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 SUBMISSIONS

PART 1: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The issues in this appeal are:
   (a) whether the duty of care owed by police officers to bystanders, when carrying out a police action in public, should be confined to those bystanders in the "immediate vicinity" of that action;
   (b) if so, whether in this case the appellant was in the "immediate vicinity" of the action of the OSG officers in rushing into a crowd while operating fire extinguishers to prevent the ignition of an Australian flag;
   (c) upon proper identification of the relevant risk of harm, whether the primary judge was correct in finding that the OSG officers breached their duty of care to the appellant;
   (d) whether, for the purposes of causation under s 5D(1)(b) and s 5D(4) of the *Civil Liability Act* 2002 (NSW) (**CLA**), the scope of the OSG officers' liability extended to the harm suffered by the appellant.

PART III: SECTION 78B NOTICE

3. No notice is required under s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: DECISIONS BELOW

4. The decision of the primary judge is *Cullen v State of New South Wales* [2023] NSWSC 653 (**PJ**). The decision of the Court of Appeal is *State of New South Wales v Cullen* [2023] NSWCA 310 (**CA**).

PART V: RELEVANT FACTS

5. On 26 January 2017, the appellant attended an "Invasion Day" rally in Sydney. Estimates varied about the number of attendees in the rally, but the Courts below proceeded on the basis that the number was around 5,000. There were also approximately 65 NSW police officers deployed for the event (CA [12] & [140])[1].
6. As the rally proceeded along Broadway, near the intersection with Buckland Street in Chippendale, the crowd stopped while a speech was given by Mr Birrigun Dunn-Velasco. At the end of the speech, Dunn-Velasco bent down and squirted liquid onto an Australian flag which was about the size of a pillowslip (CA [155])[2]. Before any fire was lit, officers from the NSW Police's Operations Support Group (**OSG**) rushed through the crowd towards Dunn-Velasco, two of those officers discharging fire extinguishers.
7. Within the crowd, about 10-15 metres away from Dunn-Velasco, Leading Senior Constable Lowe stood filming these events (CA [19], [164])[3]. Mx Williams, who was also in the crowd, saw Lowe filming and slapped the camera out of her hand (CA [21], [147]-[148])[4]. Leading Senior Constable Livermore saw this occur and moved towards Williams to effect an arrest. Williams moved away. Livermore followed, sought to grab Williams, and in that process knocked the appellant over. The appellant fell heavily, hit her head on the ground, and suffered injury (CA [21], [150])[5].
8. The primary judge Elkaim AJ found that the OSG officers and Livermore breached their respective duty of care to the appellant, and that their breaches caused the appellant's injury.
9. Before the Court of Appeal, the majority (Gleeson and Kirk JJA) found that the OSG officers and Livermore did not owe a duty of care to the appellant; did not

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[1] CAB 75 &112.
[2] CAB 115.
[3] CAB 78 & 117.
[4] CAB 78 & 113.
[5] CAB 78 & 115.

breach any duty even if owed; and in the case of the OSG officers, their breach did not cause the appellant's injury in the sense that it is not appropriate for the scope of their liability to extend to the harm so caused, being a requirement for a finding of causation under s 5D(1)(b) of the CLA.

10. In partial dissent, White JA upheld the primary judge's finding of duty, breach and causation in respect of the OSG officers, but overturned the primary judge's finding of breach in respect of Livermore.
11. On appeal all three judges found that the higher standard for breach of duty, under s 43A of the CLA, was not applicable in assessing the impugned actions of the OSG officers and Livermore.
12. By her Notice of Appeal, the appellant challenges the majority's findings against duty, breach and causation in respect of the OSG officers. She does not challenge the Court of Appeal's findings in respect of Livermore.
13. The respondent has filed a Notice of Contention, contending that the Court of Appeal erred in deciding that s 43A does not apply, and also in determining that the appellant had established factual causation in accordance with s 5D(1)(a) of the CLA. The appellant will address these matters in her Reply to the respondent's written submissions, save noting that the respondent is raising factual causation for the first time, having both at trial and before the Court of Appeal conceded it.

