HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Laura Cullen
Appellant

and

State of New South Wales
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION

This outline of oral argument is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **The scope of the duty of care was unjustifiably confined.**
   (a) There is no challenge to the finding by all three members of the Court of Appeal that a duty of care was owed to some members of the crowd. The point of contention in this appeal concerns the class of persons to whom it was owed.
   (b) The Common Law, has, from the earliest of times, drawn a distinction between causing damage by a positive act and "causing" damage by a failure to act.[1]
   (c) There is no reason in principle or policy to confine the scope of the duty of care found to those in the "immediate vicinity". Even if that be wrong, the appellant was indeed to be regarded as being in that class.
   (d) The use of that term in *Robinson v Chief Constable of West Yorkshire Police* [2] was germane to the circumstances of that case, not a statement of general principle.

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[1] *Pyrenees Shire Council v Day* (1998) 193 CLR 330 at 368.
[2] [2018] AC 236 **(JBA, Part D Cases, Vol 4, Pt 2, p.1382)**.

(e) The approach taken by the majority at (CA [72]) [3] fails to recognise that the proper identification of the class to whom the duty was owed should have been made by reference to the touchstone of reasonable foreseeability of injury. In the case of positive acts, the duty is to all who might reasonably foreseeably come to harm. The question of foreseeability there is an "undemanding" one.[4] It was not only foreseeable, but foreseen, that persons beyond the "immediate vicinity" could come to harm if the crowd were to become uncontrolled. The precise harm, or manner of its occurrence, was not required to be foreseen.[5]

(f) It has repeatedly been recognised, in this Court and others of the highest authority, according to orthodox principles of the law of negligence that in cases involving ordinary physical injury to a plaintiff's person or property as a consequence of the direct impact of a positive act, it is likely to be settled that, if the risk of injury was reasonably foreseeable, a relationship will exist sufficient to impose a duty of care, *the scope of which is settled.*[6]

(g) There was every reason to foresee that harm could be done to those beyond the "immediate vicinity".

(h) The Court of Appeal wrongly treated the risk of harm relevant to breach as defining the scope of the duty. Even if that were a correct approach, which is doubtful, there was no principled reason to define the scope so narrowly.

(i) Limits on the scope of duty involving injury to person or property other than that of reasonable foreseeability, only generally arise when the duty alleged is one of affirmative action and the alleged breach is constituted by a failure to take the mandated action. To restrict by geographical reference the duty of a person who acts affirmatively, would require exceptional and rigorous justification. This has only been done by common law courts in the context of nervous shock cases.

2. **The restriction of the scope of duty to those in the immediate vicinity obscured the proper assessment of the question of breach of duty.**

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[3] ACAB 93.
[4] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 446-7 [71]-[72] per Gummow J **(JBA, Part C Cases, Vol 3, Pt 2, p.1118-9)**.
[5] *Chapman v Hearse* (1961) 103 CLR 112 at 120-121.
[6] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 507 per Deane J **(JBA, Part C Cases, Vol 3, Pt 1, p.836)**; *Bryan v Maloney* (1995) 182 CLR 609 at 617 **(JBA, Part C Cases, Vol 2, Pt 1, p.301)**; *Robinson v Chief Constable of West Yorkshire* [2018] AC 236 736 at [74] per Lord Reed **(JBA, Part D Cases, Vol 4, Pt 2, p.1407)**.

(a) The failure by the majority to consider those *not* in the path of the OSG Officers as they entered the crowd surrounding Dunn-Velasco meant that the question of breach was not considered in light of the risk of harm to those in the appellant's class (again assuming the appellant was not rightly to be regarded as being in the immediate vicinity.) This Court has emphasised the importance of identifying the correct risk of harm, at an appropriate level of abstraction.[7]

(b) Breach of duty is a question of fact, ultimately for the Court. Crowd disorder was a foreseeable and not insignificant risk of harm if there were a sudden and forceful intrusion by police into a peaceful crowd of protestors. That is what occurred. Looked at in prospect, the risk of injury to others in the crowd was manifest. The OSG officers' response to the threatened ignition of the flag was disproportionate to any risk that that would have posed. The "Actions On" document specifically warned police against such a "hastened" reaction.

3. **The scope of the State's liability extends to the damage suffered by the appellant, according to ordinary principles.**

(a) Once the scope of the duty, and therefore breach, is correctly formulated, the harm which befell the appellant was of the very kind likely to happen because of the breach. In *March v Stramare*[8] McHugh J treated the descriptions "the very kind likely to happen" and "the natural and probable consequence" as satisfied by reason of the fact that the occurrence in question was what the defendant had a duty to guard against. The scope of liability for the consequences of negligence is often (usually) coextensive with the content of the duty of the negligent party that has been breached.[9] The appellant had no choice in the conduct of the OSG officers and no control over its consequences. There is no policy reason to treat the scope of the respondent's liability as anything less than coextensive with the properly formulated scope of the duty owed. The purpose of the duty imposed here only has content if the scope of liability reflects it. This accords with the view of Professor Stapleton that the focus on intervening conduct as a class distracts from the real question of whether the event fell within or outside the scope of the risks in relation to which

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[7] *Tapp v Australian Bushmen's Campdraft and Rodeo Association Ltd* (2022) 273 CLR 454 at 489-490 **(JBA, Part C Cases, Vol 3, Pt 2, p.1077-1078)**.
[8] (1991) 171 CLR 506 at 536 **(JBA, Part C Cases, Vol 2, Pt 2, p.607)**.
[9] *Wallace v Kam* (2013) 250 CLR 375 at 386 [26] **(JBA, Part C Cases, Vol 3, Pt 2, p.1169)**.

the defendant owed a duty to be careful.[10] That policy explains the decision in *Stansbie v Troman*[11], cited with approval on multiple occasions by this Court.[12]

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[10] Professor Jane Stapleton, Three Essays on Torts, Clarendon Law Lectures (2021) 15 at pg 93 **(JBA, Part E, Vol 5, p.1644)**
[11] [1948] KB 48 at 52 **(JBA, Part D, Vol 4, Pt 2, p.1463)**.
[12] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 442 **(JBA, Part C Cases, Vol 2, Pt 1, p.289)**; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 279 per Kirby J (in dissent) **(JBA, Part C Cases, Vol 2, Pt 2, p.634)**; *Chappel v Hart* (1998) 195 CLR 232 at 256 per Gummow J **(JBA, Part C Cases, Vol 2, Pt 1, p. 374)**; *March v Stramare (E & Mh) Pty Ltd* (1991) 171 CLR 506 at 536 **(JBA, Part C Cases, Vol 2, Pt 2, p.607)**.