HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND EDELMAN JJ

AILEEN ROY APPELLANT

AND

JULIE O'NEILL RESPONDENT

Roy v O'Neill
[2020] HCA 45
Date of Hearing: 8 September 2020
Date of Judgment: 9 December 2020
D2/2020

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Northern Territory

Representation

P R Boulten SC with P D Coleridge for the appellant (instructed by North Australian Aboriginal Justice Agency)

J T Gleeson SC with T J Moses for the respondent (instructed by Director of Public Prosecutions (NT))

CATCHWORDS

Roy v O'Neill

Evidence – Admissibility – Trespass – Where appellant charged with breach of Domestic Violence Order ("DVO") – Where DVO included condition that appellant not remain in her partner's presence while intoxicated – Where police attended unit occupied by appellant and her partner for purpose of DVO check – Where police engaged in wider proactive policing operation – Where police knocked on front door and asked appellant to come to door for DVO check – Where police observed signs of intoxication and requested appellant submit to breath test – Where breath test positive for alcohol – Whether evidence of breath test lawfully obtained – Whether police trespassed – Whether common law implied licence permitted police to approach unit and knock – Whether lawful purpose to attend unit.

Words and phrases – "breath test", "coercive powers", "common law implied licence", "Domestic Violence Order", "implied licence to enter private property", "interference with an occupier's possession", "lawful communication with an occupier", "lawful purpose", "police", "proactive policing", "trespass".

Police Administration Act (NT), s 126(2A).
Domestic and Family Violence Regulations (NT), reg 6.

1 KIEFEL CJ. In June 2017 a Domestic Violence Order (a "DVO") issued out of the Local Court of the Northern Territory of Australia at Katherine against the appellant. Its evident purpose was to protect the appellant's partner, Mr Johnson, from her in circumstances where she had consumed alcohol or another intoxicating drug or substance. In relevant part it restrained the appellant from being in the company of Mr Johnson or at a place where he lived when she was consuming alcohol or was under its influence. In proceedings brought for breach of the DVO[1], evidence of the results of a breath test, which showed that the appellant had consumed alcohol, was excluded from admission into evidence on the ground that it was obtained unlawfully. It was held to have been obtained unlawfully because the police officer who administered the breath test was found to have no authority to be present on the premises, which is to say he was a trespasser. The appellant was found not guilty of the charge.

2 At the time of the visit by the police officer, Constable Elliott, and two other officers to the dwelling unit where the appellant and Mr Johnson resided, the police in the Northern Territory were engaged in a wider operation which targeted domestic violence. This was referred to as "proactive policing", which may be understood to be directed to preventing such violence rather than dealing with it after it had occurred.

3 In his evidence at the hearing of the charge in the Local Court, Constable Elliott said that prior to the visit he had concerns that Mr Johnson's welfare could be compromised when the appellant was intoxicated. The appellant had stabbed Mr Johnson on a previous occasion. There had been a number of incidents involving other behaviour on the part of the appellant which he considered could adversely affect Mr Johnson. Two weeks prior to the visit in question Constable Elliott had taken the appellant to a "sobering up shelter". He said that he believed that she would be intoxicated when he visited the premises on the occasion here in question, because she invariably was.

4 The dwelling unit in which the appellant and Mr Johnson lived was part of a public housing complex. The police officers entered the yard from the footpath and walked along one of the pathways shared by the units to the entrance to the dwelling unit. Constable Elliott knocked on the flyscreen door, looked in and saw Mr Johnson seated on a couch and the appellant lying on the floor. He called the appellant to the door for the purpose of a DVO check. As she approached, he observed indicia of intoxication. He required her to provide a sample of her breath to test and she complied. The machine he used gave a positive reading for alcohol. When asked at the hearing of the charge what power he was exercising, Constable Elliott gave as his answer, reg 6 of the *Domestic and Family Violence Regulations* (NT).

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1 *Domestic and Family Violence Act* (NT), s 120(1).

5 Regulation 6 requires a defendant to comply with a reasonable direction by a police officer to submit to a breath test to assess whether the defendant may have had alcohol in his or her breath. For the direction to be reasonable, it is not necessary that the officer have a suspicion that the defendant has consumed alcohol. But it does not in terms authorise entry onto premises for that purpose.