Some important factual matters

14. The following factual matters are drawn from evidence accepted by the primary judge in his Honour's judgment, and from factual findings made on appeal by the majority in their judgment.
15. **First**, the NSW Police's planning for the 2017 rally predicted that flag burning was one of several potential issues that might affect the rally (CA [8], [137])[6]; and, in relation to several other potential issues such as detection of an offence and possession of flares, foreshadowed that a hastened reaction to incidents could inflame a situation and result in injury to police (CA [10], [141]).[7]
16. Inspector Baker was the officer responsible for planning and coordinating the police preparations for the 2017 rally (CA [8])[8]. By letter dated 18 January 2017 to the

[6] CAB 73 & 111.
[7] CAB 74 & 112.
[8] CAB 74.

rally's organisers, Baker advised that police would approve the rally if a number of conditions were agreed to, one of which was that there would be no flag or effigy burning (CA [8], [137])[9]. At an Invasion Day rally the year prior, there had been an attempt to burn an Australian national flag and burning leaves were taken into Redfern police station [CA [8]][10].

17. The operational orders for the 2017 rally were prepared by Baker and provided to the police commanders for the rally as well as each of the team leaders who were part of the operation for "crowd control".[11] Annexure F to the operational orders included a list of potential concerns which might arise (CA [9], [140]-[142])[12]. It is entitled "Actions On". Annexure F relevantly stated:

> *The following is a list of potential issues that may impact on this event. Although every incident may have unique factors which affect or influence our planned operational response, the following list outlines details of who is responsible for initiating action, as well the response that is to be taken:-*
>
> *…*
>
> *1. Detection of an offence during a static gathering or mobile procession:*
>
> *…*
>
> *NB: Unless an immediate response is required, police should be careful not to intervene in a situation without sufficient support. A hastened reaction to an incident could inflame a situation and result in injury to police…*
>
> *2. Fire – burning flags, effigies or other articles, flares etc.*
>
> ** Any incidents are to be brought to the attention of the Team/Field Supervisor via VKG*
>
> ** If required, take immediate and appropriate action to prevent or respond to a serious incident where a person has been injured or a serious risk to public safety or property is imminent? This includes taking action to contain or isolate the hazard.*
>
> ** The Team/Field Supervisor is to converse with the officers on-scene, assess the situation and provide a SITREP via VKG including the following:-*
>
> ** Is police intervention required to prevent a serious injury to members of the public or prevent any burning item from spreading and causing damage to other objects or buildings in the area?*

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[9] CAB 73 & 111.
[10] CAB 73.
[11] Appeal Black Book 157.12-15.
[12] CAB 74 & 112, ABFM 4.

* *Is an OSG Fire Team or the NSWFB required to extinguish any fire?*

* *Would police intervention to prevent injury to persons or damage to other objects/structures result in officers being hindered or assaulted?*

NB: The act of burning a flag, effigy or other article by a person who owns the property is <u>not</u> an offence, however their actions can endanger public safety.

18. The primary judge described these guidelines as "effectively expressions of common sense" (PJ [72])[13].

19. Whether they were or not, the operational orders demonstrate that: (i) the police treated the rally as a single "operation"; (ii) those attending the rally comprised a single "crowd" to be controlled by the police; (iii) the police understood there was a risk of inflammation from police intervention to incidents occurring in that crowd; and (iv) the police foresaw that inflammation of that crowd could endanger "public safety", including specifically injury to the police but by necessary extension injury to others in that crowd which comprised the "public".

20. **Second**, to those attending the rally including those standing closest to Dunn-Velasco, there was no serious risk of injury from fire even if he had proceeded to ignite the flag.

21. The rally was orderly as it proceeded and stopped near the corner with Buckland Street. It was accompanied by multiple police officers. During Dunn-Velasco's speech, a circle formed around him keeping a space between him and the surrounding attendees (PJ [13])[14]. They were calm and listening closely (PJ [14])[15]. Dunn-Velasco sprayed liquid onto an Australian flag which was the size of a pillowslip (PJ [129]; CA [155])[16]. One witness (Mr Canning) gave unchallenged evidence that "there was a safe distance between the crowd and the flag" (PJ [41])[17].

22. At the 2016 rally the Australian flag had been ignited without incident or confrontation with the police (PJ [30])[18]. As White JA observed (CA [162])[19], the respondent did not seek to demonstrate that there was in fact a risk to public safety if the flag had been lit, nor did the primary judge make such a finding.

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[13] CAB 21.
[14] CAB 9.
[15] CAB 9.
[16] CAB 36 & 115.
[17] CAB 14.
[18] CAB 12.
[19] CAB 116.

