GOOD COP, BAD COP, REASONABLE COP? WHETHER POLICE OFFICERS SHOULD OWE A DUTY OF CARE TO SUSPECTS

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> The criterion of judgment must adjust to the changing circumstances of life. The categories of negligence are never closed.[1]
>
> The categories of negligence never close, but when the court is asked to recognise a new category, it must proceed with some caution.[2]

I. Introduction

There are infinite ways by which the careless behaviour of one person can cause loss to another; the tort of negligence determines the situations in which this loss should be borne by the person causing the loss instead of allowing it to lie where it falls. On conventional analysis the first step in making this determination is to consider whether or not one person should owe a duty of care to another. Determining the situations where this duty should be recognised is necessarily an exercise in delimiting boundaries to the tort of negligence. Yet there is constant pressure for these boundaries to be shifted. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[3] Lord Pearce explained that the extent of the duty of care in negligence 'depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others'. So, as the demands of society change over time, so do the categories of negligence that the courts are invited to recognise.

In *Hill v Hamilton-Wentworth Regional Police Services Board* ('*Hamilton*')[4] the Supreme Court of Canada was invited to recognise a novel duty of care owed by police officers to suspects. By a 6:3 majority the Court accepted the invitation. In so doing the Supreme Court of Canada has set itself apart from its Commonwealth counterparts. The courts in England,[5] Australia[6] and New Zealand[7] have all declined to recognise a duty to suspects, yet this position will come under increasing scrutiny following the Supreme Court of Canada's decision. In light of this crossroads in this area of the law, this article explores whether there is a sound policy basis for extending the ambit

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1 *Donoghue v Stevenson* [1932] AC 562, 619 (Lord MacMillan).

2 *Weller v Foot and Mouth Disease Research Institute* [1965] 3 All ER 560 (Widgery J).

3 [1963] 2 All ER 575, 616.

4 (2007) 285 DLR (4th) 620. For case notes see Erika Chamberlain, 'Negligent Investigation: The End of Malicious Prosecution in Canada' (2008) 124 *Law Quarterly Review* 205; Rakhi Ruparelia, 'Denying Justice: Does the Tort of Negligent Investigation Go Far Enough?' (2008) 16 *Tort Law Review* 48.

5 See, for example, *Calveley v Chief Constable of Mersyside Police* [1989] 1 All ER 1025; *Elguzouli-Daf v Commissioner of Police* [1995] QB 335.

6 See, for example, *Emanuele v Hedley* (1997) 137 FLR 339; *Tame v New South Wales* (2003) 211 CLR 317.

7 *Fyfe v O'Fee* [2003] NZAR 662, aff'd *Fyfe v Attorney-General* [2004] NZAR 731.

of negligence the way *Hamilton* has done. Although to establish a duty it must be shown that there was a relationship of proximity between the parties, the question whether to recognise a novel duty and thus shift the boundaries of negligence is ultimately informed by considerations of policy.[8] Unfortunately, many of the relevant policy considerations were analysed unsatisfactorily in *Hamilton*. This article suggests that although there is a strong argument that some of the policy concerns that oppose the recognition of this proposed duty are overstated, policy appears ultimately to weigh against the recognition of a duty owed by police officers to suspects.

Part II will describe the facts of *Hamilton* and outline the majority and minority judgments. Part III will then briefly examine the issue of proximity, and Part IV will begin to analyse the policy considerations raised by this novel duty and address the risk that was raised by the minority in *Hamilton* that persons who have actually committed the crime investigated, but are nonetheless acquitted, may recover. Part V will then consider the impact a duty could have on the performance of police functions; this issue is heavily influenced by the House of Lords' decision in *Hill v Chief Constable of West Yorkshire Police* ('*Hill*')[9] and its progeny. It should be noted that *Hill* was concerned with whether police officers could owe a duty of care to *victims* of crime and this is a different duty from that which could be owed to *suspects*, and raises many different issues. Nonetheless, some of the policy considerations that have informed the inquiry into whether a duty could be owed to victims are also relevant when considering whether a duty can be owed to suspects. Finally, Part VI will consider how the proposed duty to suspects coheres with other rules and principles of the law of torts. This is an essential issue when considering the ambit of the tort of negligence, and was unfortunately one to which little attention was paid in *Hamilton*. Existing torts such as malicious prosecution represent what has previously been considered the appropriate balance of policy. It follows that if the rules and principles that existing torts like malicious prosecution represent are to be disturbed by recognising a novel duty, it must be shown that the policy considerations that underpin the existing position are no longer compelling.

II. *Hill v Hamilton-Wentworth Regional Police Services Board*

Jason George Hill was wrongfully convicted of robbery in 1995 and served 20 months in jail before his acquittal.[10] Hill had become a suspect during the investigation of 10 robberies in Hamilton, Ontario, which took place between 16 December 1994 and 23 January 1995. Because of similarities in the *modus operandi* of the robberies, and on the basis of eyewitness testimony, the police concluded at an early stage of the investigation that the same person had committed all 10 robberies. Once the police focused its investigation on Hill, it released a photo of Hill to the media. The police also conducted a photo lineup with Hill, who was an Aboriginal man, and 11 Caucasian foils.

8 Stephen Todd, 'Policy Issues in Defective Property Cases', in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (2007) 199, 212.

9 [1989] AC 53.

10 The facts are outlined by McLachlin CJC at 627-630.

On 27 January 1995 the police arrested and charged Hill with 10 counts of robbery, based on several eyewitness identifications, a 'Crime Stoppers' tip, identification by a police officer on the basis of a surveillance photo, and a possible sighting of Hill near the scene of one of the robberies.

At the time of Hill's arrest the police possessed evidence that potentially exculpated Hill. The police had on 25 January received an anonymous Crime Stoppers tip suggesting that two Hispanic men, 'Frank' and 'Pedro', were actually the perpetrators. Further exculpatory evidence soon followed. While Hill was in custody two similar robberies were committed. Eyewitness descriptions of the perpetrator were similar to that of the earlier 10 robberies, and the *modus operandi* was similar except for the presence of a gun used as a threat in the two later robberies. Police also received a second Crime Stoppers tip implicating Frank, suggesting that Frank looked similar to Hill, and that Frank was laughing because Hill was being held responsible for Frank's robberies.

The officer investigating the two later robberies received information from another officer that one Frank Sotomayer could be responsible for the earlier 10 robberies. Sotomayer was similar in appearance to Hill, and the officer collected further information that inculpated Sotomayer, including evidence corroborating the Crime Stoppers tip implicating 'Frank', and photographs from the earlier robberies that looked more like Sotomayer than Hill. This information was conveyed to the officer who was investigating the earlier robberies.

The police concluded that Sotomayer had committed two of the earlier robberies, and after legal proceedings in respect of the eight outstanding charges proceeded against Hill seven of these charges were dropped at an early stage. The Crown nevertheless proceeded with the one remaining charge because two eyewitnesses, bank tellers at one of the banks allegedly robbed by Hill, remained steadfast in their identifications of Hill. Hill stood trial and was convicted in March 1996. He successfully appealed the conviction based on errors of law made by the trial judge and a new trial was ordered. Hill was subsequently acquitted on 20 December 1999. During the period of time between the investigation of Hill as a suspect and his acquittal, Hill was imprisoned for more than 20 months in total, though not continuously.

Hill brought claims for, inter alia, negligence against the Hamilton-Wentworth Regional Police Services Board and several individual officers. Hill was unsuccessful at trial,[11] but appealed to the Ontario Court of Appeal.[12] Police officers in Ontario owed a duty of care to suspects since the Ontario Court of Appeal's decision in *Beckstead v Ottawa (City) Chief of Police*.[13] In that case, a police officer decided to charge the plaintiff with fraud after conducting no or little investigation, and the Court had upheld the plaintiff's claim in negligence. However, as Charron J noted in the Supreme Court,[14] despite the absence of authority at the time supporting

11 (2003) 66 OR (3d) 746.
12 (2005) 259 DLR (4th) 676.
13 37 OR (3d) 62.
14 (2007) 285 DLR (4th) 620, 663.

such a duty, the Court of Appeal in *Beckstead* undertook no *Anns* analysis, or any other systematic analysis considering the proximity of the parties or the relevant policy considerations, to determine whether this novel duty of care should exist.

The Court of Appeal created a special five-judge panel to consider whether police officers should owe a duty to suspects. The Court unanimously approved the existence of such a duty, considering that it would not give rise to unduly defensive policing and that the tort of malicious prosecution currently set the bar too high.[15] However, the Court was divided over whether the police officers had breached the standard of care of a reasonable police officer in like circumstances. The minority considered that the photo lineup and the failure to reinvestigate were negligent.[16] Conversely, the majority held that the impugned elements of the investigation did not amount to a breach of duty at the time of the investigation in 1995. In particular, there were no uniform rules or procedures relating to photo lineups at the time,[17] and in any event the lineup was not structurally biased because although the 11 foils were Caucasian, the race of the men in the lineup was not apparent by sight and Hill did not stand out as the only dark-skinned man.[18] Further, despite the coming to light of evidence tending to exculpate Hill, there remained credible eyewitness evidence to support the charge.[19]

Finally, in the Supreme Court a 6:3 majority (McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ; Charron, Bastarache and Rothstein JJ dissenting) upheld the Court of Appeal's decision that police officers could owe a duty to suspects.[20] McLachlin CJC, for the majority, held that there existed a proximate relationship between the investigating police officers and Hill, and that there were no policy considerations that negated a duty. Her Honour considered that a duty to suspects would not conflict with the police's overarching duty to investigate crime and that the fear of defensive policing was merely speculative. Her Honour also downplayed the difficulties inherent in identifying the innocent, and considered that the existing remedies such as malicious prosecution were insufficient.[21] Charron J, for the minority, held that that the requirement of proximity was not present, and that numerous policy considerations militated against the imposition of a duty. Her Honour considered that recognising a duty to suspects would give rise to conflicting duties which would lead to unduly defensive policing. Her Honour also considered that the difficulties inherent in identifying the innocent tended towards the rejection of a duty. Charron J felt that the existing torts struck the necessary balance between the competing policy considerations at play.[22]

15 (2005) 259 DLR (4th) 676, 688-698, 711.
16 Ibid 725.
17 Ibid 700.
18 Ibid 705.
19 Ibid 707.
20 The recognition of a duty of care in *Hamilton* has since been followed by lower courts in Canada: see, for example, *Matton v Yarlasky* (2007) CanLII 56507; *Lucas v Faber* (2008) SKQB 25; *Reilly v Bissonnette* (2008) BCCA 167.
21 (2007) 285 DLR (4th) 620.
22 Ibid 657-689.