6 Section 126(2A) of the *Police Administration Act* (NT) does authorise entry onto premises. It provides that a member of the Police Force of the Northern Territory may "enter a place" if he or she believes on reasonable grounds that a contravention of a DVO made under the *Domestic and Family Violence Act* (NT) has occurred, is occurring or is about to occur at the place. It authorises the police officer to remain at the place and take such reasonable actions as are considered necessary.

The decisions below

7 The trial judge, Judge Woodcock, held that neither provision gave the police power to attend at the premises to check the appellant's compliance with the DVO. So far as concerned s 126(2A), his Honour found that Constable Elliott did not have the requisite belief and that the appellant was merely a "person of interest" to him. It is to be inferred that his Honour took the view that when he entered the premises Constable Elliott could not have a belief, on reasonable grounds, that the appellant had consumed alcohol and thereby breached the DVO, rather he was ascertaining whether that was the case.

8 This was also the view of Mildren A-J on the appeal to the Supreme Court of the Northern Territory[2]. His Honour found that the requisite belief arose only when Constable Elliott observed the appellant coming to and opening the door of the dwelling unit. Up until that time, his Honour said, the police officer could not suspect, reasonably or otherwise, that the appellant had consumed alcohol. The statutory authority of s 126(2A) therefore could not have been invoked when Constable Elliott and the other police officers arrived at the door from the footpath.

9 Mildren A-J then considered whether the implied permission, which the common law attributes to an occupier, for persons to enter the premises for lawful purposes applied. His Honour held that it could not arise where the purpose is to investigate whether a breach of the law has occurred or to gather evidence of a crime committed by the occupier[3]. His Honour rejected the argument that a purpose of Constable Elliott was to conduct a check on the welfare of Mr Johnson.

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2 *O'Neill v Roy* (2019) 345 FLR 8.

3 *O'Neill v Roy* (2019) 345 FLR 8 at 26 [44].

10 The Court of Appeal of the Northern Territory (Southwood and Kelly JJ and Riley A-J)[4] overturned the latter finding. The Court held that Constable Elliott had a dual purpose in entering the premises – to determine whether the terms of the DVO were being honoured and to check on the wellbeing of the protected person, Mr Johnson. It was sufficient for the permission which the common law implies that the officer had the latter, lawful, purpose.

The implied licence and its limits

11 It is well understood that the law of trespass requires that for a person lawfully to enter private premises there must be an invitation or permission from the occupier respecting that entry. The common law also recognises that such a rule would be unworkable in our society if it were strictly applied so as to render all visitors who did not have an express permission from the occupier, trespassers. It recognises that it is in the interests of the occupier, entrants and society more generally that there be a qualification to the law of trespass. It effects that qualification by implying a permission, on the part of an occupier, for persons to enter upon premises and approach a dwelling to engage in lawful purposes. It balances its recognition of that implied permission by acknowledging that an occupier may negate the permission, by sufficiently indicating that entry is not permitted, and that an occupier may revoke the permission at any time, by requiring the visitor to leave the premises. The implied licence applies to members of the public and the police alike, albeit that the business which they may have with the occupier or those present on the premises may differ.

12 The most common such licence, a majority of this Court in *Halliday v Nevill*[5] observed, relates to the means of access, usually by path or driveway, to a suburban house. If access is unobstructed, the entrance gate unlocked and there is no notice or other indication that entry by visitors is prohibited, "the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house". If the implied licence is revoked at any time, the visitor becomes a trespasser if they remain.

13 Although a purpose of speaking with the occupier or another person present at the premises is the most common lawful purpose in entering residential premises, it is not the only category of purpose that will qualify for the law to imply a licence. In *Halliday v Nevill*[6] it was explained more generally that the path or driveway of premises is held out by the occupier "as the bridge between the public

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4 *O'Neill v Roy* (2019) 345 FLR 29 at 39 [37].

5 (1984) 155 CLR 1 at 6-7.

