Police Care for the Mentally Ill: The Restricted Vision of the High Court in Stuart v Kirkland-Veenstra

Abstract

Encounters with people suffering from mental illness are a common occurrence for Australian police, and the way these interactions are handled can have profound consequences for all involved. In this comment an examination is made of the differing approaches taken by the High Court of Australia and the Victorian Court of Appeal to a situation in which the police came upon a person who was contemplating suicide. After questioning the person the police formed the view that the circumstances did not justify the exercise of their powers to apprehend him and take him to a mental health facility for examination. The individual subsequently committed suicide. His wife then brought an action in tort against the police alleging that they had failed in their duty of care to take reasonable steps to protect a person suspected of attempting to commit suicide.

For most community based Australian police officers encounters with persons suffering from a mental illness or mental disorder form a regular part of the job (Sced 2006; Wylie & Wilson 1990). In a society which has largely emptied its asylums for the mentally ill it remains a sad reality that in the absence of adequate alternative care in the community it is the police who are all too often left with the task of assisting and, where necessary, apprehending those lacking the requisite mental capacity or resources to help themselves (Fry et al. 2002). It is a task which they often accept with some reluctance because of the drain it creates on police time and personnel, although most commentators agree that the majority of police perform this sensitive work in a humane and appropriate way (Chappell 2008).

It is against this general backdrop that the present comment considers the recent decision of *Stuart v Kirkland-Veenstra* (2009) in which the High Court of Australia was presented with the issue of whether the police owe a duty of care to take reasonable steps to protect a person suspected of attempting to commit suicide. Courts have long been reluctant to impose a common law duty of care on police officers. They have commonly cited policy reasons, particularly that a duty would promote defensive policing and compromise the police's paramount duty to the public (*Hill v Chief Constable of West Yorkshire* 1988; *Brooks v Metropolitan Police Commissioner* 2005).

However, when dealing with a case in which a statute, namely the *Mental Health Act* 1986 (Vic), gave the police the power to apprehend and assist mentally ill people, the High Court shied away from establishing that the police had a duty to assist suicidal people. In reaching this decision the High Court, overturning the verdict of the Victorian Court of Appeal, placed a strong emphasis on personal autonomy which has been a pervasive thread in the Court's reasoning in recent years.

The Facts of the Case

At about 5.40am on the morning of 22 August 1999 two experienced Victorian police officers noticed Ronald Veenstra sitting in his car at the Sunnyside Beach car park with a

hose leading from the exhaust into a rear window of the car. The engine was not running and the bonnet and radiator were cold. They questioned him about the hose and he said he had being contemplating doing 'something stupid'. The police observed that Mr Veenstra had been writing what appeared to be a suicide note.

The officers were aware that under s10 of the *Mental Health Act* 1986 (Vic) ['the *Act*'] they could 'apprehend a person who appears to be mentally ill' where they had 'reasonable grounds for believing that – (a) the person has recently attempted suicide ... or (b) the person is likely by act or neglect to attempt suicide'. Recognition of mental illness does not require clinical judgment; the provision is activated when, 'having regard to the behaviour and appearance of the person, the person appears to the member of the police force to be mentally ill' (s10(1A)). Finally, s10(4) provides that the police must 'as soon as practicable after apprehending a person' arrange for an examination or assessment by a medical practitioner.

The police officers formed the opinion that Mr Veenstra was contemplating suicide. They offered to contact a doctor, his family or the Crisis Assessment Team. According to the police, Mr Veenstra refused and indicated he wanted to return home to speak with his wife about their marital problems. The officers also formed the view that Mr Veenstra did not display signs of mental illness, defined as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory', which was necessary under s8(1A) to enliven the powers under s10 of the *Act*. One of the officers, however, considered Mr Veenstra to be depressed, which was noted in the police log book. In their discussions, the police viewed Mr Veenstra as rational, cooperative and responsible and permitted him to leave the scene.

Several hours after Mr Veenstra's encounter with the police, he committed suicide. His modus operandi was to secure a hose to the exhaust of his vehicle and start the engine. He died of asphyxiation.

His wife, Mrs Kirkland-Veenstra, brought a civil claim in the Victorian County Court for her husband's death and for her own psychiatric illness endured as a consequence of her husband's suicide. The plaintiff alleged that the police officers were a cause of her husband's death by their failure to apprehend him. She argued that either there existed a statutory duty under the *Act*, or else a common law duty on the police to exercise their powers to take reasonable steps to protect persons against reasonably foreseeable injury arising from attempted suicide. The first argument was ultimately abandoned, counsel instead emphasising the common law duty to exercise the powers under the *Act*. This argument was accepted by the majority of the Victorian Court of Appeal in overturning the Victorian County Court's decision that the officers did not owe a duty of care.