23. **Third**, before Dunn-Velasco had taken a lighter from his pocket to light the flag (PJ [42])[20], at least four OSG officers[21] rushed through the tightly packed crowd[22] towards Dunn-Velasco, also described as the "thickest part of the crowd" (PJ [22])[23]. The footage shows that those in the crowd had their backs to the direction from where the OSG officers approached. Two of the OSG officers operated fire extinguishers while rushing into that part of the crowd. The fire extinguishers made a smell, also described as "a cloud of chalk or smoke" (PJ [22])[24].
24. There was no warning before this intervention. No fire was ever lit. The respondent did not call any of the OSG officers to give evidence.
25. The primary judge accepted the evidence of one witness (Mr Holbrook) who described the action of the OSG officers as "overtly aggressive" (PJ [15])[25], observing that the OSG officers were "right on top of everyone before [he] knew what was happening" and that "one minute it was a peaceful, emotive rally and the next it was bedlam" (PJ [14])[26].
26. **Fourth**, at that time the appellant was standing 10-15 metres from Dunn-Velasco. The footage shows that there was a single crowd forming the rally, and that the outer limits of the crowd extended well beyond 15 metres from Dunn-Velasco. It follows that the appellant was one of many attendees, whether described as participants or bystanders, who formed part of that single crowd at the centre of which was Dunn-Velasco.
27. **Fifth**, the actions of the OSG officers caused immediate chaos and confusion in the crowd, during which chaos and confusion the injury to the appellant occurred.
28. The majority found that "[many] members of the crowd in the area became angry. It may be that some of them were also somewhat panicky" (CA [18])[27]. A melee ensued (CA [146])[28]. There was some pushing and shoving (PJ [18])[29]. About a

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[20] CAB 14.
[21] Ms Glacken said she saw "four to five police in riot gear run down to the crowd" (PJ [47]); Dr Smith said he saw "a line of between 15 to 20 police rushed forward" (PJ [22]);
[22] Description of Sgt Lowe (PJ [61]).
[23] CAB 10.
[24] CAB 10.
[25] CAB 9
[26] CAB 9.
[27] CAB 77.
[28] CAB 113.
[29] CAB 10.

metre or two away, a male police officer grabbed the hair of a male protester from behind and was yanking it forcefully backwards as he rushed past into the thickest part of the crowd (PJ [22])[30]. Besides this male protester and the appellant, one other person might also have been knocked down (PJ [35])[31].

29. One witness gave unchallenged evidence that "the air became thick with gas and a chemical smell as police rushed into the crowd… The police were spraying the fire extinguishers as they rushed into the crowd. People were getting pushed over by the police…" (PJ [31])[32]

30. The primary judge relevantly found at PJ [64][33], when commenting on the evidence of Lowe:

> *The importance of this description is that the strike to Sgt Lowe's hand occurred while the police officers with the fire extinguishers were running into the crowd. In order words, the actions of Mx Williams occurred during the rush of the officers bearing the fire extinguishers. It is therefore difficult to view the two incidents (the intervention into the crowd and the interaction with Mx Williams) as not being part of the same event.*

31. That finding was not challenged in the Court of Appeal, or overturned in the judgment of the majority or of White JA.

PART VI: ARGUMENT

Ground 1a – Scope of Duty of Care

32. At issue before the Court of Appeal was whether the OSG officers owed a duty of care to *any* of the attendees at the rally. The primary judge had applied the decision of the Supreme Court of the United Kingdom in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736; [2018] UKSC 4, to find that a duty was owed to the attendees including the appellant (PJ [132])[34].

33. All three judges of the Court of Appeal rejected the respondent's submission that the OSG officers owed no duty of care to any class of persons with respect to the rally, for reasons expressed by White JA at CA [170]-[213][35].[36] White JA held that

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[30] CAB 10.
[31] CAB 13.
[32] CAB 12.
[33] CAB 19.
[34] CAB 37.
[35] CAB 119 to 130.
[36] See majority's adoption of those reasons at CA [67].

there was no incompatibility between the "public" duty of the OSG officers to prevent a breach of the peace and in the imposition of a duty to take reasonable care for the safety of the bystanders who might be affected by a breach of the peace, finding that those duties were congruent. In doing so, White JA applied *Robinson* as well as prior decisions of this Court in *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540; [2002] HCA 54, [76], [81] per McHugh J, [148] per Gummow and Hayne JJA; and *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59, [57], [60].[37]

34. The disagreement between the majority and White JA concerned whether that duty extended to the appellant.

35. White JA described the appellant as forming part of a class of persons, which his Honour described as "bystanders" (CA [212])[38] or "surrounding bystanders" (CA [198]-[199])[39] to whom that duty was owed.

36. The majority held that the duty was owed only to "the class of persons in the **immediate vicinity** of an operational response by OSG officers during the protest march" (CA [72])[40] [emphasis added]. The majority reasoned that the ascertainment of the persons to whom the OSG officers owed a duty of care is closely connected with the identification of the risk of harm in regard to the conduct of the OSG officers (CA [71])[41].