6 (1984) 155 CLR 1 at 7-8.

thoroughfare and his or her private dwelling upon which a passer-by may go *for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property*" (emphasis added). These factors may be understood to provide the limits of the licence to enter which the law will imply. They are consonant with the law of trespass, to which the implied licence effects a qualification. An approach which requires that the purpose both be legitimate and involve no interference with possession or injury to those present is comprehensible and workable. It requires no fine distinctions to be drawn, unguided, as to what are permissible or impermissible purposes; rather one looks to the effects of the purpose carried out upon the occupier's rights and its impact on those present.

14 The circumstances in *Halliday v Nevill*[7] provide an example. The purpose of the police in entering upon the driveway of the dwelling in question was not to communicate with the occupier or other persons lawfully there present. The police had no business with such persons. Their purpose was to arrest without warrant a person known to be a disqualified driver who took refuge in the driveway. Clearly the entry of the police to effect that purpose involved no interference with the occupier's possession or injury to the occupier or others on the property. The conclusion reached by the majority, that the police officer was not a trespasser, was said to be based on common sense, reinforced by considerations of public policy[8].

15 In *Robson v Hallett*[9], which was referred to with approval in *Halliday v Nevill*[10], police officers had received information concerning a possible offence which had taken place that evening. They went to and entered upon residential premises through the gate and to the front door in order to make enquiries of the occupants in relation to it. Lord Parker CJ held that the police officers entered the premises under a lawful licence[11]. The purpose of the police in entering the premises to undertake the business of police by making enquiries[12] may also be

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7 (1984) 155 CLR 1.

8 (1984) 155 CLR 1 at 8.

9 [1967] 2 QB 939; see also *Florida v Jardines* (2013) 569 US 1 at 9.

10 (1984) 155 CLR 1 at 7.

11 *Robson v Hallett* [1967] 2 QB 939 at 952-953, Diplock LJ and Ashworth J agreeing.

12 See *Robson v Hallett* [1967] 2 QB 939 at 952 per Lord Parker CJ.

understood, in accordance with *Halliday v Nevill*, not to involve an interference with the occupier's possession or injury to any person present.

16 "Injury" is a broader concept in the law of trespass than in some other torts. It may include an affront to a person's dignity or apprehension of harm. Injury of this kind may be caused, for example, as a result of an unauthorised and therefore unlawful search of a person's dwelling and seizure of the person's property[13]. The use of other coercive powers might likewise involve injury in this wider sense. The prospect that a person might be investigated for an offence is not injury of this kind[14].

17 Clearly it would be an interference with an occupier's possession if police entered for the purpose only of searching the premises[15]. Consistently with what was said in *Halliday v Nevill*, the common law will not imply a licence to enter for that purpose. To enter lawfully, police must have a valid warrant issued under a statute which provides that authorisation in order to justify what would otherwise be a trespass[16]. Likewise, if a police officer was to enter premises for the sole purpose of exercising coercive powers, such as requiring a person to submit to a breath test, a statutory power such as s 126(2A) of the *Police Administration Act* would be necessary and the police officer must have the required belief as to contravention.

The present case

18 Applied to the facts of the present case, the approach of the majority in *Halliday v Nevill* readily admits of a conclusion that a licence would be implied. It is implied by the law so that police might undertake such enquiries and observations of the appellant as were necessary if she was present at the dwelling unit, to ascertain whether the DVO had been breached and an offence committed, as Constable Elliott expected might be the case. Whether this be called a "check" or an investigation does not matter. It is a non-coercive aspect of police business which involves no adverse effect upon any person and nothing which might qualify as "injury" in the extended sense referred to above. It involves no interference with the occupants' possession. It is difficult to imagine how police could go about their

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13 *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 524 [73] per Kiefel CJ, Bell and Keane JJ; 376 ALR 575 at 593.

14 *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 524 [73] per Kiefel CJ, Bell and Keane JJ; 376 ALR 575 at 593.

15 *Florida v Jardines* (2013) 569 US 1 at 9.

16 See *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 523 [67] per Kiefel CJ, Bell and Keane JJ; 376 ALR 575 at 592.

business and more particularly how they could be expected to prevent domestic violence in the public interest unless they were able to make such enquiries and observations of the subject of a DVO and the person it is intended to protect.