The majority did, however, hold that there could be no breach of the proposed duty in this case. Although the release of Hill's photograph, incomplete records of witness interviews, interviewing witnesses together, and failing to blind-test photographs were not considered good practices today, they did not breach the standard of care required of police officers in like circumstances in 1995. Also, as the Court of Appeal had found, there were no established practices regarding photo lineups and the lineup in this case was not structurally biased anyway. Given the remaining eyewitness evidence from the bank tellers, it was not unreasonable not to intervene to halt the case.[23]

Despite Jason George Hill's individual failure to recover, the Supreme Court's recognition of a duty to suspects is a potential watershed decision that may encourage similar development in other commonwealth jurisdictions. The following discussion considers whether there is a sound basis for extending the ambit of negligence in the way *Hamilton* has done.

III. Proximity

The courts are concerned with two broad fields of inquiry when considering whether to recognise a duty of care: proximity and policy.[24] The latter provides the focus of this discussion, but the former requires brief mention before proceeding. Proximity broadly requires that the defendant should reasonably have foreseen injury to the plaintiff, and that the plaintiff was someone who was closely and directly affected by the defendant's conduct.[25] It seems likely that a police officer will often be in a proximate relationship with a suspect he or she is investigating. In *Hamilton* both McLachlin CJC and Charron J regarded it as self-evident that, as between an investigating officer and a suspect, the requirement of foreseeability could be made out.[26] McLachlin CJC also emphasised that the police had singled out and identified a 'particularised suspect', and were not dealing with 'the universe of all potential suspects'.[27] As such, her Honour concluded that the relationship was personal, close and direct. So, whether an officer can be in a proximate relationship with a number of suspects is left unclear, though it will naturally depend on the facts of each case.[28] At the least it seems correct that there exists a proximate relationship where a suspect has been singled out and is the only suspect being investigated. The position can

23 Ibid 649-653.
24 Stephen Todd (ed), *The Law of Torts in New Zealand* (4th ed, 2005) 123.
25 Ibid 123-126.
26 (2007) 285 DLR (4th) 620, 636, 661.
27 Ibid 634.
28 An exceptional case where there was considered to be no proximity is *Fyfe v O'Fee* [2003] NZAR 662, aff'd *Fyfe v Attorney-General* [2004] NZAR 731. In that case the plaintiffs, a husband and wife, were the subjects of an armed detention effected by police after the husband was mistakenly identified as another man who was a dangerous suspect wanted for armed robbery. The plaintiffs' vehicle was brought to a halt and the plaintiffs were handcuffed at gunpoint and subsequently detained for a short period. Durie J held that there existed insufficient proximity because the police had no particular reason to consider that apprehending the occupants in the vehicle in question would result in injury to innocent persons.

be contrasted with the lack of proximity that generally militates against a proximate relationship between police officers and victims of crime. So, for example, in *Hill*[29] the police could not be in a proximate relationship with a victim of the Yorkshire Ripper as the victim was one of a vast number of the female general public and was at no special distinctive risk. Charron J did however in *Hamilton* conclude that although there was foreseeability there was no proximity, but her Honour reached this conclusion on the basis that the proposed duty would give rise to conflicting duties.[30] As discussed below, it is whether these conflicting duties give rise to negative policy consequences that is important rather than the conflict *per se*, and as such this issue is better considered as part of the second field of inquiry concerning policy considerations.[31] These policy considerations now fall to be considered.

IV. Identifying the Innocent

The past can seldom be recovered with complete confidence. The criminal justice system resolves this problem by deciding who shall bear the burden of producing evidence and persuading the trier of fact of the defendant's guilt. In effect, the burden of proof becomes the placeholder for the missing knowledge.[32] What therefore becomes relevant at the criminal trial is not the factual question of whether the defendant committed the offence, but rather the legal question of whether the State has produced sufficient evidence and discharged its burden of proving the defendant's guilt beyond reasonable doubt. The failure by the State to discharge this burden does not mean that the defendant is therefore factually innocent; rather, a broad range of circumstances are encompassed by this event, from factual innocence through to proof just short of reasonable doubt. Although the proposed duty of care to suspects could provide recourse to suspects in respect of whom criminal proceedings stopped short of a trial, many plaintiffs will have been acquitted at trial, or convicted but then subsequently acquitted. Identifying which of these plaintiffs did not in fact commit the crime they were acquitted of can thus give rise to a problematic, and controversial, inquiry. The issue becomes whether a plaintiff suing the police in negligence can rely on his or her previous acquittal as conclusive proof of innocence, or whether the plaintiff's innocence is something that remains to be determined by the court.

29 [1989] AC 53. Cf *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 where the police were held to owe a duty of care to a rape victim. Proximity was established because a series of previous attacks had occurred in a small geographical area in apartments with accessible balconies. The police were held to owe a duty to warn or protect women in the area from potential attacks.

30 (2007) 285 DLR (4th) 620, 667-671.

31 Neither field of inquiry can be completely quarantined from the other, and there is often an overlap between proximity and policy: *Rolls Royce New Zealand Ltd v Carter Holt Harvey Limited* [2005] 1 NZLR 324. Nevertheless, it seems that how a proposed duty relates to other duties the individual owes is better considered as an issue of policy; as the Supreme Court of Canada said in *Cooper v Hobart* [2001] 3 SCR 537, 554 the second stage of the inquiry is concerned with, inter alia, 'the effect of recognizing a duty of care on other legal obligations'.

32 Richard A Posner, *The Problems of Jurisprudence* (1990) 217.

The Discussion in Hamilton

This issue had not been broached in previous cases where a duty to suspects had been contended, but both sides of it were canvassed by Charron J in *Hamilton*. Her Honour stated that on the one hand a compelling argument could be made that a verdict of not guilty should be considered as a determination of innocence for all purposes, including compensation at a civil trial. In support of this argument was the point that any qualification of an acquittal would introduce the third verdict of 'not proven'. Such a 'Scotch verdict'[33] would create a lingering cloud in respect of persons who were found not guilty.[34] Her Honour cited Professor H A Kaiser in support of this argument:

> It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of 'not proved' or 'still culpable' under the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:[35] [footnote inserted]
>
> > … one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower. … There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted.[36]

Charron J was also concerned that if the plaintiff had to prove his or her innocence this may be a difficult burden to discharge. Her Honour considered it unjust that an acquitted should have to pass this additional hurdle, as well as be faced with the risk that, if unsuccessful, an aura of suspicion could be cast on the acquittal.[37] The key concern was that all of this could result in the undermining of the overall meaning of an acquittal.

Yet as Charron J also noted, a compelling argument could be made that any compensation regime must be limited to those who are factually innocent, lest those who in fact committed the offence, but whose guilt could not be proven beyond reasonable doubt at the criminal trial, are enabled to profit from their crime.[38] Her Honour noted that Canada's federal-provincial *Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* draw a clear distinction between a finding of not guilty and a finding of innocence for the purpose of compensation. The *Guidelines* expressly provide that compensation is to be granted only to 'those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty)',[39] and as such either a pardon or a statement from the Appellate Court that the person did not commit the offence is required.

33 Scots law recognises three verdicts: guilty, not guilty, and not proven: see, for example, Peter Mackinnon, 'Costs and Compensation for the Innocent Accused' (1988) 67 *Canadian Bar Review* 489, 497.

34 (2007) 285 DLR (4th) 620, 676.

35 Above n 33, 497-498.

36 H A Kaiser, 'Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course' (1989) 9 *Windsor Yearbook of Access to Justice* 96, 139.

37 (2007) 285 DLR (4th) 620, 680.

38 Ibid 677.

39 Ibid.

Charron J felt that the risk that truly guilty persons may unjustly recover was particularly pertinent where the case involved a substandard police investigation. Although careless investigation would often lead to a wrongful conviction, such carelessness could also be the effective cause of an acquittal. Various evidentiary and procedural safeguards exist in order to protect individuals from wrongful convictions. So, for example, inculpatory evidence may be declared inadmissible precisely because it was obtained by careless and improper investigative techniques.[40]

However, despite Charron J's *tour d'horizon* of the points surrounding the issue, it was not necessary for her Honour to decide whether an acquittal should be treated as conclusive proof of innocence in order to dispose of the appeal. Her Honour did conclude, though, that the negative ramifications that would flow from either approach provided reason 'to be cautious about imposing on police officers a novel duty of care towards suspects'.[41]

Conversely, McLachlin CJC considered that the difficulties that trying to identify the wrongfully convicted gave rise to should not be a reason for declining to recognise the proposed duty. In response to the risk that the plaintiff may in fact be guilty of the offence, her Honour rejoined that '[t]his possibility of "injustice" – if indeed that is what it is – is present in any tort action'.[42] Her Honour, by way of example, described how a person who claims against a doctor for negligence may, despite persuading the court that he or she is ill, have in fact been malingering.[43] McLachlin CJC went on:

> The legal system is not perfect. It does its best to arrive at the truth. But it cannot discount the possibility that a plaintiff who has established a cause of action may 'factually', if we had means to find out, not have been entitled to recover. The possibility of error may be greater in some circumstances than others. However, I know of no case where this possibility has led to the conclusion that tort recovery for negligence should be denied.[44]

Her Honour believed that safeguards like the need to prove causation and the right of appeal provided the law's response to the ever-present possibility of error in the legal process rather than a categorical denial of the right to sue in tort.[45]

The courts should indeed be cautious as Charron J urges, but as McLachlin CJC emphasises the courts should not be so cautious as to deny a duty on the basis that whichever approach is taken there will be negative ramifications. As will be discussed in greater detail below, both under the tort of defamation and the tort of malicious prosecution the courts have been prepared to go beyond the fact of an acquittal to determine the factual innocence of plaintiffs. The courts have conceded the negative ramifications of doing this, but have presumably proceeded on the basis that the negative ramifications of not proceeding at all would be even greater. The courts thus

40 Ibid 678.
41 Ibid 680.
42 Ibid 645.
43 Ibid.
44 Ibid.
45 Ibid.

need to balance the respective consequences of whether or not to treat an acquittal as conclusive proof of innocence and determine which approach is preferable.