Was the appellant in the "immediate vicinity of the operational response"?

37. An immediate difficulty is that the majority does not explain why the appellant was not in the "immediate vicinity" of the operational response of the OSG officers. The appellant was 10-15 metres away, as part of a single crowd of people who had gathered around Mr Dunn-Velasco for his speech. It is unclear from the majority's reasoning how one is to determine, out of what was described in the evidence as a

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[37] Also the decisions of *Cran v State of New South Wales* (2004) 62 NSWLR 95; [2004] NSWCA 92, [42], [70]; *Fuller-Wilson v State of New South Wales* [2018] NSWCA 218, [51]; *State of New South Wales v Tyszyk* [2008] NSWCA 107, [123*]; Australian Capital Territory v Crowley (2012) 7 ACTLR 142; [2012] ACTCA 52, [287]; Jennings v Police (2019) 133 SASR 520; [2019] SASCFC 93, [64]-[65]; and Hill v Chief Constable of West Yorkshire* [1989] AC 53.

[38] CAB 130.

[39] CAB 129 & 127.

[40] CAB 93.

[41] CAB 93.

tightly packed crowd, who was in the "immediate vicinity" of the actions of the OSG officers and who was not.

38. This issue was not explored in argument before the Court of Appeal. Both written and oral submissions proceeded on the basis that the appellant *was* in the immediate vicinity of the actions of the OSG officers. That remains the contention of the appellant. During oral submissions there was no suggestion from the bench that the appellant was not, with the result that the issue was not previously examined against the evidence.

Is the scope of the duty limited to those in the "immediate vicinity"?

39. Even if one accepts for the sake of argument that the appellant was not in the "immediate vicinity" of the actions of the OSG officers, there are conceptual difficulties with confining the duty of care in this way – i.e. using physical distance to define the beneficiaries of the duty.

40. There appears to be no authority to support this approach.

41. In *Graham Barclay Oysters*[42], Gummow and Hayne JJ discussed the need to consider each of the salient features of the relationship between a statutory authority and a class of persons when evaluating whether a duty of care is owed to that class. Their Honours observed that it ordinarily will be necessary to consider, among other things, the degree and nature of control exercised by the authority over the risk of harm that eventuated, and the degree of vulnerability of those who depend on the proper exercise by the authority of its powers. It is immediately to be noticed, of course, that *Graham Barclay Oysters* was a case concerned not with positive acts giving rise to a foreseeable risk of harm, but with omissions to act to prevent that harm.

42. In *Robinson* at [97], Lord Mance DPSC described the duty as follows:

> *…The present case concerns in contrast a quite delicate operational decision involving coordination between four officers, with a view to the arrest of suspected drug dealers, in a public place. It can be suggested that this raises special considerations, negativing any duty of care. But in my view we should not accept that suggestion. Rather we should now recognise the direct physical interface between the police and the public, in the course of an arrest placing an innocent passer-by or bystander at risk, as falling*

[42] [149] per Gummow and Hayne JJ

within a now established area of general police liability for positive negligent conduct which foreseeably and directly inflicts physical injury on the public.

43. Lord Reed JSC at [70] and [74] described the duty as follows:

> *…there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency…*
>
> *…*
>
> *It was not only reasonably foreseeable, but actually foreseen by the officers, that Williams was likely to resist arrest by attempting to escape. … The place where the officers decided to arrest Williams was a moderately busy shopping street in a town centre. Pedestrians were passing in close vicinity to Williams. In those circumstances, it was reasonably foreseeable that if the arrest was attempted at a time when pedestrians – especially physically vulnerable pedestrians, such as a frail and elderly woman – were close to Williams, they might be knocked into and injured in the course of his attempting to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards the pedestrians in the* ***immediate vicinity*** *when the arrest was attempted, including Mrs Robinson.* [emphasis added]

44. Unlike *Graham Barclay Oysters*, *Robinson*, like the present case, *was* concerned with positive acts on the part of the police officers. In taking the approach he did, Lord Reed was applying the well-settled fundamental principle of the common law that when a person acts affirmatively, he or she is, subject to rare exceptions, under a duty to the whole world to take reasonable care to avoid his or her act being a cause of foreseeable physical harm to them.[43]

45. Although not stated in the majority's reasoning at CA [71]-[72][44], it is possible that the expression "immediate vicinity" was drawn from the above passage in Lord Reed's judgment in *Robinson*. If so, it has been taken out of context. *Robinson* did not concern police rushing into the middle of a rally which then erupted. It concerned an arrest of a suspect on a public street who proceeded to run away. The plaintiff Mrs Robinson was within a yard of the arrest. The only people endangered

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[43] Professor Jane Stapleton, *Three Essays on Torts* (OUP) – Clarendon Law Lectures (2021), p.15.
[44] CAB 93

by the attempted arrest were those in the immediate vicinity of where suspect ran. Even so, Lord Reed went on at [77] to describe the potential for harm to "members of the public", including the risk to those in "the vicinity". On a proper understanding of Lord Reed's reasons, the word "immediate" describes the factual circumstances of that case, and was not used to confine the class of the members of the public, or bystanders, to whom the duty was owed.