19 It follows that when Constable Elliott entered the premises he was not a trespasser. There was nothing to indicate entry was not permitted. His purpose in making enquiries and observing the appellant and Mr Johnson was legitimate and those actions had no adverse consequences. When he ascertained that the appellant was there and observed her state of intoxication he had the requisite belief for the purposes of s 126(2A) of the *Police Administration Act*, as Mildren A-J found. He was then authorised to remain on the premises and to require a sample of the appellant's breath pursuant to reg 6 of the *Domestic and Family Violence Regulations*.

20 The Court of Appeal was correct to hold that Constable Elliott had another purpose when he entered the premises of the dwelling unit. That purpose was to ascertain whether Mr Johnson's welfare was being compromised. This was undoubtedly a purpose of Constable Elliott according to his unchallenged evidence, which was generally accepted by the trial judge, who regarded the police officer as an honest witness and not prone to exaggeration about his state of mind. The two purposes – to observe and enquire of the appellant and Mr Johnson – go hand in hand. But this is not to negate that the purpose respecting Mr Johnson is itself a lawful purpose for the implied licence. Constable Elliott's expectation that the appellant might be intoxicated in the company of Mr Johnson might have been the cause for his concern about Mr Johnson, but he had a dual purpose in attending at the dwelling unit. He was checking on both of them.

Evidence relating to purpose

21 The appellant's argument denies these purposes. It is her contention that Constable Elliott's purpose in attending at the dwelling unit was to use the coercive powers under reg 6 to obtain a sample of the appellant's breath for testing. It is to be inferred that the appellant contends Constable Elliott intended to do so when he first entered the premises, regardless of how she presented when he came to the door of the dwelling unit.

22 No finding to this effect was made by the trial judge or by Mildren A-J. True it is that the Court of Appeal's reasons contain a statement that Constable Elliott "was intending to obtain a sample of the [appellant's] breath for analysis"[17]. This statement does not accurately reflect the evidence and should be understood, in the wider context of the reasons, to refer to an intention to require a breath test if the appellant's condition made that necessary.

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17 *O'Neill v Roy* (2019) 345 FLR 29 at 31 [3].

23 It will be recalled that Constable Elliott's evidence was that it was his experience that the appellant was invariably intoxicated. Arguably this was a sufficient basis for a belief that a contravention of the DVO would be occurring when he entered the premises. Had that view of his evidence been taken, s 126(2A) would have authorised his entry and the requirement for a breath test. But the trial judge did not accept that the police officer had a sufficient basis for that belief and, on appeal, Mildren A-J found that he could only have had a suspicion after the appellant went to and opened the door. That finding was not challenged.

24 It was in connection with the powers provided by s 126(2A) and reg 6 that counsel for the appellant submitted to the trial judge that it was unclear what specific purpose the police officers had in mind when they went to the dwelling unit or what power was being exercised by them. The submission was understandable not the least because the appellant's counsel had not put any questions to Constable Elliott on those topics.

25 The findings referred to above did not affect the evidence of Constable Elliott that he expected the appellant to be intoxicated when he arrived. The question which then arises is whether it may be inferred that he intended to require her to undertake a breath test regardless of her condition when he first observed or spoke to her.

26 Constable Elliott did not say that he knocked on the door and called out to the appellant to come to him for the purpose of a breath test. He said that he called her to the door for the purposes of a DVO check. He explained in his evidence that "part of her conditions was to provide a breath test upon request", but he did not suggest that he said this to the appellant before she came to the door. Clearly enough he was explaining this aspect of the DVO for the court. He said that it was when the appellant approached him for that "check" that he observed indicia of intoxication and required a breath test. A conclusion that he intended to require a test, rather than first observe and speak to her as he in fact did, is not supported by this evidence.

27 There was no direct evidence from Constable Elliott that he intended to require a breath test when he entered the premises and regardless of the appellant's evident condition. Importantly, the appellant's counsel did not suggest to the police officer that he had such an intention. It was merely put to him and to the other police officer who gave evidence that the reason they attended was to conduct a proactive domestic violence check, without explaining what counsel meant to convey by the word "check" and without enquiring of the police officers what they meant by it in giving their evidence. One available meaning was to ascertain the state of the appellant and Mr Johnson and then take whatever action was necessary, which is at least consistent with what occurred.

