HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Laura Cullen
Appellant

and

State of New South Wales
Respondent

APPELLANT'S REPLY

PART 1: Certification for internet publication

1. These submissions are in a form suitable for publication on the internet.

PART II: Concise reply

Disputed Facts

2. Some of the respondent's submissions on "disputed facts" (RS [12]) misstate the evidence and findings below.
3. As to (ii) and (viii), Cullen's point is that no judge has found that there *was* a serious risk of injury posed, so as to justify the OSG officers' response. A finding of serious risk of injury is not available in all the circumstances, particularly given the size of the flag and the space kept between Dunn-Velasco and the surrounding members of the crowd.
4. As to (iii), no such finding was made below (see CA [16]), and the respondent is now asking this court to make a factual finding from video footage – the very charge levelled against Cullen at RS [13].
5. As to (iv)-(vi), what AS [27]-[29] says is that there was immediate confusion in the crowd, referring to the whole rally, during which the injury to Cullen occurred. This follows from the previous point, at AS [26], that there was a single crowd forming the rally.
6. What CA [102] says is that Williams was not part of the crowd *into which the officers rushed*. The point in AS [37]-[38] is that given all the attendees in the rally formed a

single crowd, it is artificial to seek to separate out those individuals who happened to be closest to the OSG officers.

7. As to (vii), the document quoted at CA [102] makes no reference to inflaming "individuals in the crowd". It refers to the risk of inflaming a "situation".

Scope of Duty

8. RS [22]-[35] sets out various reasons why no duty of care should be imposed on the officers at all. As observed in AS [32]-[34], the respondent unsuccessfully ran that argument before the Court of Appeal. Its Notice of Contention does not challenge the finding by all three judges that, notwithstanding the very submissions now again put, a duty was owed at least to some of those attending the rally.

9. What is unclear is why any of the factors identified in RS [23]-[35] permit a principled delineation between those in the rally to whom a duty was owed (i.e. those standing closest to the OSG officers), as against others in the rally (such as Cullen) to whom it is asserted a duty ought not be owed. The statutory context (RS [23]) was the same. The history of police powers and functions (RS [24]) was the same. The suggested incongruity (RS [25]-[29], which was rejected by all judges below and could properly form part of an assessment of breach under the *Shirt*[1] calculus, was the same. Cullen has set out in AS [39]-[53] the reasons why the scope of this duty should not be limited to those in the "immediate vicinity" of the OSG officers. Contrary to RS [37], Cullen does not "ignore" the formulation of the duty by the majority; she challenges it.

10. As to control (RS [30]), vulnerability and dependence (RS [32]), and immediate vicinity (RS [33]): what the police relevantly assumed and in fact exerted was control over the rally, including through the imposition of conditions and the provision of a significant police presence. What the attendees to the rally depended upon was that the police would then exercise reasonable care for their safety in carrying out any police activity. What the respondent seems to be submitting is that because rallies can be unpredictable, police can only have separate bubbles of "control" that move around within the parts of the rally where the police choose to take specific action, thereby restricting their duty of care only to those who happen to fall from time to time within these bubbles. This approach would mean that relevant control over a risk only exists if the defendant has the sole

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[1] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48.

capacity to avoid materialisation of the risk. Such a proposition cannot be found in *Graham Barclay*[2] or *Stuart*.[3]

11. RS [31], [33]-[35], [38] go on to misstate the contended duty. As stated in AS [49], applying what Gummow J said in *Dederer*[4] and what McHugh J said in *Vairy*[5], the contended duty is for the OSG officers, when taking positive action, to take reasonable care for the safety of those in the rally who might foreseeably suffer harm from that action. It rises no higher, and is no more complicated, than the duty owed by any person performing an act in the rally to any other people in that rally. It was not a duty "to prevent [someone] from doing damage to a third-party" (RS [31]), or "to prevent the criminal acts by Williams" (RS [31]), or "a duty not to provoke emotional or psychological reactions in members of the public" (RS [34]-[35]).

12. What reasonable care required in the circumstances is a question of fact that goes to breach. If the need to discharge duties, functions and powers made it reasonable in all the circumstances for the OSG officers to act or not act in a certain way, despite the risk of provoking people within the rally, then a finding would follow that there was no breach of the duty. The problem for the respondent is that the objective evidence did not show that a need for them to act as they did ever arose, and none of the OSG officers was called to explain why subjectively they thought it did.