Reasoning of the Victorian Court of Appeal in Finding a Common Law Duty of Care under the *Act*

The Victorian Court of Appeal held that a duty of care was owed to the deceased and Mrs Kirkland-Veenstra. The leading judgment by Warren CJ first established that a duty of care was owed to the deceased. This was regarded as a necessary prerequisite for a finding of a duty owed to Mrs Kirkland-Veenstra. Her Honour asserted that duties develop incrementally by analogy and factual similarity.

Warren CJ pointed to a special subset of duties owed by statutory authorities. She distinguished *Home Office v Dorset Yacht* (1970) and *Hill v Chief Constable of West Yorkshire* (1988) that were concerned with the police exercising (or failing to exercise) certain powers in the administration of criminal justice. In those cases, questions of public policy were of significant concern. The current case, involving an omission, required more than foreseeability of the risk of damage. Warren CJ discerned a duty based on the relationship of proximity between the police and the deceased, the reasonable foreseeability of risk of harm to the deceased and the salient features test. The latter encompasses the following principles: that the defendant has an ability to protect a specific class of persons including the plaintiff from injury; the plaintiff is vulnerable and unable to look after his own interests; the defendant knew, or ought to have known, of the risk arising from his omission and the absence of interference with the defendant's 'quasi-legislative' functions (2009:21, citing *Crimmins v Stevedoring Industry Finance Committee* 1999).

Warren CJ held that it was reasonably foreseeable that a lack of action could result in injury to the deceased. Further, the respondents had a power under the *Mental Health Act* to apprehend a specific class of persons. The legislature had considered a specific class of vulnerable persons unable to protect themselves when devising the *Act*. The Court thus assumed that a suicidal person is mentally ill (2008:[64]). The police knew, or ought to have known, that there was a risk of harm as they were aware of Mr Veenstra's state of mind at the time. She also found that the imposition of a duty was consistent with the *Act*'s purpose of safeguarding the wellbeing of the mentally ill. Finally, the duty was 'enlivened' when the police became aware of Mr Veenstra contemplating suicide, coupled with their existing awareness of their powers under the *Act*. Therefore, there was a proximate relationship between the deceased and the police.

Mrs Kirkland-Veenstra was also reasonably within the contemplation of the police and 'closely and directly' affected by their 'acts or omissions in relation to her husband' (2008:[90]). It was held, referring to *Jaensch v Coffey* (1984) and *Tame v New South Wales; Annetts v Australian Stations* (2002), that an antecedent relationship between a plaintiff and a defendant is unnecessary where the plaintiff suffers nervous shock by perceiving the aftermath of an accident. Her Honour held that the respondent police officers had complete control over the circumstances giving rise to the risk of psychiatric injury.

Personal Autonomy Trumps Duty of Care: Reasoning of the High Court of Australia

The Victorian Court of Appeal's decision was overturned unanimously by the High Court. The High Court adopted a materially different approach to the Victorian Court of Appeal in deciding that the police power was *not* enlivened under the *Act*. French CJ and, in a separate joint judgment, Crennan and Kieffel JJ, held that the requisite statutory power under s10 was lacking and in its absence the police could not owe a duty of care at common law. By contrast, Gummow, Hayne and Heydon JJ preferred to consider whether such a duty could exist at law in the event that the statutory power was available for exercise. They found that such a duty did not exist.

Emphasis on Personal Autonomy

French CJ began his judgment by indicating that following a long history of repressive legislation affecting the mentally ill the *Act* was intended to restrict the curtailment of their

civil liberties only in cases where it was absolutely necessary for the safety and wellbeing of the person, or for the safety of the community. Gummow, Hayne and Heydon JJ also turned particular attention to the history of suicide in legislation and its decriminalisation. French CJ further noted the high value placed on personal autonomy in the common law which meant generally that the freedom of mentally ill persons should only be interfered with if they were unable to make decisions for themselves.

Statutory Construction of the Mental Health Act

Based on a strict interpretation of the *Act* consistent with values of personal autonomy, the High Court regarded the Victorian Court's statutory interpretation as too liberal. It held that the Victorian Court erred in conflating the mentally ill and suicidal components of the *Act*. French CJ pointed out that s10 of the *Act* refers to *two* conditions: that the person appears mentally ill *and* that the police officer has reasonable grounds for suspecting the person has recently attempted or will attempt suicide. Gummow, Hayne and Heydon JJ differed materially from the Victorian Court of Appeal in finding that the structure of s10 does not provide that attempted suicide is of itself an indicator of mental illness (2009:[91]).