28 The evidence concerning Constable Elliott's intention does not warrant the inference the appellant seeks to draw.

Conclusion and orders

29 Either of the two lawful purposes referred to above was sufficient for the law to imply a licence for Constable Elliott to enter the dwelling unit in question. He was not a trespasser. The evidence of the results of the breath test was admissible.

30 The appeal should be dismissed.

31 BELL AND GAGELER JJ. In the Australian way of thinking, a home is a sanctuary. This sentiment is reflected in common expectations and common practices: "the habits of the country"[18]. Those habits are founded on an ingrained conception of the relationship between the citizen and the state that is rooted in the tradition of the common law. The conception can be traced to the Jacobean resolution of the Court of King's Bench that "the house of every one is to him as his castle ... as for his repose"[19].

32 Nobody, and especially no officer of the state, can enter my home, or even walk up my path or stand at my doorstep or knock on my door, without my permission unless positively authorised by statute or the common law to take that action[20]. But, of course, the very fact that I have a path and a doorstep, and a door, implies that I am granting permission for anyone who means me no harm to walk up the path, to stand at the doorstep and to knock on the door so as to talk to me if I am home and if I choose to answer the knock[21].

33 That generally implied licence – to "knock and talk"[22] – applies as much to an officer of the state as it does to my neighbour or to a door to door salesman. Invocation of the licence by uninvited visitors to my home does not depend on the intended subject matter of their communication with me or on whether their communication might or might not be expected to be welcomed by me[23].

34 The implied licence is therefore available to be invoked by a police officer to walk up my path, stand at my doorstep and knock on my door, and then to continue to stand at my doorstep and talk to me at my door if I am home and if I choose to answer the knock. The police officer can do all of that in the context of

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18 *McKee v Gratz* (1922) 260 US 127 at 136.

19 *Semayne's Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195].

20 *Halliday v Nevill* (1984) 155 CLR 1 at 7-8, 19; *Plenty v Dillon* (1991) 171 CLR 635 at 639, 647; *Coco v The Queen* (1994) 179 CLR 427 at 435-436; *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [43], [45].

21 *Lipman v Clendinnen* (1932) 46 CLR 550 at 557; *Halliday v Nevill* (1984) 155 CLR 1 at 7-8.

22 cf *Florida v Jardines* (2013) 569 US 1 at 21.

23 *Lipman v Clendinnen* (1932) 46 CLR 550 at 559.

investigating a crime, even if I am a suspect[24]. The licence implied from the fact that I have a path and a doorstep and a door in that respect has not been understood in Australia quite so narrowly as in Canada, where it has been said that "occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them"[25].

35 The police officer can ask me any questions he or she wants to ask while standing at my doorstep. I have a choice to answer or not answer. What is more, the implied licence that the police officer has to stand at my doorstep and talk to me is immediately revoked if I choose at any time to say, "go away", following which the police officer will become a trespasser if the police officer does not leave within a reasonable time[26]. On top of all that, I can negative the implication of the licence in the first place if I contact the police station in advance to say that I do not want police officers to come to my home or if I hang a sign on my gate or my door saying, "Police Not Welcome".

36 But the licence to "knock and talk" implied from the fact that I have a path and a doorstep and a door is surely not a licence to compel me to do anything. The habits of our country do not condone my own coercion in my own home. The carefully crafted and jealously maintained statutory and common law rules authorising search and seizure[27] and service and execution of civil and criminal process[28] would count for little if they did. If you want to walk up my path and stand at my doorstep and knock on my door so that you can order me to do something, and you do not have my express permission to come to my home, then you need to be specifically authorised by statute or the common law not just to give me the order but also to enter upon my land to give me that order.

37 The implied licence to "knock and talk" is accordingly confined by reference to the "purpose" of the visit, in the sense that the status of an uninvited visitor as either a licensee or a trespasser depends on what the visitor is seeking to

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24 *Robson v Hallett* [1967] 2 QB 939, cited in *Halliday v Nevill* (1984) 155 CLR 1 at 7, 19, and in *Plenty v Dillon* (1991) 171 CLR 635 at 647. See also *Pitt v Baxter* (2007) 34 WAR 102 at 103-105 [3]-[8]; *R v Daka* [2019] SASCFC 80 at [73]-[77].