The Presumption of Innocence

Charron J's concerns as to the effect of not treating an acquittal as conclusive proof of innocence invoke principles seen as fundamental to any developed legal system. The presumption of innocence has been described as the 'golden thread' running through the English criminal law,[46] and as a 'cardinal principle of the common law'.[47] The sanctity of this cardinal principle is arguably tainted if acquittees are treated differently and a *de facto* verdict of 'not proven' or, as MacKinnon puts it more caustically, 'the guilty but [un]lucky' is allowed to result.[48] Proving one's innocence, in effect proving a negative – that they 'didn't do it' – is likely to prove a difficult task, especially if key witnesses are no longer available. Meanwhile the defendant, the police, is effectively being given a second chance to prove the plaintiff's guilt. This is despite the State with all its power and resources being unable to do so on the first occasion. The second time round it will be in a stronger position; it will not repeat the mistakes it made the first time round, while it may also not have to bear the burden of proving the individual's guilt beyond reasonable doubt. There also exist the other negative consequences of what is effectively a re-trial, including the victim and witnesses having to give evidence again and the duplication of resources in what, if new evidence for instance is introduced, may be a protracted trial.

The Distinction Between Legal and Factual Innocence

However, as discussed above, the criminal court is concerned with the legal question of whether the State has proved the defendant's guilt beyond reasonable doubt rather than whether the defendant in fact committed the offence. This distinction between the legal innocence that an acquittal represents and the factual innocence that remains undetermined, suggests that the argument that an acquittal should be treated as conclusive proof of innocence oversimplifies the nature of innocence under the criminal justice system. The distinction between legal and factual innocence is one that the New Zealand courts have in recent times taken care to articulate. That a verdict of not guilty could be equated with a declaration of innocence was flatly rejected by the Court of Appeal in *R v Degnan*:

> That approach risks elevating perceived theory over the realities of criminal practice. In the vast majority of cases a jury, when returning a verdict of not guilty, cannot be taken as saying affirmatively they are satisfied the accused is innocent; what they are really saying is that they are not satisfied beyond reasonable doubt the accused is guilty.[49]

46 *Woolmington v Director of Public Prosecutions* [1935] AC 462.

47 *Wright Stephenson & Co Ltd v Attorney-General* [1966] NZLR 271, 282. The presumption of innocence is also enshrined in section 25(c) of the *New Zealand Bill of Rights Act 1990*.

48 Above n 33, 497.

49 [2001] 1 NZLR 280, 291 (Tipping J).

This view was reiterated by Tipping J in the Supreme Court's decision in *Rogers v TVNZ*,[50] where his Honour unequivocally declared that an 'acquittal is not … a declaration of innocence'. Accordingly, not all acquittees are necessarily deserving plaintiffs in a subsequent civil trial. The law of torts has often thwarted undeserving plaintiffs by applying the maxim *ex turpi causa non oritur actio*, which means that 'no right of action arises from a shameful cause'.[51] However, the distinction between legal and factual innocence leaves uncertain whether the plaintiff's cause is in fact 'shameful'. The more particular concern is thus how the civil court is to deal with the *risk* that truly guilty persons, who have nonetheless been acquitted, will recover. The risk has indeed been adverted to in respect of torts other than negligence. If a person publishes that another person has committed a criminal offence and the subject of the publication has been acquitted and sues the publisher in defamation, the publisher is not prevented by the law from raising truth – that the other person did in fact commit the offence – as a defence to the defamation action.[52]

The Guilt Defence to Malicious Prosecution

It may also be possible for a defendant in a malicious prosecution action to raise guilt as a defence. Proving guilt on the balance of probabilities clearly provides a defence to a malicious prosecution action in the United States,[53] including where the plaintiff has previously been acquitted.[54] There has also been some support for this defence in England[55] and New Zealand,[56] and a recent discussion of the relevance of guilt to a malicious prosecution action was provided by the New Zealand Court of Appeal in *Van Heeren v Cooper*.[57] Fisher J, for the Court, first acknowledged the existence of policy considerations opposing any inquiry into the actual guilt of the plaintiff. To allow the defendant's guilt to be revisited in a civil court could promote relitigation and raise the risk of conflicting decisions.[58] The requirement for the plaintiff to defend himself twice also raised double-jeopardy concerns. It should be noted here that many of these concerns underlie the general principle that an attempt to mount a collateral attack on the final decision of a competent court will be dismissed as an abuse of process.[59] However, where an acquittee seeks to rely on his or her previous acquittal he or she is not mounting any such attack, but is in fact trying to uphold the previous

50 [2008] 2 NZLR 277, 300 (SC).
51 Todd, above n 24, 884.
52 W V H Rogers, *Winfield & Jolowicz on Tort* (17th ed, 2006) 865.
53 W Page Keeton, *Prosser and Keeton on The Law of Torts* (15th ed, 1984); *Clary v Hale* (1959) 175 Cal App 2d 880, 1 Cal Rptr 91; *Restatement of Torts* § 657.
54 Ibid; and see, for example, *Mooney v Mull* (1939) 216 NC 410, 5 SE 2d 122; *Wiggs v Farmer* (1964) 205 Va 149, 135 SE 2d 829.
55 See, for example, *Heslop v Chapman* (1853) 23 LJQB 49, 52; *Glinski v McIver* [1962] 1 All ER 696, 721.
56 See, for example, *McLeod v Reeves* (1883) 1 NZLR 50, 83; *Harcourt v Aitken* (1903) 22 NZLR 389, 402-404.
57 [1999] 1 NZLR 731.
58 Ibid 737.
59 *Hunter v Chief Constable of West Midlands Police* [1982] AC 529.

decision. Also, where the issue of guilt is raised as a defence, then this could not constitute an abuse of process because that principle is directed at the initiation of proceedings rather than the formulation of a defence.[60]

In any event, Fisher J found the considerations in favour of inquiring into the actual guilt of the plaintiff more convincing than the concerns raised in opposition. First, there was something repellent about allowing a person who may in fact be guilty to sue his accusers without challenge. Guilty plaintiffs would be free to sue upon proving malice and the other elements of malicious prosecution.[61] Secondly, the absence of a guilt defence would remove a disincentive to bringing malicious prosecution suits and would thus promote relitigation. Unlike plaintiffs in defamation suits, plaintiffs in malicious prosecution suits would not by re-opening the dispute be exposing themselves to the original allegation.[62] Thirdly, it would often be a misplaced assumption that the criminal court had pronounced upon guilt or innocence. The prosecution may have been terminated for various reasons having little bearing on the defendant's innocence, such as abandonment, withdrawal or dismissal for delay, abuse of process, or technical deficiency, and in such cases there would be no risk of conflicting findings.[63] Fourthly, an acquittal merely indicates that the defendant's guilt has not been proved beyond reasonable doubt. For Fisher J it did not follow that the defendant should be denied the opportunity of proving guilt on the balance of probabilities.[64] For the purposes of the case at hand his Honour left it open whether the guilt defence should be available in all malicious prosecution cases, and was content with saying that the defence was appropriate where there had been no prior acquittal on the merits. In such cases guilt or innocence on the merits could be ruled upon for the first time by the civil court and there was no risk of conflicting findings. Fisher J maintained that if guilt was put in issue this way there was no justification for requiring the plaintiff to prove his or her innocence. His Honour felt that, as with all accusations of this type, the onus should lie on the defendant.[65]

Despite Fisher J's late retreat expressly supporting the guilt defence only to the extent that there had been no prior acquittal on the merits, the four reasons Fisher J provides in favour of allowing a guilt defence certainly apply where there has been a prior acquittal. His Honour's observation that an acquittal merely indicated that a defendant's guilt had not been proved beyond reasonable doubt essentially dispelled this risk of conflicting findings. The four reasons his Honour provides can also be applied where the plaintiff is claiming in negligence. The third and fourth reasons Fisher J provides, relating to the distinction between an acquittal and factual innocence, have been discussed above. As to the repellence Fisher J notes of guilty plaintiffs benefiting from their wrongs, this is a spectre that looms even larger in negligence claims where the plaintiff bears the less onerous burden of establishing negligence rather than malice.

60 Rogers, above n 52, 866.
61 [1999] 1 NZLR 731, 738.
62 Ibid 738-739.
63 Ibid 739.
64 Ibid.
65 Ibid 740-742.

Ramifications for the Wider Administration of Justice

This risk of all acquittees being in a position to claim damages, irrespective of factual guilt or innocence, together with what Fisher J observed as the lack of a disincentive to bringing such suits that would exist in the absence of a guilt defence, could result in a proliferation of suits that would have deleterious ramifications for the wider administration of justice. Such ramifications certainly weigh against the argument for treating an acquittal as conclusive proof of innocence. This view was taken by the New Zealand Law Commission when it considered possible compensation schemes for individuals wrongfully convicted.[66] The Commission contended that too lenient an approach would give rise to a floodgates risk that in many cases the current processes of trial and appeal would be converted into an effective double trial: the first of guilt and the second of innocence.[67] Not only would this undermine finality in criminal procedure,[68] but such duplication would divert the legal system's scarce resources.[69] However, the Commission went further than recommending guilt to be raised as a defence, as Fisher J supported regarding malicious prosecution in *Van Heeren*. The Commission recommended that not only should innocence not be conclusively presumed from the fact of an acquittal, but the claimant should have to prove his or her innocence beyond reasonable doubt to be eligible.[70] That this made claiming compensation a difficult task must, the Commission rationalised, 'be accepted as the price for avoiding the destabilisation of the administration of justice'.[71] The government accepted this recommendation when introducing its non-statutory compensation guidelines,[72] although the scheme has since been altered so that to be eligible a claimant is required to prove his or her innocence on the balance of probabilities rather than beyond reasonable doubt.[73]

66 The Commission first released a discussion paper on the topic ('Compensation for Wrongful Conviction or Prosecution', Preliminary Paper 31, April 1998) followed several months later by 'Compensating the Wrongly Convicted', Law Commission Report 49, September 1998.