French CJ found that neither of the conditions precedent for use of the defendant's power under the *Act* were present in the facts of the case. French CJ systematically addressed the conditions precedent for the duty to arise. First, he stated that the *appearance of mental illness* is based on the subjective opinion of the officer, not objective circumstances. Previous attempts at suicide are insufficient to activate this power without further indication of mental illness. Second, French J noted that *'reasonable grounds for believing' the person attempted or will attempt suicide* requires that the officer actually held this belief *and* it was reasonable. It is insufficient for it to be reasonable to hold the belief without the officer actually holding it. French CJ pointed to the Hansard that referred to 'emergency situations' as relevant to applying s10. On the facts, the police officers had not formed the belief that the plaintiff's husband was mentally ill given his rationality. Further, they did not believe from the conversation that the plaintiff's husband was likely to suicide in the very near future, as he had said he would talk about matters with his wife and see a doctor. Therefore, both conditions precedent were absent.

Duty to Prevent Another from Inflicting Self-harm

Gummow, Hayne and Heydon JJ questioned whether there was a common law duty to prevent another from inflicting harm. They contended that this conflicts with the concept of personal autonomy, which includes autonomy to self-harm. They suggested that the situation differs where a person has a restricted capacity to make choices and therefore a duty may be imposed on those exercising control. However, a past attempt of suicide is not evidence of this lack of capacity.

Statutory Duty to Prevent Another from Inflicting Self-harm

Gummow, Hayne and Heydon JJ also considered whether a statutory duty to prevent self-harm might exist. Such a duty is not determined by the conditions precedent to exercise of the statutory power, and it is not confined to or by s10 of the *Act* (2009:[103]). The posited duty is therefore restated more generally. It is a duty owed by those equipped with a statutory power to exercise that power when (1) it is reasonable to do so, and (2) acting thusly will be likely to protect another from physical harm (2009:[107]). The conditions for the existence of this statutory duty include where the exercise of power is necessary; where it is reasonably foreseeable, and where the existence of the duty is dependent on the

relationship between the statutory authority and a class of persons including the plaintiff (citing *Graham Barclay Oysters v Ryan* 2002).

The following considerations are required when evaluating the relationship (2009:[113]):

- Degree and nature of control over the risk of harm.
- Degree of vulnerability of those dependent on the exercise of the power.
- Consistency of the posited duty with the purpose of the statute.
- Other relevant considerations.

Control was identified as a central consideration in this case. Contrary to the Victorian Court's characterisation of control, Gummow, Hayne and Heydon JJ asserted that the plaintiff's husband, and not the police defendants, controlled the source of the risk.[1] At the same time the judges conceded that 'no doubt it can also be said that they [the defendants] were in a position to control or minimise the occurrence of the observed risk (in this case because they had the power given by [the Act])' (2009:[116]). However, the joint judgment dismissed the relevance of this by stating that such considerations will generally be present for any passer-by, who 'can almost always do something that would reduce the risk of harm'. The judges failed to recognise that the police officers, equipped with a statutory power, are *especially* able to reduce the risk of harm.

Conclusions: A Restricted Vision?

For tort lawyers, *Stuart v Kirkland-Veenstra* (2009) will no doubt form the subject of lively debate and discussion for some time to come. It is also a decision which is likely to find favour among the ranks of police administrators worried about the potential costs involved should their officers be bound by a duty to assist in circumstances like those just described. However, for the mentally ill and their carers the High Court's reasoning provides little comfort and support. The High Court's vision and endorsement of maximising personal autonomy does not fit well with the realities of severe mental illness, including depression which afflicts a significant proportion of the Australian population and which is known to increase the risks of suicide (see in general Australian Bureau of Statistics, 1998 and 2007). Although suicide does not equate with mental illness, there is often a strong correlation between the two. Nor does the High Court's vision appear to place any weight upon the notions of therapeutic jurisprudence, and the belief that to the greatest extent possible the law should seek to prevent harm as well as respect personal autonomy (Winick 2008).

Among Australian police forces there are now encouraging signs that the police role in assisting the mentally ill is becoming better recognised and organised. In New South Wales, for example, police are engaging with health professionals in establishing mental health crisis intervention teams across the state. In addition, 1500 officers are to be given special training in mental health issues over the next three years to equip them better to understand the nature of mental illness and the needs of the mentally ill (see NSW Police 2009).

Measures like these may do something to ameliorate the legalistic approach to interactions between the police and the mentally ill suggested by the High Court's reasoning in *Stuart v Kirkland-Veenstra*. Perhaps in the future well trained police officers will intervene when they discover a person in Mr Veenstra's situation and take that person to an

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1 Compare this with the VCA's judgment at [44] and [62]-[63]. See also especially [102]-[103] per Maxwell P.

appropriate mental health facility where they can be examined by a health professional and given whatever assistance they require. Certainly a response of this kind would seem preferable, even if it potentially interferes with personal autonomy, if it has the potential to save the life of another person. In such circumstances, a duty of care would be a burden on individual responsibility, but a necessary burden.

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