25 *R v Evans* [1996] 1 SCR 8 at 19 [16]. See also *R v Le* (2019) 434 DLR (4th) 631 at 680-681 [126]-[127].

26 *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 631.

27 eg *George v Rockett* (1990) 170 CLR 104 at 110-111.

28 eg *Plenty v Dillon* (1991) 171 CLR 635 at 639-645.

achieve at my home by walking up my path, standing at my doorstep and knocking on my door. If the purpose is just to talk to me, and in talking simply to ask for permission to come inside or to go elsewhere on my land or simply to ask for my voluntary cooperation in pursuing some inquiry, the totality of the conduct is within the scope of the licence. If the purpose is just to coerce me, the totality of the conduct is outside the scope of the licence; it is a trespass.

38 What then if the purpose is both to talk and to coerce? Or what if the purpose is first to talk and then perhaps to coerce if cooperation is not forthcoming? The application of the implied licence to the conduct of police officers would lose touch with the informing conception of the relationship between the citizen and the state were the scope of the implied licence to become entangled in subtle notions of "mixed" or "contingent" purposes[29]. The lawfulness of the conduct of police officers in a context such as this should not "depend upon fine shades of meaning of words or nice distinctions"[30].

39 A passage in the reasoning of Brennan and Deane JJ in *Barker v The Queen*[31] is instructive. In the context of examining whether entry of a thief onto his neighbour's land was authorised by an express licence granted by the neighbour asking him "to look after the place" whilst the neighbour was away on a holiday, their Honours said:

> "[E]ntry will be as a trespasser if, as a matter of substance and fact, the entry in question is beyond the scope of the permission. ... The answer to the question is not complicated by artificial notions that a permission must be qualified by reference to authorized purpose or by artificial doctrines of relation back. When the only suggested justification for entry is the permission of the person in possession, the question whether entry was as a trespasser involves no more than identification of the limits of the actual permission, the definition of the actual entry and the determination of whether that entry was within the scope of that permission. If the permission was not subject to any express or implied limitation which excluded the entry from its scope, the entry was not as a trespasser. If the permission was

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29 cf *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 69 SR (NSW) 311 at 321, 332-333; *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584 at 599, 606; *Barker v The Queen* (1983) 153 CLR 338 at 346-347.

30 *Lippl v Haines* (1989) 18 NSWLR 620 at 623.

31 (1983) 153 CLR 338 at 364-365. See also *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 341 [29].

subject to an actual express or implied limitation which excluded the actual entry, the entry was as a trespasser."

40 By parity of reasoning, the answer lies in identifying the limits of the permission granted by the implied licence to "knock and talk". The preferable view is that a police officer who walks up my path, stands at my doorstep and knocks on my door exceeds the limits of the permission granted by the implied licence, and is therefore a trespasser, if the police officer has any conditional or unconditional intention of ordering me to do anything. That view is preferable because it is clear and workable and because it is consonant with contemporary community expectations. At this stage in the development of the common law of Australia, it is an appropriate resolution of the "contest between public authority and the security of private dwellings"[32].

41 Section 126(2A) of the *Police Administration Act* (NT) empowers a member of the Northern Territory Police Force to "enter a place" if the member believes on reasonable grounds that a contravention of a Domestic Violence Order ("DVO") made under the *Domestic and Family Violence Act* (NT) has occurred, is occurring or is about to occur at the place. The provision goes on to authorise the member to remain at the place for such period, and take such reasonable actions, as the member considers necessary, amongst other things, to verify the grounds of the member's belief and to prevent a contravention of the DVO.

42 Senior Sergeant Evans and Constables Elliott and Dowie did not seek to invoke that provision when they turned up in the alcove of the unit occupied by Ms Roy and Mr Johnson at their housing complex in Katherine and spoke to Ms Roy through the fly-screen door. They were engaged instead in an exercise of "proactive [DVO] compliance check[ing]"[33]. Ms Roy, against whom a DVO had been made, was not a "suspect" but a "person of interest". Mr Johnson, for whose protection the DVO had been made, was also a person for whose welfare they were concerned.

43 Had they turned up merely with the intention of asking Mr Johnson if he was okay, or even of talking exclusively with a view to forming an opinion as to whether Ms Roy was complying with the DVO, they would not have exceeded the implied licence which the existence of the alcove gave to anyone who wished to talk to the occupant of the unit. They would have been just talking.