67 'Compensating the Wrongly Convicted', ibid para 19.

68 Ibid.

69 Ibid E12.

70 Ibid E9.

71 Ibid E12.

72 *Compensation for Wrongful Conviction and Imprisonment*, Ministry of Justice Press Release, 10 December 1998.

73 *Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases*, Pol Min (01) 34/5 12 December 2001; Andrea Patterson, 'Compensation for Wrongful Conviction and Imprisonment' (2004) *New Zealand Law Journal* 460. The difficulty in obtaining compensation and the fact that the scheme is discretionary, or *ex gratia* ('by way of grace'), make the scheme an unsatisfactory source of compensation: see generally Christine E Sheehy, 'Compensation For Wrongful Conviction in New Zealand' (1999) 8 *Auckland University Law Review* 977. Similarly in Canada the *Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons* provide a discretionary scheme where factual innocence must be established. Access to state compensation is likewise limited in Australia where compensation is *ex gratia* except in the Australian Capital Territory (ACT): Lynne Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Conviction?' (2007) 40 *The Australian and New Zealand Journal of Criminology* 179. Access to statutory compensation in the ACT and in the United Kingdom which have similarly worded statutory provisions is still limited. The claimant is required to show, inter alia, that he or she had his

However, while these ramifications for the wider administration of justice are indeed significant, they are likely to be less so in the context of a negligence action compared to a claim under a state compensation scheme. The existence of a negligence action may have the potential to lead to more claims than under the more difficult to establish tort of malicious prosecution, but this potential is not so great that the burden of proving innocence or guilt should be borne by the claimant rather than the defendant. Whereas under a state compensation scheme all individuals convicted but then subsequently acquitted may be in a position to claim if there are no restrictions such as regarding factual innocence or guilt, this would not be so under a negligence action against police. In the latter situation, all of the elements of the tort of negligence would still need to be made out before the claim could sound in damages. The claimant would still bear the rather onerous task of proving that the police were negligent and that this negligence caused loss to the plaintiff. The flexible standard of care that would be expected of police officers would make proving a breach of duty relatively difficult,[74] as would proving that the police's negligence was so significant that it was a contributing cause to the conviction. For instance, in *Hamilton* the allegedly negligent actions of the police included: witness contamination as a result of publishing the suspect's photograph; failing to make proper records of events and interviews with witnesses; and interviewing two witnesses together and with a photograph of the suspect on the desk. Not only did McLachlin CJC hold that these actions were not negligent when judged by the standards of a reasonable officer at the time, but her Honour also found that it was not clear that if these incidents had not occurred, the suspect would not have been charged and convicted.[75] Causation, therefore, would not have been established.[76] The difficulties that would thus be faced by a suspect in trying to make out a negligence claim are likely to stem the tide of such claims and prevent the excessive diversion of resources that could destabilise the administration of justice. Accordingly, although an acquittal should not be treated as conclusive proof of innocence at the subsequent civil trial, it should be incumbent on the defendant to prove guilt, rather than on the plaintiff to prove innocence.

V. The Impact the Imposition of a Duty of Care Could Have on the Performance of Police Functions

Fundamental to the maintenance of law and order in a free and democratic society is the effective enforcement of the criminal law. Police officers are the main actors charged with fulfilling this vital function, one which necessarily entails the targeting and investigating of individuals suspected of being

or her conviction overturned on the ground that a new or newly discovered fact showed conclusively that there has been a miscarriage of justice: Nick Taylor, 'Compensating the Wrongfully Convicted' (2003) 67 *Criminal Law Journal* 220.

74 The flexible standard of care that operates for professionals is discussed in greater detail below.

75 (2007) 285 DLR (4th) 620, 650.

76 Moreover, as Charron J noted (ibid 686), numerous actors such as attorneys, judges and juries are involved in the criminal process, providing opportunities for a *novus actus interveniens* to break the chain of causation.

involved in crime. A concern that flows from this is how the proposed duty of care owed by police officers to suspects can be reconciled with the police's overarching duty to the public to investigate crime. It is arguable that these two duties in fact conflict. A related argument is that recognising a duty will have a negative, 'chilling' effect on the way police officers investigate crime; the fear of litigation may encourage defensive policing, which would be detrimental to the public interest. Recognising a duty may also usher in a flood of claims that divert valuable police resources away from the enforcement of the criminal law.

Conflicting Duties

That a proposed duty of care would conflict with an existing duty incumbent on the defendant can potentially provide a potent reason for denying the proposed duty. Indeed in *Sullivan v Moody*[77] the High Court of Australia stated that if a suggested duty of care would give rise to inconsistent obligations, then that would ordinarily be a reason for denying that the duty exists. It was this risk of conflicting duties that provided one of the minority's key objections to imposing a duty of care in *Hamilton*. Charron J opined that because society's interest in having the police investigate crime and apprehend criminals inevitably collides with the suspect's interest to be left alone by the State, the imposition of a duty of care would of necessity give rise to conflicting duties. Requiring police officers to take reasonable care not to harm an individual would inevitably pull the police away from targeting that individual as a suspect. The overly cautious approach that would result from the imposition of conflicting duties would, her Honour emphasised, seriously undermine society's interest in having the police investigate crime and apprehend offenders.[78]

McLachlin CJC, however, asserted that a duty to suspects would not conflict with the overarching duty to investigate crime. Her Honour stressed that the duty to the public to investigate crime is a duty to investigate in accordance with the law, and not in an unconstrained manner. This duty did not conflict with the proposed duty to take reasonable care toward the suspect. In fact, her Honour stated that because a suspect is a member of the public he or she shares the public's interest in diligent investigation in accordance with the law. McLachlin CJC criticised Charron J's suggestion that there existed a conflict between the police officer's duty to investigate crime and the officer's duty to leave people alone. McLachlin CJC rejoined that although a person may prefer to be left alone, there was no authority for the proposition that an investigating police officer is under a duty to leave people alone.[79]

Charron J's reasoning echoes what has been the dominant view in respect of whether healthcare professionals owe a duty of care to parents when investigating child abuse allegations. The courts have consistently declined to recognise such a duty on the ground that the duty to parents would conflict

77 (2001) 207 CLR 562.
78 (2007) 285 DLR (4th) 670, 667-672.
79 Ibid 638-640.

with the duty owed to the child. *Sullivan*[80] itself involved two appeals by parents contending a duty of care was owed to them by healthcare professionals whose allegedly negligent investigations concluded that the parents were responsible for abusing their children. The High Court of Australia unanimously held that the interests of the children and of those suspected of causing harm to the children were irreconcilable, and so there could accordingly be no duty. The relevant statutory scheme required that the healthcare professionals treat the interests of the children as paramount, which could not be done were a duty to parents imposed.[81] Subsequently in *B v Attorney-General*[82] the Privy Council held a duty of care was owed to the child,[83] but it declined to recognise any duty owed to a parent. Lord Nicholls, for the Board, held that the interests of the alleged perpetrator and the alleged victims were poles apart. His Lordship acknowledged that those conducting the investigation must act in good faith throughout, but held that to impose a duty of care in favour of the alleged victims or potential victims and, at one and the same time, in favour of the alleged perpetrator, would not be satisfactory.[84]

This view was reiterated by a majority[85] of the House of Lords in *D v East Berkshire Community Health NHS Trust*.[86] Lord Nicholls observed that although the interests of parent and child normally marched hand-in-hand, this was not so where a parent wilfully harms his or her child. It followed that the duty health professionals owed to the child should not be clouded by imposing a conflicting duty in favour of the parents or other suspects.[87] His Lordship rejected the appellant's contention that the duty owed to the parent was the same as that owed to the child, viz to exercise due skill and care in investigating the possibility of abuse. His Lordship explained that when the doctor considers the possibility that a parent is the source of the abuse, the doctor knows that the interests of the child and the parent are diametrically opposed. It is in the interests of the child that the doctor follows up on this suspicion; however it is in the interests of the parent that the doctor does not do this.[88] Appropriate protection was seen to be afforded by the requirement that investigations be conducted in good faith. This gave parents a level of protection similar to that given to individuals suspected of committing crimes.

80 (2001) 207 CLR 562.
81 Ibid 582.
82 [2004] 3 NZLR 145.
83 The House of Lords had previously held that no duty was owed to the child: *X (minors) v Bedfordshire CC* [1995] 3 All ER 353.
84 Ibid 155.
85 Lords Nicholls, Steyn, Rodger and Brown.
86 [2005] 2 All ER 443. See also the use of the conflicting duties argument to prevent a duty of care in *Trent Strategic Health Authority v Jain* [2009] UKHL 4. In this case, the issue was whether a health authority making an application for the cancelling of a nursing home's registration owed a duty to the proprietors of the nursing home. The House of Lords rejected the proposed duty partly on the basis of the conflicting duties it would give rise to. Lord Scott, delivering the leading judgment, stated that the proposed duty 'would or might' inhibit the exercise of the authority's statutory powers and be potentially adverse to the interests of nursing home residents who were the class of persons the statutory powers were designed to protect.
87 Ibid 473.
88 Ibid.