46. The majority's approach is also inconsistent with the principles established in this Court, for determining the scope of a duty of care owed by public authorities.

47. The above passages quoted from *Graham Barclay Oysters* and *Robinson* draw attention to the principle that imposition of a duty of care and identification of its scope requires consideration of the relationship between alleged tortfeasor and injured person, to be assessed in foresight based on the risk of harm to the latter that might arise from the envisaged or impugned activity (or inactivity) of the former.[45] It is through this inquiry that salient features of that relationship, such as control, vulnerability and assumption of responsibility are examined.[46]

48. Consistent with this principle, this Court has held that in the case of a public authority the scope of any duty of care is closely linked to the statutory purpose underlying the powers which the authority might exercise[47], see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 509 (Deane J); and *Electricity Networks Corporation v Herridge Parties* [2022] HCA 37, [18], [20]; see also a similar approach described by Lord Hoffmann in *South Australian Asset Management Corporation v York Montague Ltd* [1997] AC 191 ("SAAMCO"), 212.

49. In the present case, the police's operational orders for the rally did not seek to demarcate parts of the crowd which it sought to control from potential interventions, and other parts which it did not. The police officers treated the operation as a single operation to maintaining public order. Public order extended to the safety of those who might foreseeably suffer harm from police action. A duty of care owed to that class of people aligns with the statutory purpose underlying the powers and public

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[45] See also *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, [43]-[44] per Gummow J.

[46] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59, at [50]; *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258 at [102]-[107].

[47] McDonald, "Scope of Liability and Remoteness of Damage: A Final Limit on Responsibility for Negligence in Australia", in *Australian Tort Law in the 21st Century*, 115, 120.

duties to be exercised by police officers in the rally, and with the fundamental principle identified at [44] above.

Mischaracterisation of the "operational response"

50. A further error in the majority's reasoning is to mischaracterise the OSG officers' "operational response" in this case as being confined to one component of their impugned activity – the act of running into an unsuspecting crowd (CA [72])[48].

51. By characterising the relevant "operational response" of the OSG officers as comprising only that act, the majority erroneously confined the "relevant risk" as being the risk of people who were in the pathway of those officers being knocked over during that act.[49] Because the risk was erroneously characterised in this way, the majority then erroneously reasoned that the duty of care was owed only to those persons, essentially because they were in the pathway of those OSG officers.

52. However, the impugned activity of the OSG officers cannot be taken out of its context in this way. The impugned activity was not simply running into a crowd. The impugned activity comprised four or more OSG officers, during an Invasion Day rally, running into the crowd to stop the ignition of an Australian flag (with two of those officers operating fire extinguishers before there was a fire), when it was unnecessary for them to intervene at all, and when it was foreseen that unnecessary police action in this rally might inflame the entire crowd and cause injury.

53. When the impugned activity is correctly characterised in this way, it becomes clear that the relevant risk of harm cannot be limited to the risk of people in the pathway of the OSG officers being knocked over. As the appellant submitted below (see CA [77][50]) the relevant risk of harm must extend to the risk to everyone in the crowd suffering harm from the resultant confusion and chaos that might arise from the OSG officers' activity, however that harm is realised. If it be correct (as the majority suggests) that identification of the relevant risk of harm has a role to play

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[48] CAB 93.

[49] See *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11; (2022) 273 CLR 454, [106]-[107] as to the importance of, and the correct approach for, identification of the relevant risk of harm; adopting the approach stated by Sackville AJA in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156, [52]-[70]. Importantly, his Honour observed (at [67]) that the risk of harm created by the impugned activity "*was not confined to the particular hazard that caused the [plaintiff] to suffer an injury*".

[50] CAB 95.

in identifying those to whom a duty of care is owed[51], then the proper characterisation of the risk of harm as being a risk to everyone in the crowd demonstrates that the duty of care was similarly owed to everyone in the crowd.