Breach of Duty

13. RS [55]-[56] describes as a "new case" the contention that it was unreasonable for the OSG officers to have intervened. This is incorrect. It was the first of the particulars of negligence pleaded.[6] It was the case presented at trial.[7] It was also the breach found by the primary judge (at PJ [139]-[140])[8], although his Honour briefly (at PJ [133]) mentions two other ways, too, by which the OSG officers could have discharged their duty if they were to intervene. It was the breach finding which Cullen sought to maintain

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[2] *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540, [150], [152].
[3] *Stuart v Kirkland Veenstra* (2009) 237 CLR 215, [114].
[4] *RTA v Dederer* (2007) 234 CLR 330, [49]-[58] – referring also to Brennan J's remark in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 478 that "the common law distinguishes between an act affecting another person, and an omission to prevent harm to another."
[5] *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 432 [25].
[6] Statement of Claim [22(a)], also [22(c)], [22(d)], [17(c)]. See also Amended Statement of Claim [11E]-[11G], [19A], [19D(a), (b), (d), (e), (f), (g)], [19J(a), (d), (h), (o), (p), (s)].
[7] Plaintiff's Closing Written Submissions [36]-[37], [39], [45]-[61].
[8] Indeed, it is the case upon which the primary judge assessed factual causation at PJ [142]-[151].

on appeal in her written submissions[9], although in oral submissions the Court of Appeal focused more on the manner of the OSG officers' intervention.[10]

14. Turning briefly to the respondent's submissions as to the manner of intervention:
    (a) RS [42] overstates the significance of the finding at CA [88]. The absence of intention as to outcome does not "destroy" a case in negligence.
    (b) RS [43]-[44] sets out a series of police "needs" for urgent action as though each of these was present at the time. For the reasons set out in AS [54]-[60], this was not the case.
    (c) RS [45]-[52] and [56]-[58] set out a series of factual propositions said to be "obvious", but do not squarely engage with Cullen's contention at AS [54]-[60] that the majority's decision to interfere with the primary judge's finding of breach was premised on two erroneous assumptions. Once that intervention is held to be in error, this Court should (as White JA did below) uphold the primary judge's original finding of breach and not embark on its own factual inquiry: *Commonwealth v Sanofi* [2024] HCA 47; 99 ALJR 213, [25]-[28].
    (d) RS [59] misrepresents Cullen's submission at AS [59], which is that the OSG officers had no absolute obligation to "prevent" all breaches of the peace. AS [59] specifically differentiates this from their public duty to maintain the peace.

Scope of the State's Liability: s 5D(1)(b)

15. RS [63]-[67] appear to accept Cullen's formulation in AS [74] of the correct inquiry.
16. Although RS [63] contends that the majority undertook this inquiry, RS [64]-[67] do not identify any factors considered by the majority besides the two impugned factors the subject of Cullen's appeal.

Causation in Fact: s 5D(1)(a)

17. Contrary to RS [73], factual causation was not in contest below. The references in footnotes 27-28 demonstrate that at trial the respondent mentioned causation only in relation to scope of liability.[11] The same approach was taken before the Court of Appeal, where there is no mention of factual causation in the respondent's written submissions in chief[12] or in reply[13] for grounds 8-9 of its Notice of Appeal. Factual causation is a

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[9] Respondent's Outline of Submissions [34]-[35].
[10] T.34.15-25, T.35.18-32 (08.12.23).
[11] Defendant's Closing Writing Submissions [105]-[107].
[12] Appellant's Annotated Outline Written Submissions, [56]-[61].
[13] Appellant's Submissions in Reply, [18]-[19].

fact-rich inquiry which the respondent should not be permitted to raise in this court for the first time: *Sanofi*.[14]

18. In any event, RS [69]-[72] does not identify any error in the primary judge's findings at PJ [142]-[151]. The primary judge did not misstate or misapply the "but for" test. The primary judge correctly applied that test to Cullen's primary case that the OSG officers should not have intervened at all.

Section 43A

19. The Court of Appeal held that s 43A does not apply to the impugned breach by the OSG officers because they were not exercising a "special statutory power". This was because any power being exercised was derived from the common law (CA [42], [46]), and because that power could have been exercised by a member of the public (CA [219]).

20. Without grappling with that reasoning, RS [77] sets out a series of "duties" which the officers were allegedly discharging. In doing so, RS [77] confuses "duties" with "powers". The relevant question under s 43A(2)(b) is whether the officers were exercising a power that is of a kind that persons generally are not authorised to exercise without specific statutory authority. It is not whether the officers were discharging duties, whether conferred by common law or statute.

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[14] *Commonwealth v Sanofi* [2024] HCA 47; 99 ALJR 213, [25]-[28]