Most relevantly, the Australian courts also have made use of this idea of conflicting duties to reject a duty owed by police officers to suspects.[89] For example, in *Tame v New South Wales*[90] a police officer incorrectly recorded a high blood alcohol reading against a driver following an accident. Although the error was soon corrected, the plaintiff suffered psychiatric damage and claimed a duty of care was owed to her by the police. The High Court of Australia unanimously refused to recognise such a duty, four of the judges referring to the conflicting duties it would give rise to.[91]

Yet the Australian cases were not rebutted by McLachlin CJC. Moreover, in light of the fairly analogous position of parents as suspects, it is disappointing that McLachlin CJC did not critique these views, let alone mention them, before taking a different stance. The absence of any such discussion was even more surprising as the Supreme Court of Canada had itself just several months earlier unanimously declined to recognise a duty to parents when investigating child abuse claims, and had done so, like the English and Australian cases, largely on the basis that to allow a duty would give rise to conflicting duties.[92]

Lord Bingham, though, delivered a powerful dissenting judgment in *East Berkshire*,[93] which may provide some support for McLachlin CJC's approach. Lord Bingham formulated the duty of the healthcare professional as one not to cause harm to a parent foreseeably at risk of suffering harm by failing to exercise reasonable and proper care in making a diagnosis of child abuse.[94] His Lordship accepted the appellants' contention that this was, in substance, the same duty as the healthcare professionals already owed to the child. The duty to the child would be breached if signs of abuse were overlooked which a careful and thorough examination would identify, with the risk then being that abuse which would otherwise be stopped would be allowed to continue. Yet this would also be a breach of the duty if owed to a normal parent, whose interests are the same. This would not be different if the parent were the abuser, because the duty could only be to serve the lawful interests of the parent.[95]

Other suspects, however, are generally in a different position to parents. By virtue of their close and intimate relationship with their children, parents have a direct interest in identifying the abuser and stopping the abuse. To say that a suspect, as a member of the public, shares, as McLachlin CJC asserted, the public's interest in investigating crime is not as convincing. Although parents may be willing to tolerate a careful and thorough examination of the child which includes involving the parents in the questioning process, the primary interest of other suspects would generally be, as Charron J observed, to be left alone. The suspect's interest in being left alone does not,

89 *Soutter v Williams* [2007] VCC 306; *Mohamed v State of Victoria* [2007] VSC 538; *Gandy v State of Victoria* [2006] VSC 480.
90 (2003) 211 CLR 317.
91 Gleeson CJ [26-27], Gaudron J [57], McHugh J [124-125] and Hayne J [298-299].
92 *D (B) v Halton Region Children's Aid Society* (2007) 284 DLR (4th) 682.
93 [2005] 2 All ER 443.
94 Ibid 460.
95 Ibid.

as McLachlin CJC claimed, translate to a duty owed by police officers to leave a person alone. But, the fact that the interests of a suspect diverge from those of the public, which wants the suspect to be investigated, still undercuts the duty owed to the public. As Lord Rodger stated in *East Berkshire*, acting on a suspicion of parental abuse might well be reasonable where only the child's interests were engaged. However, it could well be unreasonable where the parents interests also had to be taken into account.[96] So, too, recognising a duty owed by police officers to suspects could affect when it is reasonable to act against a suspect. Where without a duty to suspects it may have been reasonable to continue investigating a person, it may no longer be reasonable where a duty is owed to suspects.

However, that the duties may be conflicting does not automatically preclude the recognition of a duty of care. As the High Court of Australia put it in *Sullivan*,[97] inconsistent obligations will *ordinarily* be a reason for a denying a duty. It would not, the Court said, of itself rule out a duty of care, for people may be subject to a number of duties so long as they are not irreconcilable.[98] At what point two duties cross the line from being inconsistent to irreconcilable is not clear exactly, but it must surely be informed by the policy implications of recognising the novel duty alongside the existing overarching duty. In *Hamilton*, McLachlin CJC observed that the authorities made it clear that conflicting duties will only negate a duty of care where the conflict gives rise to a 'real potential for negative policy consequences'.[99] In *Cooper v Hobart*,[100] for example, the Supreme Court of Canada held that the Registrar of Mortgage Brokers did not owe a duty of care to exercise his statutory powers to avoid or minimise a loss suffered by an investor resulting from the improper actions of a mortgage broker. The Court held so on the basis that not merely would a duty to individual investors potentially conflict with the Registrar's overarching duty to the public, but that it would 'come at the expense of other important interests, of efficiency … and at the expense of public confidence in the system as a whole'.[101] Similarly, in the child abuse cases that have been discussed it was not the conflicting duties *per se* which negated a duty, but the fear that the conflicting duties would inhibit the health authorities in their investigation of child abuse to the detriment of the child's interests. The potential detrimental effects a duty to suspects could have on the police's overarching duty to investigate crime therefore demand consideration.

The Detrimental Effects the Recognition of a Duty Could Have on Policing

In *Hill v Chief Constable of West Yorkshire Police*[102] the House of Lords struck out a claim brought by the mother of the final victim of the Yorkshire Ripper alleging negligence by the West Yorkshire police in failing to

96 Ibid 480.
97 (2001) 207 CLR 562.
98 Ibid 582.
99 (2007) 285 DLR (4th) 620, 639.
100 [2001] 3 SCR 537.
101 Ibid [50].
102 [1989] AC 53; followed in *Osman v Ferguson* [1993] 4 All ER 344.

apprehend Peter Sutcliffe before he could strike again. Although the plaintiff failed to establish proximity because the victim was merely one of a vast number of the female general public and was at no special distinctive risk, Lord Keith set forth a number of policy reasons opposing any role for the law of negligence as far as the conduct of police investigations were concerned. His Lordship first stated that the general sense of public duty which motivates police forces was unlikely to be appreciably reinforced by the imposition of such liability. Furthermore, recognising a duty could lead to police carrying out investigations in a detrimentally defensive frame of mind. His Lordship was finally concerned about the floodgates risk, and that valuable police resources would be diverted from suppressing crime to defending police decisions in subsequent litigation.[103]

The House of Lords' decision in *Hill* is open to the criticism that it both overstated the potential negative effects of subjecting police investigations to the law of negligence, and ignored the potential salutary effects of doing so. The first policy reason provided by Lord Keith, namely that police are already impeccably motivated by their sense of public duty, is the least compelling. The naïveté of viewing all police officers as paragons of honour is illustrated by cases like *Brooks v Metropolitan Police Commissioner*.[104] There, the House of Lords was considering issues surrounding a police investigation which Lord Steyn described as containing a 'litany of derelictions of duty and failures'.[105] It was with some justification then, that in *Brooks* Lord Steyn, who delivered the leading judgment, pronounced that '[n]owadays, a more sceptical approach to the carrying out of all public functions is necessary'.[106] Yet the House of Lords continues to support the other policy reasons set forth by Lord Keith in *Hill*. Lord Steyn in *Brooks* had no doubt that *Hill* would still be decided the same today. His Lordship held that a retreat from *Hill* would have detrimental effects for law enforcement, and that the police's ability to perform their public functions in the interests of the community, fearlessly and with dispatch, would be impeded.[107] On the other hand, though, there were signs that not all of their Lordships were entirely content with the position laid down by Lord Keith in *Hill*. Both Lord Nicholls and Lord Bingham took the time to say that they were reluctant to indorse the full breadth of *Hill*.[108] Lord Nicholls also mentioned that there may be exceptional cases where denying a remedy 'would be an affront to the principles which underlie the common law',[109] in which case *Hill* should not prevent a remedy, while Lord Steyn left open the possibility that cases of 'outrageous negligence' by the police might fall beyond the reach of *Hill*.[110] However, when again the House of Lords was required to consider whether

103 Ibid 63.
104 [2005] 2 All ER 489.
105 Ibid 494, summarizing *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (1999) Cm 4262-1.
106 Ibid 504.
107 Ibid.
108 Ibid 493, 494.
109 Ibid 494.
110 Ibid 506.

police officers should owe a duty of care to victims of crime in *Smith v Chief Constable of Sussex Police*,[111] a majority[112] once again upheld the public policy grounds enumerated in *Hill* as generally preventing a duty of care with respect to police investigations. Though this may cause individual hardship, their Lordships considered the greater public good outweighed this. These authorities place considerable obstacles in the way of a novel duty to suspects, and a closer scrutiny of the policy considerations they represent is required.

The Defensive Practice Argument

Imposing on police officers a duty to suspects could, it is said, cause them to investigate suspects less vigorously than they would otherwise. Police officers may choose to pursue suspects only where the evidence is overwhelming. As Charron J explained in *Hamilton*, by letting the suspect go, the police officer would be avoiding the risk of civil liability. Her Honour also noted that police officers may be particularly cautious where the suspect in question is a 'person of stature and means' who stands to lose considerably from being entangled in the criminal law process.[113] These possibilities could mean that the duty to a suspect both conflicts with and significantly undermines the police's overarching duty to the public to investigate crime.

In response to the defensive practice argument it has been remarked that vicarious liability may operate in many cases so that it will be the police force rather than the police officer paying the damages.[114] However, individual detectives were still sued along with the Hamilton-Wentworth Regional Police Services Board in *Hamilton*. Still, many police officers may be indemnified from civil liability in the course of carrying out their professional duties, thus reducing to an extent any chilling effect.[115] But even so, if a police officer is responsible for carelessly causing significant harm that results in a large damages award the officer may run the risk of internal disciplinary action, and it is also likely to have a negative effect for the officer in terms of career advancement. In any event, incurring civil liability, whether for oneself or for one's police force, is something to be avoided.

More convincing are the arguments that flow from the fact that police officers are professionals,[116] from whom society demands a certain level of competence. The defensive practice argument could equally be made on behalf of other professionals such as doctors, however the argument that holding doctors liable for medical negligence would make them less efficient or stifle the advancement of medical science has not been accepted by the

111 Sub nom *Van Colle v Chief Constable of Hertfordshire Police* [2008] 3 All ER 977.

112 Lords Hope, Phillips, Carswell, and Brown. Lord Bingham dissented, but still stated that *Hill* was correct and simply distinguished the facts of *Smith* from *Hill*.

113 (2007) 285 DLR (4th) 620, 670.