Ground 1b – Breach of Duty of Care

54. White JA (CA [226][52]) held the actions of the OSG officers were '*calculated to inflame the situation and created a mêlée as happened'* (the fact of the mêlée being at CA [146][53]), as did the primary judge. The majority disagreed, setting out four reasons for overturning the primary judge's conclusion (CA [81]-[88])[54].

55. None of the OSG officers gave evidence. The only explanation offered by the respondent as to why the intervention was necessary came from the evidence of Baker, who was their superior officer. His evidence essentially elevated the desire to prevent any ignition of the flag above and beyond all other considerations for the OSG officers.

56. The difficulty is that the respondent never established that there was a need to prevent ignition of the flag. Burning the Australian flag was not illegal (CA [157], [158])[55]. It could only amount to a breach of the peace if it threatened to interfere with the ordinary operation of civil society.[56] The flag was no bigger than a pillowslip. The crowd kept a distance around Dunn-Velasco during his speech. They were watching him. The safety of the crowd was not threatened. The safety of those not in the crowd was not threatened. Why a breach of the peace was threatened by ignition of the flag is not apparent. It was not explained by the OSG officers, none of whom was called to give evidence.

57. The error underlying the majority's analysis of beach lies in two incorrect premises: (i) that there was a threatened breach of the peace; and (ii) that the OSG officers had an obligation to "prevent" breaches of the peace.

58. As discussed above, the first premise is incorrect and inconsistent with the evidence.

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[51] This proposition is stated in CA [68], relying on the reasoning of Kirk JA in *Collins v Insurance Australia Ltd* (2022) 109 NSWLR 240; [2022] NSWCA 135, [9]-[14].
[52] CAB 132.
[53] CAB 113.
[54] CAB 96.
[55] CAB 116.
[56] *State of New South Wales v Bouffler* [2017] NSWCA 185, [164].

59. The second premise is also incorrect. Police officers have power to intervene to prevent a breach of the peace.[57] They also have a public duty to maintain the peace.[58] The Operational Orders specifically foreshadowed that in the case of flag burning, officers were to consider whether immediate action was required to prevent "a *serious injury to members of the public or prevent any burning item from spreading and causing damage to other objects or buildings in the area*." If the OSG officers considered that ignition of a pillowslip flag while a crowd watched at a safe distance somehow met this criterion, they were not called to say so.

60. Once these incorrect premises are put aside, the finding of breach made by the primary judge is difficult to fault and should have been upheld, as it was by White JA. There being no immediate need to intervene to stop the ignition of the flag or to put it out once ignited, the method by which the OSG officers chose to intervene was unnecessary and unreasonable particularly when one has regard to its foreseeable (and in fact foreseen) impact on the crowd. That the primary judge (PJ [133])[59] identified alternative ways for the OSG officers to intervene so as to reduce the risk (described as "precautions"), such as announcing their arrival to the crowd, or having a single officer approach with a fire extinguisher, should not detract from the nub of the primary judge's conclusion that intervention in the circumstances was unnecessary (PJ [127]-[131])[60].

Ground 2 – 'Normative Causation' under s 5D(1)(b) of the CLA

61. White JA held that s 5D(1)(b) was satisfied because: (i) the police foresaw that police intervention during the rally could result in inflammation of the situation, resulting in injury to the police (CA [242])[61]; (ii) this clearly could extend to injury to participants in the rally including from violent and unlawful actions directed towards the police as a result of that intervention (CA [243])[62]; and (iii) the injury to the appellant from an attempted arrest of Williams, notwithstanding Williams' voluntary and unlawful actions, was a natural, probable and reasonably foreseeable consequence of the OSG officers' intervention (CA [244]-[245])[63].

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[57] *Fletcher v State of New South Wales* [2019] NSWCA 31, [12].
[58] *R v Howell* [1982] QB 416, 426-427.
[59] CAB 37.
[60] CAB 36 & 37.
[61] CAB 135.
[62] CAB 136.
[63] CAB 136.

62. In contrast, the majority held that s 5D(1)(b) was not satisfied because: (i) Williams' criminal actions comprised an "independent, free, deliberate choice made by Williams" (CA [105], [106]-[108])[64]; (ii) this choice was made at a place "materially distant from the melee catalysed by the action of the officers" because it was 15 metres away (CA [105], [109])[65]; and (iii) Williams' actions cannot therefore be characterised as occurring in the ordinary course of things which might flow from the actions of the OSG officers (CA [105], [109])[66].

