman who was murdered by Peter Sutcliffe, commonly known as the Yorkshire Ripper, against the police who, she alleged, failed to exercise a reasonable degree of care and skill in their investigation as could be expected from a competent police force. She alleged that their failure to competently investigate earlier murders had been responsible for her daughter's death.

[13] Lord Keith of Kinkel, who wrote the leading judgment, recognised the duty owed by police officers to the general public, enforceable by mandamus, to enforce the criminal law.[7] However, as there is no duty as to the manner in which that obligation is to be performed, his Lordship held that this was not a situation where an intention of the common law to create a duty towards individual members of the public could readily be inferred.[8] Absent some further special characteristics or ingredients beyond reasonable foreseeability of likely harm which might result in civil liability for failure to control another person to prevent that person doing harm to a third person, such as was found in *Dorset Yacht Co Ltd v Home Office*,[9] no duty in tort was owed to an individual such as Miss Hill. His Lordship went further to hold that, for public policy reasons, the police were immune from an action of this kind.[10]

[14] This decision was cited with approval by the High Court in *Sullivan v Moody*,[11] where the court considered whether there was a cause of action in negligence brought by the fathers of children who were alleged to have been sexually abused, against medical practitioners and social workers who were alleged to have negligently concluded that the children had been sexually abused and reported that sexual abuse, and the State who employed them.

[15] The court first dealt with the question of foreseeability. Echoing the reasoning in *Hill v Chief Constable of West Yorkshire*, the court held that foreseeability of harm was necessary but not sufficient to give rise to a duty of care.[12]

> "The argument was conducted upon the basis that it was foreseeable that harm of the kind allegedly suffered by the appellants might result from want of care on the part of those who investigated the possibility that the children had been sexually abused. But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is

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6 [1989] 1 AC 53 at 59.

7 *R v Commissioner of Police of the Metropolis, Ex-parte Blackburn* [1968] 2 QB 118.

8 (supra) at 59.

9 [1970] AC 1004 at 1070-1071.

10 This decision has been followed and applied in *Alexandrou v Oxford* [1993] 4 All ER 328; *Osman v Ferguson* [1993] 4 All ER 344; *Ancell v McDermott* [1993] 4 All ER 355.

11 (2001) 207 CLR 562 at 581.

12 (supra) at 576 [42].

> subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care."

[16] As the court held, notwithstanding the centrality of proximity, particularly during the 1980s, as the test of determining what was needed in addition to foreseeability to give rise to a duty of care,[13] it gave no practical guidance in determining in novel cases whether a duty of care existed.[14] This has been repeated in even stronger terms recently in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[15] when it was said that a relationship of proximity can no longer be regarded as*:*

> "the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another."[16]

[17] In *Sullivan v Moody*,[17] their Honours referred to the problem that importing a duty of care in such a case would have on the other duties and responsibilities of the defendants and cited with approval decisions of the House of Lords that considered such a question, including *Hill v Chief Constable of West Yorkshire*:[18]

> "How may a duty of the kind for which the appellants contend rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty? A similar problem has arisen in other cases. The response to the problem in those cases, although not determinative, is instructive.
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> In *Hill v Chief Constable of West Yorkshire*,[19] the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kirkel pointed out[20]

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13 *Jaensch v Coffey* (1984) 155 CLR 549 at 584-585; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52.

14 *Jaensch v Coffey* (1984) 155 CLR 549 at 584 – 587 per Brennan J; *San Sebastian v The Minister* (1986) 162 CLR at 367 – 369 per Brennan J; *Hawkins v Clayton* (1988) 164 CLR 359 at 555 – 556 per Brennan J; *Gala v Preston* (1990 – 1991) 172 CLR 243 at 261 – 263 per Brennan J; *Bryan v Maloney* (1995) 182 CLR 609 at 653 – 655 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 210, per McHugh J; *Crimmin v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 96-97 [270] – [274], per Hayne J.

15 [2004] HCA 16 at [18].

16 *Bryan v Maloney* (1995) 182 CLR 609 at 619.

17 (supra) at 581.

18 (supra).

19 (supra).

20 (supra) at 63.

> that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate."

[18] The court did not rule out the possibility of a duty of care arising in some cases. However, ordinarily a duty of care would not arise in circumstances such as were found in *Sullivan v Moody*. As their Honours held:[21]

> "The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations."

[19] In this case, any duty of the off-duty police officers was to the public at large and not to individual members of it, such as the plaintiff. The distinction between a duty to the public in general and a duty owed to a particular member of the public was drawn in *Graham Barclay Oysters Pty Ltd v Ryan*[22] by the Chief Justice:

> "A legislative grant of powers to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of particular class."[23]

[20] The High Court has held that usually a police officer will not have any duty of care to a person under investigation. In *Tame v New South Wales*,[24] Gummow and Kirby JJ held in reliance on *Hill*[25] and *Sullivan v Moody*[26] that:

> "It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer's duty, ultimately based in the statutory framework and anterior common law by which

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21 (supra) at 582 [60].
22 (2002) 211 CLR 540 at 562.
23 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39 [93].
24 (2002) 211 CLR 317 at 396 [231].
25 (supra).
26 (supra).