114 Chamberlain, above n 4, 209.

115 *Hamilton* (2007) 285 DLR (4th) 620, 644.

116 In *Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187, 199 Richardson J described the police as having 'the training and experience to investigate a possible offence impartially and with skill'.

courts.[117] As the Ontario Court of Appeal said in *Hamilton*, '[s]urgeons do not turn off the light over the operating room table because they owe a duty of care to patients. They perform the operation, with care'.[118] Likewise barristers can now not rely on the chilling effect argument to immunise themselves from liability. The fear that unfounded actions might have a negative effect on the conduct of advocates, an argument which moved the House of Lords to confer an immunity on barristers from negligence liability in *Rondel v Worsley*,[119] was dismissed, along with the immunity, in *Arthur J S Hall & Co v Simons*.[120] Lord Steyn rejected the argument as having 'a most flimsy foundation, unsupported by empirical evidence'.[121]

The defensive practice argument as it applies to the police likewise rests on rather flimsy foundations. Although some research suggests that police do genuinely fear litigation,[122] other research has shown that the impact on police performance has been exaggerated.[123] Several studies have observed that only a minority of officers believed the threat of civil liability hindered their effectiveness,[124] while some studies actually suggest that a fear of litigation promotes better policing practices. In one survey of 289 US police chiefs, 86% of respondents believed that some lawsuits had helped make police officers more professional.[125] Certainly where the defensive practice argument has been used by the courts to reject imposing liability in negligence on police officers, it has not been founded on empirical evidence. At the very least the point can be made that the empirical research does not provide a solid basis for the defensive practice argument, which is therefore of a merely speculative nature. This, combined with the point that the defensive practice argument carries little weight shielding other professionals from negligence suits, suggests that this policy consideration is overstated.

117 See, for example, Marcus Tregilgas-Davey, '*Osman v Metropolitan Police Commissioner*: The Cost of Police Protectionism' (1993) 56 *Modern Law Review* 732, 735; Tom Baker, *The Medical Malpractice Myth* (2005) 136.

118 (2005) 259 DLR (4th) 676, 693.

119 [1969] 1 AC 191. Barristers were accorded immunity in New Zealand by *Rees v Sinclair* [1974] 1 NZLR 180.

120 [2000] 3 All ER 673. The immunity has likewise been rejected in New Zealand: *Lai v Chamberlains* [2007] 2 NZLR 7. The High Court of Australia, in contrast, has retained full immunity for barristers from negligence claims: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 70 ALJR 755 (HCA). Noteworthy, though, was the majority's statement that although the defensive practice argument was not irrelevant, it was also 'not of determinative significance', [29].

121 Ibid 683.

122 See, for example, S Jeller, N K Pope, and K E Voges, 'The Stress of Litigation' (1994) *Australian Police Journal* 163; F Scogin and S Brodsky, 'Fear of Litigation Among Law Enforcement Officers' (1991) X (1) *American Journal of Police* 41.

123 See the studies cited by Mandy Shircore, 'Police Liability for Negligent Investigations: When Will a Duty of Care Arise?' (2006) 11 *Deakin Law Review* 33, 38 n 140.

124 See, for example, A Garrison, 'Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal, and State Police Officers' (1995) 18 *Police Studies* 19; D E Hall et al, 'Suing Cops and Correction Officers: Officer Attitudes and Experiences About Civil Liability' (2003) 26 *Policing: An International Journal of Police Strategies and Management* 529.

125 T J Martinelli and J M Pollock, 'Law Enforcement Ethics, Lawsuits, and Liability: Defusing Deliberate Indifference' (2000) 67(10) *The Police Chief* 52.

The Salutary Effects of Recognising a Duty of Care

It has been said that the House of Lords in *Hill* recast tort law as the enemy, rather than the instrument, of public policy.[126] The defensive practice argument can indeed be criticised on the grounds that it ignores the role that negligence can play in promoting professional standards. It is arguable that nothing more effectively focuses the mind and thus enhances the quality of a decision than the knowledge that the decision may later be scrutinised by a court of law.[127] In *D v East Berkshire* Lord Bingham was particularly scathing of focusing just on the negative effects of imposing a duty of care: '[t]o describe awareness of a legal duty as having an "insidious effect" on the mind of a potential defendant is to undermine the foundation of the law of negligence'.[128] The courts have, for example, appreciated the role negligence can play in promoting professional standards when recognising a novel duty of care owed by a solicitor to the intended beneficiary of a will. In *Gartside v Sheffield, Young and Ellis*[129] Richardson P stated that the recognition of a duty of care in this context shared two important social objectives: to compensate deserving plaintiffs, and to promote professional competence. Similarly in *Hill v Van Erp*[130] Gummow J noted that the public interest in the promotion of professional competence supported the recognition of such a duty.

In *Hamilton*, McLachlin CJC believed that the tort of negligence could have a salutary effect by responding to failures in the justice system such as wrongful convictions. Her Honour was able to cite a surfeit of official reports and inquiries where negligent policing was criticised as contributing to wrongful convictions.[131] This problem is certainly not limited to Canada. The 'litany of derelictions' the House of Lords was faced with in *Brooks* has already been noted, and in New Zealand Sir Thomas Thorp's report on *Miscarriages of Justice*[132] documented the role substandard policing had played in previous wrongful convictions. Moreover, a recurring point in many of these reports and inquiries is that the instances of substandard policing which have contributed to wrongful convictions are not isolated. Sir Thomas Thorp, in his report, concluded that wrongful convictions could not be treated as aberrations or isolated incidents caused by rogue police officers or individual misuses of forensic science. Rather, after a survey of international evidence he reported that many miscarriages of justice occur because of systemic conditions.[133] In Canada the *Morin Inquiry* similarly concluded that the flaws in existing police practices played a contributory role.[134] Indeed, in New Zealand it has been noted that current police procedures for

126 Laura Hoyano, 'Policing Flawed Police Investigations: Unravelling the Blanket' (1999) 62 *Modern Law Review* 912.
127 Tregilgas-Davey, above n 86, 735.
128 [2005] 2 All ER 443, 459.
129 [1983] NZLR 37, 51.
130 (1997) 188 CLR 159.
131 (2007) 285 DLR (4th) 620, 637.
132 Legal Research Foundation, December 2005.
133 Ibid 77.
134 Peter Sankoff, 'Wrongful Convictions and the "Shock Wave" Effect' (2006) *New Zealand Law Journal* 134, 135.

conducting lineups and photo spreads do not accord with the latest research on collecting reliable eyewitness evidence.[135] All of this suggests a role for negligence in promoting, and indeed increasing, professional standards. If a duty to suspects can have this effect, then it may tend to enhance the public interest more than conflict with it. It is obviously in the public interest that the true culprit is brought to justice; investigating and convicting the wrong person means that the true culprit remains beyond the pale of justice, his or her trail growing colder all the while.

The Floodgates Risk and the Diversion of Public Resources

Defending negligence actions could prove costly for police. Long and protracted discovery and hearing procedures, the cost of damages or settlement, and the increased insurance premiums that police forces would be required to pay to provide cover for negligence all have the potential to divert valuable resources away from investigating crime.[136] Even so, these problems have not protected police from regular suits for battery and false imprisonment.[137] Moreover, the Ontario Court of Appeal in *Hamilton* observed that the recognition of a duty owed to suspects in *Beckstead* had not ushered in a flood of claims. Between the decision in *Beckstead* in 1997 and the Court of Appeal's decision in *Hamilton* in 2005, there had been only 15 reported cases alleging negligent investigation in Ontario, a mere two of which had been successful.[138] It thus seems that the flood of cases that some believe a recognition of a duty to suspects would precipitate is unlikely to happen, and so the amount of resources being diverted away from law enforcement is not likely to be crippling.

Resolving These Concerns Through the Flexible Standard of Care Required of Professionals

In *Hamilton*, McLachlin CJC believed that concerns regarding defensive practice and the opening of the floodgates could be further allayed by focusing on the standard of care that would need to be breached before liability could arise.[139] A closer look at this standard of care does suggest that it gives rise to a degree of flexibility that should not seriously inhibit policing, while it will also mean that establishing a breach of duty will not be easy. The general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances.[140] But, where that person is a professional this standard is qualified so that the defendant must attain the standard of persons of reasonable skill and experience within that profession.[141] The standard of the reasonable police officer in similar circumstances, which was adopted in *Hamilton*, provides a flexibility that gives sufficient regard to the

135 Ibid 136.

136 Tom Hughes, 'Police Officers and Civil Liability: "The Ties That Bind"?' (2001) 24 *Policing: An International Journal of Police Strategies and Management* 240, 243.

137 *Osman* ECHR Case 87/1997/871/1083, 141; Hoyano, above n 94, 933.

138 (2005) 259 DLR (4th) 676, 694.

139 (2007) 285 DLR (4th) 620, 646.

140 *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784.