63. As this Court observed in *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375, [11]-[12], the common law of negligence requires determination of causation for the purpose of attributing legal responsibility. This determination involves two questions, now made distinct under s 5D(1)(a) and (b): a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person.[67]

64. There has been a line of cases both in the United Kingdom and in Australia which have considered this 'normative question' in the context of a criminal act of a third-party forming part of the causative chain. Contrary to the majority's reference to the "chain of causation [being] broken by what has traditionally been called a novus actus interveniens" (CA [95])[68], what might be broken by a third party's criminal or even negligent act (using the descriptor in *Wallace v Kam*) is the chain of <u>legal responsibility</u> for some of the consequences of the defendant's breach of duty.[69]

65. In *Stansbie v Troman* [1948] KB 48[70], Tucker LJ placed significance on the fact that scope of the tortfeasor's duty (to leave the premises in a reasonably secure state) was precisely to avoid access by thieves.

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[64] CAB 103 & 104.
[65] CAB 103 & 104.
[66] CAB 103 & 104.
[67] On the second question, see discussion in *Paul v Cooke* (2013) 85 NSWLR 167, [85]-[89], [90] (Leeming JA); *Ruddock v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269, [89] (Ipp JA); *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249, [37]; *Stephens v Giovenco* [2011] NSWCA 53, [16].
[68] CAB 100 & 101.
[69] See critique of the "incoherent Novus Actus Interveniens Notion" in Professor Jane Stapleton, *Three Essays on Torts* (OUP) – Clarendon Law Lectures (2021), 91-95.
[70] Cited with approval by this Court in *March v Stramare (E&MH) Pty Ltd* [1991] HCA 12, [27]; *Chappel v Hart* [1998] HCA 55, [63]-[64]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000]

66. In *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112, 122, this court in rejecting the proposition that there should not be imputed to a wrongdoer foreseeability of subsequent intervening conduct which is itself wrongful, observed:

> *It is, we think, beyond doubt that once it be established that reasonable foreseeability is the criterion for measuring the extent of liability for damage the test must take into account all foreseeable intervening conduct whether it be wrongful or otherwise.*

67. In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, Lord Reid made the following observation (at 130):

> *But if the intervening action was likely to happen, I do not think that it can matter whether the action as innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the very kind of thing which is likely to happen as a result of the careless act of the defendant.*

68. In *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522, 524, this court described the drawing of a line marking the boundary of the damage for which a tortfeasor is liable in negligence as "*very much a matter of fact and degree*".

69. In *March v Stramare (E&MH) Pty Ltd* [1991] HCA 12, (1991) 171 CLR 506, 517-519, part of which was cited by the majority at CA [104], Mason CJ (citing Lord Reid in *Dorset Yacht*) did not lay down a general principle as to when normative causation would be established in such cases. Rather, his Honour gave an illustration as to when the negligent act of a plaintiff or a third party would *not*, as a matter of logic or policy, negative normative causation – i.e. where the defendant's wrongful conduct has generated the very risk of injury resulting from that act and the injury occurs in the ordinary course of things.

70. Against that background, the passage in *Hart and Honore, Causation in the Law* (2nd ed, 1985, Clarendon Press, at 136), although quoted approvingly by McHugh J in *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 429-430 and by the majority at CA [96][71], might have overstated things when describing it as a "*general principle… that the free, deliberate informed act or omission of a human being, intended to exploit the situation created by the defendant, negatives causal connection*. It was also qualified in *Hart and Honore*

HCA 61, [70]; *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48, [51].

[71] CAB 101.

at 194-204, in a subsequent passage not cited by the majority, by the "exception" in the case in which the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being.[72] As Professor Jane Stapleton explains in her discussion of the fallacy of "novus actus interveniens" as a concept in normative causation:

> *The relevance of interventions is simply that they may be the materialisation of a risk that fell outside the scope of the risks in relation to which the defendant owed a duty to be careful. If anything is broken, it is the chain of responsibility…*[73]

71. The various statements of "principle" should not obscure or impose a gloss upon the overall inquiry, now made clear and mandated by s 5D(1)(b) and s 5D(4): i.e. to determine "*whether or not and why responsibility for the harm should be imposed on the negligent party*". The fact that the chain of causation included an "independent, free and deliberate choice" of a third party to commit a criminal act does not, by itself, answer the question. In such cases, the answer depends on assessment of all the relevant surrounding circumstances of the duty owed, the way the duty was breached, their connection with criminal act, and their connection with the injury. This inquiry must at least include consideration of: (i) whether the risk of harm against which the tortfeasor owed a duty to avoid included the risk of criminal act of that kind; and relatedly (ii) whether the criminal act was the very kind of thing likely to happen as a result of the impugned act of the tortfeasor.[74]
72. Turning to the reasoning of the majority in the present case, as is clear from CA [109][75] that inquiry was resolved by reference only to two considerations, being that Williams' criminal act was "free and deliberate", and that it occurred some 15 metres away in the crowd.
73. The relevance of the physical distance between the OSG officers' intervention and Williams' act is, with respect, difficult to see. As observed at paragraph 19 above,