> the relevant police service is established and maintained,[27] fully to investigate the conduct in question."[28]

Similar views were expressed by McHugh J,[29] Hayne J[30] and Callinan J.[31] In that case, it was held that a police officer did not owe a duty of care to avoid psychiatric injury to a driver under investigation. Such injury was not foreseeable in the particular case. *Tame* has been referred to with approval by the Queensland Court of Appeal in *Hood v State of Queensland*.[32]

[21] The High Court has not, however, held that police officers have the broad immunity held by the House of Lords in *Hill v Chief Constable of West Yorkshire Police*.[33]

[22] In this State, the Court of Appeal dealt with a similar question to that which arises in this case in *Gibbs v Commissioner of Police*[34] where an unsuccessful application was made for an extension of time for leave to appeal a decision of a District Court judge striking out an action against the Commissioner and the State of Queensland for damages caused by the failure of police officers to investigate certain complaints. Wilson J, with whom the other members of the court agreed, held that there was no reason to distinguish the decision in *Hill*: [35]

> "In *Hill v The Chief Constable of West Yorkshire* [1989] 1 AC 53, the House of Lords held that as a matter of public policy police are immune from actions for negligence in respect of their activities in the investigation and suppression of crime. This question appears not to have been considered at appellate level in this country.
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> In *Osmond v The United Kingdom*, 28 October 1988, the European Court of Human Rights held that that immunity is not absolute. The decision turned on article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is not part of Australian Law.
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> In relevant respects the present case is not distinguishable from *Hill*. The applicant has not demonstrated that there is sufficient doubt about the correctness of *Hill* to justify the grant of leave to appeal to argue the question of principle in this Court."

[23] In New South Wales, the Supreme Court has held in a number of cases that there are sound policy reasons against extending the law of negligence to investigations,

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27 *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1955) 92 CLR 113 at 118-121; [1955] AC 457 at 477-481.

28 *Hill v Chief Constable of West Yorkshire Police* (supra) at 63 – 64; *X (Minors) v Bedfordshire County Council* [1995] AC 633 at 739; *Sullivan v Moody* (supra) at 582 [60].

29 At [125]-[126].

30 At 418 [298].

31 at 430 [335]-[336].

32 [2003] QCA 408 at [28]-[29] per McMurdo P.

33 (supra).

34 [2000] QCA 33.

35 (supra) at p 4.

prosecutions and other actions taken for the suppression of crime in the community.[36]

[24] There is, however, no binding authority that police officers enjoy a blanket immunity from liability in tort in the investigation and prevention of crime although they are "generally exempt" from liability.[37] Ordinarily, remedies by members of the public against the police are found in public law[38] or the torts of false imprisonment or malicious prosecution. A police officer may assume a duty of care to a member of the public in situations where the police have custody of the person[39] or where the police have committed criminal acts against an accused person by fabricating evidence or conspiring to give false evidence.[40] This is not such a case. These and other examples footnoted suffice to show that it is incorrect in principle to say that liability in negligence cannot exist because a police officer can never be said to owe a duty to an individual member of the public in the investigation or prevention of crime. This has been recognised in England following the decision in *Hill v Chief Constable of West Yorkshire*. As May LJ observed in *Costello v Chief Constable*,[41] "*Hill v Chief Constable of West Yorkshire* does not provide blanket immunity for all police operations."

[25] In order to determine whether such liability might extend to the novel circumstances of this case, it is necessary to return to the principles for determining the existence of a duty of care when the reasonable foreseeability test is satisfied and the injury has been caused by a third party but where it is claimed that the defendant was under a duty to prevent such injury or damage.[42]

[26] Those principles have recently been reviewed in the High Court in *Graham Barclay Oysters Pty Ltd v Ryan*.[43] In considering whether the State of New South Wales and the Great Lakes Council owed a duty of care to consumers including the named plaintiff, who contracted the Hepatitis A virus after eating contaminated oysters, the Chief Justice held:[44]

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36 *Wilson v State of New South Wales* (2001) 53 NSWLR 407 at 415; *Quintano v The State of New South Wales* [2002] NSWSC 766; *Cran v State of New South Wales* [2004] NSWCA 92 at [35]-[51], [63], [74].

37 *Crimmins v Stevedoring Industry Finance Committee* (supra) [232] per Kirby J.

38 In *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, the Court of Appeal held that the Commissioner owed a duty to the public to enforce the law which he or she could be compelled by mandamus to perform.

39 *Cran v State of New South Wales* (supra) at [52].

