



## 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

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**RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

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### **Part I: Certificate**

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

### **Part II: Outline of argument**

2. In this case the police intervention produced a negative crowd reaction, which ultimately led to criminal violence by a bystander, which indirectly occasioned physical injury to Cullen.
3. The scope of the duty of care owed by the OSG officers in that situation does not extend to taking reasonable care not to provoke negative crowd reactions which may trigger criminal violence that occasions physical injury: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [36].
4. A duty of that scope is not consonant with the relevant statutory regime regulating police in this situation: *Police Act* s 6, *LEPRA* ss 4, 198-200, 230-231; RS [25]-[29].
5. Various tests of inconsistency in the caselaw support this submission. In particular, a duty of that scope is inconsistent with the proper and effective discharge by police of their responsibilities: *Sullivan v Moody* (2001) 207 CLR 562 at [62]; RS [26].
6. That is particularly so given (a) the likelihood of a “safety first” approach by police to comply with that duty of care; and (b) the likelihood that any police intervention in a protest crowd is apt to trigger an adverse response from protesters who are very likely to be emotionally committed to the cause in support of which they are protesting.
7. Consideration of situations apt to arise in a protest march context show the difficulties in thus extending the scope of the duty of care.
8. In addition, the common law does not recognise a duty of this scope in this situation.
9. There is no precedent for a duty of this scope. The scope of the standard duty applicable in most personal injury cases does not cover the situation.
10. Moreover, the courts are extremely loathe to extend the scope of a duty of care to provoking emotional reactions: RS [34]; *Tame v NSW* (2002) 211 CLR 317 at [7] and [26].
11. Further, it is highly exceptional (outside the area of vicarious liability)<sup>1</sup> for the courts to extend the scope of a duty of care to cover deliberate and violent criminal acts of a third party which have occasioned physical injury: *Modbury* [35]. And there is no special feature present here, which would warrant such an extension.

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<sup>1</sup> Cf *Deatons Pty Ltd v Flew* (1949) 79 CLR 370

12. In addition, contrary to AR[11], an ordinary member of the community would not be held to be under a duty of this scope: *N v Poole* [2020] AC 780 at [64]; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at [45], [67], [68].
13. In relation to breach of duty the judge dealt with that issue at [134] focusing on the lack of an announcement, police rushing (not walking) and the presence of more than one officer with a single fire extinguisher.
14. Cullen asks this court to reinstate that finding. That argument obliges Cullen to indicate error in the approach of the CA majority and then to have this court redetermine the matter in her favour.
15. The CA majority dealt comprehensively with each of the four factors at J [134]:
  - i. one officer: CA [84]; RS [49];
  - ii. one extinguisher: CA [84]; RS [50];
  - iii. walking not rushing: CA [81], [86], RS [44]; and
  - iv. no announcement: CA [83]; RS [51].
16. Although the majority's reasoning on those four points is sufficient to deal with J [134] the majority added other reasoning destructive of the judge's reasoning on breach:
  - v. need for a rapid decision in the field: CA [84] – [85], [87]; RS [48];
  - vi. actions of OSG officers in intervening not calculated to inflame the situation and create a melee: CA [88], RS [42];
  - vii. the conflicting obligations of officers: RS [27] – [29], [43]; CA [82];
  - viii. the social utility of the activity which creates the risk of harm: RS [47]; CA [87]; and
  - ix. failure to consider the many concessions made by Cullen's expert (Halpin): CA [85], RS [52].
17. Cullen makes only three small criticisms of the majority reasoning on breach.
18. First, Cullen submits that the majority erred because police are under no duty to prevent breaches of the peace: AS [57] and [59]. But that submission is wrong: RS [59].
19. Secondly, at AS [50] – [57] Cullen submits that the majority erred in holding that there was a threatened breach of the peace. But the majority did not so hold and (in any event) a breach of the peace was threatened.
20. Thirdly, Cullen in her Outline [2] (a)-(b) submits that the CA majority considered the wrong risk of harm on breach and should have considered the risk of harm she advocated. However at CA [80] and [88] the majority state that their conclusions on breach were the same even if the risk of harm was that asserted by Cullen.

21. In any event, even if one of these errors were established they make little dent in the majority's reasoning. Moreover, contrary to AR [14] (c) even if error were demonstrated this court would reconsider the issue of breach and not just reinstate the primary judge's holding.
22. Faced with these difficulties on breach, Cullen attempts to launch an altogether new argument (not considered below) that it was negligent for the police to have intervened at all.
23. However, (i) there are very grave difficulties in arguing such a case for the first time in this court; (ii) in any event that new case (unexplored below) has substantial problems.
24. If this Court finds a breach of duty it will need to consider factual (ie "but for") causation. If this Court's findings in negligence are not precisely identical to those of the primary judge this Court will need to determine that issue afresh.
25. If this Court determines breach of duty in a manner precisely identical to the primary judge, it is submitted that the determination of this issue by the judge (and the CA) was erroneous in law because it is based upon an incorrect counterfactual. This Court should find that Cullen has not established that on the correct counterfactual her injury would not have occurred.
26. In relation to supervening causation, the majority at [96] applied Hart and Honoré: Williams' actions were "free, deliberate and informed act", which was "intended to exploit" [etc]: Hart and Honoré p. 137, footnote [23] explains "intended to exploit".
27. That principle is an "undoubted rule": *Reeves v Commissioner of Police* [2000] 1 AC 360 at 367-8 per Lord Hoffmann.
28. The applicability of that rule is further strengthened by other factors (*Modbury* [39]) including violent criminality: CA [109], [103]. See also CA [102] – [103]; *Modbury* at [113] – [117].
29. Cullen submits (AS [71]) that the Hart and Honoré principle will not apply where the duty extended to a risk of guarding against the very criminal act that occurred.
30. However, the duty here did not so extend: CA [109] and [103].
31. Moreover, it was not appropriate for the scope of liability to extend to the harm which occurred: CA [109]; cf *Modbury* [113] – [117].
32. Nor do the other cases relied upon by Cullen assist her.



G O'L Reynolds



H N Newton

Dated: 2 December 2025