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[72] As discussed in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350; and *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 367-368 (Lord Hoffmann); 374-375 (Lord Jauncey) and 380-381 (Lord Hope).
[73] *Three Essays on Torts* (OUP) – Clarendon Law Lectures (2021), 93.
[74] *Wallace v Kam*, [24]; *Paul v Cooke*, [105]-[111]; see also Lord Hoffmann's analysis of normative causation, albeit in a different factual scenario not involving criminal conduct, in SAAMCO at 212-216 which uses the expression "adequate link" between the breach of duty and the particular type of loss claimed; see also the English Court of Appeal's discussions in *Meadows v Kahn* [2019] EWCA Civ 152; [2019] 4 WLR 26, [24]-[32]; and *Darby v The National Trust* [2001] EWCA Civ 189, [22]-[25].
[75] CAB 104.

there was a single crowd attending the rally, and the police planning treated it as such, including the impact on that crowd of any police intervention. Factual causation having been established under s 5D(1)(a), there is no authority nor principled basis for holding under ss 5D(1)(b) and 5D(4) that the scope of legal responsibility for breach of duty ends at 15 metres from the breach.

74. That leaves in support of the majority's reasoning the "free and deliberate" nature of Williams' criminal act. Whilst that may be a relevant factor in the inquiry, the authorities discussed above show that it is only one of many considerations. By rendering that factor determinative, and in effect holding that a "free and deliberate" criminal act *cannot* be the kind of thing that the duty owed by the OSG officers was imposed to "prevent", the majority fell into error. It may be that the majority's earlier mischaracterisation of the scope of that duty contributed to this error.[76]

75. The chants during the rally leading up to the speech given by Dunn-Velasco, and the speech itself, evidence the heightened emotions and anti-police sentiment that existed as part of the Invasion Day rally. A sudden, unannounced, forceful intrusion into a crowd which included such people, particularly as they were physically pushed aside, was likely to elicit a response from some in the crowd. As White JA observed (CA [243]-[245])[77], a hostile response involving criminal conduct was the very sort of response the respondent had in fact foreseen. It was the very thing which fell within the scope of the duty of the OSG officers, being to take reasonable care for those who might foreseeably suffer harm from their intrusion into the crowd. The answer may well be different if Williams' criminal conduct did not so closely align with what might be expected when an Invasion Day rally becomes inflamed from police intervention on burning the national flag – for example if after the OSG officers' intrusion Williams had taken the opportunity in the ensuing

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[76] In this regard, the majority's reasoning at CA [103] is telling: "…*we do not accept that a decision by a person who was outside the relevant crowd to commit a criminal assault in order to impede the gathering of evidence of possible offences is in the same class. It would be surprising were the law to impose a duty of care the purpose of which extended to preventing the undertaking of such action*". This statement conflates the question of whether the duty was breached (i.e. what the law in these factual circumstances required the officers to do or not to do in order to discharge their duty of care), and the question of whether, the breach having been committed, the law imposes legal responsibility for one of the consequences of that breach being a criminal act occurring in the melee that ensued.

[77] CAB 136.

confusion to steal property from the appellant, or to attack the appellant to settle an old score.

76. To the extent it is necessary to consider policy reasons in determining this issue (Ground 2b), the appellant submits that: (i) the police undoubtedly have an important role to play in maintaining public safety at rallies and protests; (ii) the police also have a responsibility, consistent with both their public duty and in this case their private law duty of care, not to cause public danger through unnecessary action in rallies and protests that inflame a crowd; and (iii) where that consequent public danger materialises as an injury to a bystander in the confusion and melee caused by police action, the police should not avoid legal responsibility solely because the criminal act of a third party formed part of the causative chain.

PART VII: ORDERS SOUGHT BY THE APPELLANT

77. The appellant seeks the orders set out in the Notice of Appeal (CAB 154-155).

PART VIII: ESTIMATE OF TIME

78. The appellant estimates that approximately 2.5 hours will be required for the presentation of oral argument on the appeal, and reserves her position with respect to time required for oral argument on the notice of contention.

Dated: 21 May 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No I of 2024, the Appellants set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	*Civil Liability Act* 2002 (NSW)	1 January 2019 to 29 February 2020	S 5B s 5D(1)(b) s 5D(4)	Version in force when proceedings commenced below	23 May 2019