141 See, for example, *Whitehouse v Jordan* [1981] 1 WLR 246 (CA); L N Klar, *Tort Law* (3rd ed, 2003) 306; *Hamilton* (2007) 285 DLR (4th) 620, 646-647.

concerns that have been raised to oppose the recognition of a duty. This standard does not require that the police officer be right, nor does it demand optimal performance judged through the rose-tinted lenses of hindsight. As McLachlin CJC stressed in *Hamilton*, '[c]ourts are not in the business of second-guessing reasonable exercises of discretion by trained individuals'.[142] Rather, her Honour said, the courts require that the police officer must act as a reasonable police officer would in the circumstances with which the defendant police officer was faced at the time. These circumstances may have required an urgent decision to be made where there was a deficiency in information, and there may have been a number of actions which the officer could reasonably have taken. Mere errors of judgment which any reasonable professional might have made would not, her Honour stated, amount to a breach of the standard of care.[143]

The flexible standard of care that operates for professionals has been used before by the House of Lords to allay concerns about the floodgates factor and defensive practice. In *Phelps v Hillingdon LBC*[144] the House of Lords held that a local education authority and its employees owed a duty of care to school children in the provision of educational services. So, an educational psychologist who negligently failed to diagnose a dyslexic child was liable. Lord Clyde rejected the argument that recognising this duty would open the floodgates or inspire a defensive attitude among the employees of educational authorities, and did so partly on the basis that the standard of care resolved these concerns.[145] His Lordship referred to the *Bolam* test, from which the standard required of professionals is often cited as flowing. In *Bolam v Friern Hospital Management Committee*[146] McNair J asserted that a doctor would not be guilty of negligence if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.[147] Lord Clyde observed that this standard recognised the difficult nature of some decisions which professionals are required to make, and that it made room for genuine differences of view on the courses of action which could be taken.[148]

The Overall Impact on Policing

It thus appears that although imposing on police officers a duty to suspects may conflict with the police's overarching duty in the public interest to investigate crime, the negative policy consequences that flow from

142 (2007) 285 DLR (4th) 620, 642.
143 Ibid 648.
144 [2001] 2 AC 619.
145 Ibid 672.
146 [1957] 1 WLR 582, 586-587.
147 Ibid 586-587. Note, however, that the courts have retreated slightly from *Bolam*. In *Bolitho v City and Hackney Health Authority* [1998] AC 232 the House of Lords held that the practices accepted as proper by the medical profession were not conclusive, and that the relevant practices or opinions must have a 'logical basis' and be 'responsible', 'reasonable' or 'respectable'. This does not constrain the actions of professionals to any great extent though; provided a police officer's actions can withstand logical analysis and are reasonable there will be no breach.
148 [2001] 2 AC 619, 672.

recognising a duty to suspects are overstated and do not provide compelling policy reasons for rejecting a duty of care. Rather, it appears to be in the public interest that police officers are required to balance the two duties, which are not irreconcilable. Among the law of torts, however, no tort is an island unto itself, and how the proposed duty in negligence relates to the rules and principles embodied in other torts now falls to be considered.

VI. The Coherence of the Proposed Duty

A novel duty of care ought to cohere with other legal rules and principles, including other rules and principles of the law of torts. The rules and principles within the law of torts 'represent a weighing up and balancing out of varying considerations of policy'.[149] It follows that a novel duty of care should not be recognised, if the effect would be to subvert other rules or principles of the law of torts, unless an analysis of the relevant policy considerations justifies such subversion. As circumstances change, some policy considerations may become more compelling than they were previously and the existing rules and principles may be in need of development. These issues are raised squarely when considering whether police officers should owe a duty of care to suspects. The existing torts of false imprisonment, misfeasance in a public office and malicious prosecution all afford some measure of recourse to individuals who suffer loss during the criminal process. In *Hamilton*, McLachlin CJC considered the existing remedies incomplete and believed that an important category of police conduct with the potential to seriously affect the lives of suspects would go unremedied if a duty of care was not recognised. Her Honour concluded that '[t]o deny a remedy in tort is, quite literally, to deny justice'.[150] Yet McLachlin CJC did not view this shortcoming in individual justice in light of the wider consideration of the overall coherence of the law. Charron J, in contrast, stated that the proposed tort of negligent investigation would effectively subsume all the existing torts and risk upsetting the necessary balance between the competing interests at play,[151] though her Honour provided no analysis of the existing rules and principles to support why these torts struck the necessary balance. An analysis of the existing rules and principles and whether, if the proposed duty would subvert these, it ought to, should precede any conclusion as to whether the proposed duty should be recognised.

False Imprisonment

Liability for the tort of false imprisonment arises where one person is detained or imprisoned by another person acting without lawful justification.[152] Although there must be an intention to detain, false imprisonment is otherwise a tort of strict liability and mistakenly believing that there is lawful authority to detain will not exculpate the defendant.[153]

149 Todd, above n 15, 131.
150 (2007) 285 DLR (4th) 620, 637.
151 Ibid 686.
152 *Willis v Attorney-General* [1989] 3 NZLR 574, 579.
153 *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19.

The tort is actionable *per se*, that is, damage need not be proved.[154] A claim may lie for instance where the police have detained a person for questioning without making an arrest,[155] or where a person is invalidly arrested and then detained. The tort, however, has a narrow ambit. As soon as the individual is brought before a court and the judge exercises his or her discretion as to how to deal with the matter, any suit must be brought for malicious prosecution rather than false imprisonment.[156] The limited window of opportunity this tort provides renders this tort of little relevance to most of those who have suffered as the suspect of a negligent investigation.

Misfeasance in a Public Office

The tort of misfeasance in a public office is founded upon the need to ensure that those vested with the power of exercising public functions do not abuse their position and harm members of the public.[157] To succeed under this tort the plaintiff must prove that:

(i) the defendant is a public officer;
(ii) the defendant acted deliberately and unlawfully in the exercise or purported exercise of his office;
(iii) the defendant acted with malice towards the plaintiff, or with knowledge that his conduct was unlawful and was likely to injure the plaintiff;[158] and
(iv) the plaintiff has suffered damage.[159]

So, unlike malicious prosecution, malice need not necessarily be established, nor need a lack of good cause. Furthermore, there is authority that a plaintiff in a misfeasance in a public office action is not required to show that the proceedings terminated in his or her favour.[160] That these differences may cause an unwarranted subversion of the tort of malicious prosecution is a risk that has been adverted to by the courts. In *Silcott v Commissioner of Police for the Metropolis*[161] the English Court of Appeal observed that an action for malicious prosecution provided a limited exception to the general rule of witness immunity. The Court held that in view of the strong policy reasons in favour of an immunity for witnesses, any claim against a witness was more appropriately brought under the head of malicious prosecution rather than the tort of misfeasance in a public office, which is slightly easier to make out. In *Niao v Attorney-General*[162] Randerson J, after considering *Silcott*, stated as a general principle that damages relating to a failed prosecution of a crime could not be recovered via a misfeasance in a public office action, and

154 Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th ed, 2003) 462.
155 *R v Goodwin (No 2)* [1993] 2 NZLR 390.
156 Todd, above n 24, 93.
157 *Jones v Swansea City Council* [1990] 1 WLR 54, 85, aff'd [1990] 1 WLR 1453.
158 For the first three elements see Todd, above n 15, 801-807.
159 *Watkins v Secretary of State for the Home Department* [2006] 2 All ER 353.
160 *Geo Cluthe Manufacturing Co v ZIW Properties Inc* (1995) 23 OR (3d) 370, 379.
161 (1996) 8 Admin LR 633, overruled on another point by *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435.
162 (1998) 5 HRNZ 269.

could be recovered only by means of a claim for malicious prosecution.[163] This principle would foreclose the use of the tort of misfeasance in a public office to individuals suffering loss where a negligent police investigation has resulted in the prosecution of the plaintiff.

Malicious Prosecution

It is likely, then, that the tort of malicious prosecution is the only tort that will generally be of relevance to an individual who has suffered loss as a suspect, and which therefore is liable to being subverted by a duty in negligence. This tort is designed to discourage the perversion of the machinery of justice for an improper purpose.[164] To make out this action the plaintiff must prove that:[165]

(i) the defendant prosecuted the plaintiff on a criminal charge;
(ii) the criminal proceedings terminated without the plaintiff being incriminated;
(iii) the defendant had no reasonable and probable cause for bringing the proceedings;
(iv) the defendant acted maliciously; and
(v) the plaintiff suffered damage as a consequence of the proceedings.

A police officer formally involved in bringing the charges is clearly responsible for prosecuting the plaintiff.[166] However, unlike misfeasance in a public office there is no requirement that the defendant be a public officer. Private citizens can also be held to have prosecuted the plaintiff, either via a private prosecution or through their role in assisting police. Although simply furnishing information is insufficient, a person may be held to have prosecuted someone if, for instance, he or she puts the police in possession of information which virtually compels an officer to lay an information, or if he or she withholds details with the knowledge of which the police would not have prosecuted.[167] As Lord Keith put it in *Martin v Watson*,[168] the fact that the defendant was not technically the prosecutor should not allow him to escape liability where he was in substance the prosecutor.

The most onerous element of the tort of malicious prosecution is proving malice, which includes 'any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice'.[169] There has been criticism that malicious prosecution provides an inadequate remedy because so difficult are the elements to establish that 'the action is for all practical

163 Ibid 293.
164 See, for example, *Mohamed Amin v Bannerjee* [1947] AC 322, 330; *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187.
165 Todd, above n 15, 775.
166 See, for example, *Fitzjohn v Mackinder* (1861) 9 CB (NS) 505; (1861) 142 ER 199; *Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187, 207; *Martin v Watson* [1995] 3 All ER 559.
167 *Commercial Union Assurance Co of New Zealand v Lamont* [1989] 3 NZLR 187; accepted by the House of Lords in *Martin v Watson* [1995] 3 All ER 559.
168 [1995] 3 All ER 559, 567.
169 *Stevens v Midland Counties Railway Co* (1854) 10 Exch 352; 156 ER 480 per Alderson B.

purposes defunct'.[170] Yet the tort was always intended to be a difficult one to establish. In the 17th century case of *Savile v Roberts*,[171] which provides the foundation for the modern tort of malicious prosecution, Holt CJ emphasised that the action ought not to be favoured but managed with great caution. The reason why 'the action for malicious prosecution is held on tighter rein than any other in the law of torts'[172] stems from the competing policy concerns that this tort strives to balance. On the one hand, the launching of scandalous charges can clearly inflict serious injury upon the accused, both in terms of loss of liberty and reputation. On the other hand, though, there exists the interest of the wider community in the efficient enforcement of the criminal law. This requires that private citizens who discharge their public duty of co-operating in bringing offenders to justice are duly protected.[173]

The Courts' Protection of Torts Requiring Malice Against the Spread of Negligence