40 *Cran v State of New South Wales* (supra) at [62]; *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435. See also the examples given of breach of confidence in *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464; liability in negligence for failing to assist a fellow police officer in *Costello v Chief Constable of the Northumbria Police* [1998] EWCA Civ 1898; liability arising out of the employment relationship: *Waters v Commissioner of Police of the Metropolis* [2000] UKHL 50; liability for negligent driving, examples of which were cited by Brooking J in *Zalewski v Turcarolo* [1995] 2 VR 562 at 563-564; and liability in negligence for an impetuous act by an experienced police officer in disregard of police instructions which provoked a reaction which was the probable consequence of his actions: *Zalewski v Turcarolo* (supra) per Hansen J at 578-579. See also the discussion by Keene LJ of circumstances that may give rise to a duty of care in *Cowan v The Chief Constable for Avon and Somerset Constabulary* [2001] EWCA Civ 1699.

41 (supra).

42 cf *Smith v Leurs* (1945) 70 CLR 256.

43 (supra).

44 (supra) at 555.

> "One thing is clear. Reasonable foreseeability of harm of the kind suffered by Mr Ryan, whilst a necessary condition for the existence of a duty of care on the part of the Council or the State, is not sufficient.[45] In the case of a governmental authority, it may be a very large step from foreseeability of harm to the imposition of a legal duty, breach of which sounds in damages, to take steps to prevent the occurrence of harm. And there may also be a large step from the existence of power to take action to the recognition of a duty to exercise the power. Issues as to the proper role of government in society, personal autonomy, and policies as to taxation and expenditure may intrude. Even where a statute confers a specific power upon a public authority in circumstances where mandamus will lie to vindicate a public duty to give proper consideration to whether to exercise the power, it does not follow that the public authority owes a duty to an individual, or a class of persons, in relation to the exercise of the power.[46] In the case of both the State and the Council, it is failure to exercise those powers, not negligence in the manner of their exercise, that is said to constitute the breach."

[27] The relevant principles for the imposition of a duty on a statutory authority were set out by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*.[47] His Honour there distinguished the duty of a Port Authority for the safety of waterside workers under its direction from the absence of a duty of care found in police officers because of the specific class of persons to whom the duty of the Port Authority was owed, rather than to the public at large to whom the duty of the police was owed.[48] The principles by which His Honour made that distinction are of assistance in the resolution of whether a duty should be imposed in this situation. As Brennan J wisely observed in *Sutherland Shire Council v Heyman*:[49]

> "…the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by 'indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed'."

[28] The principles for determining whether or not a duty of care arose were set out by McHugh J in a series of questions:[50]

> "1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
>
> 2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a

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45 *Modbury Triangle Shopping Centre v Anzil* (2000) 205 CLR 254 at 268 [35]; *Sullivan v Moody* (supra) at 572-573 [25], 576 [42], 583 [64].

46 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465, per Mason J.

47 (supra) at [93].

48 (supra) at [132].

49 (supra) at 481.

50 *Crimmins* (supra) at 39 [93].

> specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
> 3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
> 4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
> 5. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty.
> 6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.
>
> If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority."

[29] What are the relevant determinants in this case? Assuming the plaintiff can satisfy the foreseeability test set out in question 1, the plaintiff in this case nevertheless falls foul of the questions raised in questions 2 and 6. Any duty owed was to the public at large and there are strong policy reasons to deny the existence of a duty of care to the plaintiff as an individual. As I have observed, the common law has shown a marked reluctance to impose liability on police officers in this situation. One reason is because the class of persons to whom the duty is owed is too indeterminate; where, one may ask rhetorically, would it stop: is a duty owed to staff and people inside the nightclub; patrons outside the nightclub and passers by; pedestrians and other drivers whom the potential offender might encounter; persons who live with, or a family member of, the potential offender whom he might assault? Secondly, police officers owe a number of duties and the satisfaction of the duty towards or interests of one member of the public may interfere with duties owed to other members of the public or, more importantly, the public at large; the duty is owed to the public at large and not to an individual. Thirdly, the court is reluctant to intervene in what are primarily operational decisions as to what reaction is appropriate in the given situation. Further, to impose a duty in a case such as this is to impermissibly interfere in the operational decisions of the police service. It is a matter for the administration of the police service when to roster police on duty and when to roster them off-duty. If police were expected to be ever vigilant to prevent breaches of the peace whilst off-duty, as if they were on duty, this would be likely to impact on rostering decisions and procedural instructions given to police officers as to how they may or may not spend their leisure hours.

[30] There is a further compelling reason for determining that a duty of care can not arise in this case. The police officers were off-duty and not equipped as they ordinarily would be to engage in prevention of breaches of the peace or other crime. They had

not assumed control of the situation.[51] To impose upon an ill-equipped, unarmed off-duty police officer a duty in tort to act to endeavour to prevent a possible or potential breach of the peace in this situation would be to impose too onerous a duty on such a person. In my view, no such duty exists in the circumstances pleaded in this case. There can therefore be no vicarious liability in the State of Queensland whether or not s 10.5 of the PSA would otherwise give rise to vicarious liability on the part of the State of Queensland.

[31] It follows that the clauses of the statement of claim that allege liability in the State of Queensland for the acts or omissions of the three named off-duty police officers should be struck out.

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[51] cf *Modbury Triangle v Anzil* (2000) 205 CLR 254 at 263.