Recognising a duty of care in negligence is likely to undermine and render superfluous torts such as malicious prosecution that require malice to be established; plaintiffs will have no need to prove malice where they can more easily prove the lesser standard of negligence. Accordingly, the courts have, in general, jealously guarded these torts against what can at times seem the relentless spread of negligence. For instance, in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*[174] the New Zealand Court of Appeal held that a fire loss investigator engaged by an insurer to investigate and report on the cause of a fire which caused damage to the insured's property did not owe a duty of care to the unsecured creditor or the director and shareholder of the insured. One of the key reasons for this was the effect that recognising a duty of care would have on the tort of defamation. The investigator's report may be defamatory if it suggests that the insured may have been guilty of arson, yet the investigators would be able to avail themselves of the defence of qualified privilege. This defence can be defeated by proof of malice, but not by proof of mere negligence. So, as Cooke P recognised, allowing a claim in negligence would impose a greater restriction on freedom of speech than existed under the law worked out over many years to cover freedom of speech and its limitations. The law of defamation, his Honour feared, would be overthrown by a sidewind.[175]

The courts have likewise taken care to preserve the tort of malicious prosecution from the spread of negligence. In *Mortensen v Laing*,[176] a case heard concurrently with *South Pacific*, the issue was whether such a duty as was contended in *South Pacific* was owed to the insured, one of which had been prosecuted for arson, allegedly as a result of the investigator's report. That person was convicted but later had the conviction quashed on

170 Kaiser, above n 36, 114.
171 (1698) 1 Ld Raym 374.
172 John Fleming, *The Law of Torts* (7th ed, 1987) 579.
173 Ibid.
174 Alt cit *Mortensen v Laing* [1992] 2 NZLR 282.
175 Ibid 302.
176 Ibid.

appeal. The proposed duty of care was rejected, largely because it would cut across the tort of malicious prosecution. Cooke P observed that the tort of malicious prosecution represented a balancing of competing public interest factors. It was settled that a person who went so far as to set the law in motion could not be liable to the plaintiff without proof of malice and want of reasonable cause. So also, Cooke P concluded, it would be odd if a person whose involvement falls short of setting the law in motion, as was the case here, was liable for mere negligence.[177]

The English courts have also evinced a willingness to preserve the tort of malicious prosecution. In *Calveley v Chief Constable of Merseyside Police*[178] Lord Bridge asserted that 'where no action for malicious prosecution would lie, it would be strange indeed if an acquitted defendant could recover damages for negligent investigation'.[179] Similarly, in *Elguzouli-Daf v Commissioner of Police*[180] Morritt LJ noted that recognising a duty to suspects would suggest that the independent torts of malicious prosecution and misfeasance in a public office were unnecessary, a conclusion the Lord Justice was unwilling to draw. So too in Australia, Higgins J in *Emanuele v Hedley*[181] observed that recognising a duty would render the tort of malicious prosecution otiose.

Extending Negligence

In respect of some torts, however, the courts have on rare occasions lowered the standard of culpability required and admitted a claim in negligence where the existing remedies were seen as insufficient. The House of Lords' seminal decision in *Hedley Byrne*[182] is the paradigmatic example of this. Their Lordships were not dissuaded from recognising a remedy for negligent misstatements by the existence of a tort of deceit, which required that the representation causing loss be deliberately false.[183]

More recently in *Spring v Guardian*[184] a majority of the House of Lords recognised a novel duty of care owed by an employer to an ex-employee when writing a reference. This was despite for over two centuries the law according qualified privilege to an employer giving a reference concerning a former employee,[185] ensuring that under the law of defamation the referee would only be liable where he or she had acted with malice. Their Lordships considered that the policy fear of undermining the law of defamation was overstated and that justice required the ex-employee have a remedy in negligence. *Spring*, along with *Hedley Byrne*, demonstrate that other torts are by no means inviolable.

177 Ibid 305.
178 [1989] 1 All ER 1025.
179 Ibid 1030.
180 [1995] QB 335.
181 (1997) 137 FLR 339.
182 [1963] 2 All ER 575.
183 See, for example, *Pasley v Freeman* (1789) 3 TR 51; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205.
184 [1995] 2 AC 296.
185 *Edmonson v Stephenson* (1766) Buller's NP 8.

When considering whether justice requires that the tort of malicious prosecution ought to be subverted by negligence, the inquiry ought to begin with a survey of the foundations and rationales of the tort of malicious prosecution. Such a survey was surprisingly absent from the judgments in *Hamilton*. The reason why malicious prosecution came to possess its onerous elements is rooted in historical circumstances vastly different from those in existence today.[186] When during the 16th and 17th centuries the statutory writ of conspiracy and the action on the case founded upon it gave rise to the tort of malicious prosecution, there was no police force charged with enforcing the criminal law. The courts therefore sought to ensure that private citizens were not discouraged from setting the law in motion by reporting criminal offending. Today, however, there exists a professional police force that needs no encouragement to enforce the criminal law; indeed that is its very raison d'être. That this justification for the requirement of malice may have become anachronistic was broached by Lord Devlin in *Glinski v McIver*:

> A century and a half ago when this branch of the law was being formed and there was no police organization as there is today, the law was anxious to encourage the private prosecutor to come forward and recognised that his motives would not always be disinterested … Although [a police officer] may be more exposed to attack from persons he has mistakenly prosecuted, he should not stand in need of as high a degree of protection as the private individual, for there can be no occasion on which in his case a mixture of motives could be accepted as excusable.[187]

However, the retention of the protection that the onerous elements of malicious prosecution provides is seen as being justified on the basis that the same policy consideration still operates vis-à-vis private citizens. Although private prosecutions are becoming increasingly rare, private citizens still play an important role in reporting criminal offending. In *Commercial Union Assurance Co of NZ Ltd v Lamont*[188] Richardson J referred to supporting the police in this way as a 'civic responsibility', the carrying out of which ought not to be discouraged by the fear of tortious liability.[189] Similarly, in *Gregory v Portsmouth* Lord Steyn stressed that the role of enforcing the law was not limited to police forces:

> Law enforcement agencies are heavily dependent on the assistance and co-operation of citizens in the enforcement of the law. The fear is that a widely drawn tort will discourage law enforcement: it may discourage not only malicious persons but honest citizens who would otherwise carry out their civic duties of reporting crime.[190]

So, although police officers need no encouragement to enforce the criminal law, private citizens do stand in need of such encouragement. Yet the law does not appear to favour a solution whereby police officers would owe a duty of care, but not private citizens who would still only be liable if malice could be established. Making the status of the defendant as a police officer an element of the tort of negligence is a step that does not appear to be

186 Percy Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1986).
187 [1962] 1 All ER 696, 721.
188 [1989] 3 NZLR 187.
189 Ibid 199.
190 [2000] 1 All ER 560, 565.

possible; the tort of negligence does not draw such distinctions on the basis of the defendant's status. In contrast, misfeasance in a public office provides a rare example of a tort where the defendant's status, namely as a public officer, is an element of the tort. As far as negligence is concerned though, provided a defendant is sufficiently proximate to the plaintiff and satisfies the other elements of the tort, an action in negligence may succeed irrespective of the defendant's status as, for instance, a police officer or private citizen.

The inability to make such distinctions based on the defendant's status is illustrated by Hardie Boys J in *Simpson v Attorney-General*.[191] The issue before the court was whether an action could lie for the negligent procurement of a search warrant (as opposed to the recognised action for the malicious procurement of a search warrant).[192] Hardie Boys J first rejected this action on the basis of the concern discussed above regarding the discouraging effect on honest persons instituting legal process, but his Honour added a further consideration. Counsel had submitted that in response to the *New Zealand Bill of Rights Act 1990* the courts should extend the tort of malicious procurement of a search warrant to negligent conduct. Hardie Boys J observed that the *Bill of Rights Act* applies only to the three branches of government and to the performance of public functions, powers or duties.[193] His Honour noted that, in contrast, the abuse of process torts are not limited to the actions of particular classes of persons. His Honour concluded that it would be quite inappropriate to extend a duty of care only to those classes who are subject to the *Bill of Rights Act*, yet quite unwarranted to extend it universally.[194]

The tort of malicious prosecution is one of these abuse of process torts that is not limited to the actions of particular classes of persons, while the tort of negligence is likewise not limited in this way. It is thus seems inappropriate to extend only to police officers a duty of care owed to suspects. Equally, though, the valuable protection the onerous elements of malicious prosecution afford private citizens militates against such a duty being extended universally.

VII. Conclusion

The preceding discussion has sought to explore and elucidate the varying policy considerations engaged by the proposed duty of care owed by police officers to suspects. It has emerged that some of the considerations that oppose the duty are overstated. Although there is a risk that persons who have actually committed a crime but are nonetheless acquitted may recover, this can be adequately addressed by allowing guilt to be raised as a defence as appears to be the case with the tort of malicious prosecution. Furthermore, although a duty to suspects conflicts with the police's overarching duty in the public interest to investigate crime, the negative policy consequences that this could give rise to do not provide compelling reasons to deny a duty. Concerns

191 [1994] 3 NZLR 667.
192 *Everett v Ribbands* [1952] 2 QB 198; *Reynolds v Commissioner of Police of the Metropolis* [1985] QB 881.
193 Section 3.
194 [1994] 3 NZLR 667, 693.

such as those surrounding defensive policing and the floodgates factor appear more speculative than real. In fact, recognising a duty to suspects may have salutary effects in terms of promoting professional standards.

Ultimately, however, when the wider picture is considered one is driven to call into question the recognition of a duty owed by police officers to suspects. How the proposed duty coheres with other rules and principles within the law of torts was an issue critically overlooked by the Supreme Court of Canada in *Hamilton*. Recognising a duty in negligence would effectively spell the end of the tort of malicious prosecution, and an analysis of the foundations and rationales of this tort has shown that this is undesirable. Malicious prosecution's onerous elements provide needed protection to private citizens who should not be discouraged from assisting police by reporting criminal offending, and the tort of negligence cannot be manipulated so that a duty would only be owed by police officers, thus leaving private citizens beyond the reach of negligence. Should a duty owed by police officers to suspects be contended before the courts elsewhere in the Commonwealth, or indeed again in Canada, it is hoped that the courts will consider the negative effect the duty could have on the law's coherence and accordingly check the spread of negligence.