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32 *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [45], quoting *Halliday v Nevill* (1984) 155 CLR 1 at 9.

33 *O'Neill v Roy* (2019) 345 FLR 29 at 30 [1].

44 The problem is that Constable Elliott turned up intending to obtain a sample of Ms Roy's breath for alcohol analysis[34]. To obtain that sample, he intended to, and did, use the power of direction conferred on him as a member of the Police Force by reg 6 of the *Domestic and Family Violence Regulations* (NT). However politely Constable Elliott might have intended to couch the direction he gave to Ms Roy, he knew that Ms Roy would have no option but to comply had the direction been lawful. She would be criminally liable if she did not.

45 That coercive purpose took Constable Elliott and his colleagues beyond the scope of the implied licence; it made them trespassers. The fact that Constable Elliott and his colleagues had the more general "dual purpose" of checking on Ms Roy's compliance with the DVO and checking on the well-being of Mr Johnson[35] makes no difference. The fact, if it be the fact, that the coercive purpose might have been contingent on Ms Roy being home and appearing to be drunk can also make no difference. That Ms Roy chose to comply with the request for a breath test is similarly of no moment. Where criminal consequences flow from a failure to comply, the giving of a direction is clearly coercive.

46 If Constable Elliott and his colleagues wanted to turn up uninvited in the alcove of the unit to give Ms Roy a direction under reg 6 of the *Domestic and Family Violence Regulations*, then they needed to rely on s 126(2A) of the *Police Administration Act.* They chose not to do so. There could be no suggestion that reg 6 is itself a source of authority to enter land without permission[36], and there could be no suggestion that the power of direction conferred by reg 6 can be lawfully exercised by a trespasser[37].

47 In the subsequent prosecution of Ms Roy in the Local Court of the Northern Territory for the offence of contravening the DVO contrary to s 120 of the *Domestic and Family Violence Act*, the evidence obtained by use of the power of direction was correctly determined by Judge Woodcock to have been unlawfully obtained. On that basis, the evidence was excluded under s 138 of the *Evidence (National Uniform Legislation) Act* (NT) and Ms Roy was acquitted.

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34 *O'Neill v Roy* (2019) 345 FLR 29 at 30-31 [3].

35 *O'Neill v Roy* (2019) 345 FLR 29 at 39 [37].

36 cf *Coco v The Queen* (1994) 179 CLR 427 at 437-438.

37 cf *Halliday v Nevill* (1984) 155 CLR 1 at 18; *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at 360 [26]. See also *Morris v Beardmore* [1981] AC 446 at 463.

48 On appeal to the Supreme Court of the Northern Territory, Judge Woodcock's decision was correctly upheld by Mildren A-J[38]. However, his Honour expressed the scope of the implied licence too narrowly when he said[39]:

> "[N]either the police nor anyone else has an implied invitation to enter private property, or the threshold of a person's home, for the mere purpose of investigating whether a breach of the law has occurred or for the purpose of gathering evidence of criminal activity by the occupier".

49 The dismissal of the appeal from Judge Woodcock's decision ought not to have been overturned on further appeal to the Court of Appeal[40]. The Court of Appeal conceived of the implied licence too broadly when it said that Constable Elliott and his colleagues were within the scope of the implied licence merely because their "approach was for the purpose of lawful communication which is a legitimate purpose"[41]. Whether or not their purpose can be described as "legitimate", it was coercive. That took their presence in the alcove beyond the scope of the implied licence.

50 The appeal from the judgment of the Court of Appeal should be allowed. In place of the orders made by the Court of Appeal, the appeal to that Court should be dismissed.

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38 *O'Neill v Roy* (2019) 345 FLR 8.

39 *O'Neill v Roy* (2019) 345 FLR 8 at 26 [44].

40 *O'Neill v Roy* (2019) 345 FLR 29.

41 *O'Neill v Roy* (2019) 345 FLR 29 at 39 [37].

KEANE AND EDELMAN JJ.

Introduction

51 In ordinary circumstances, background social norms imply that every member of the public has a licence to enter the curtilage of a property to knock on a front door or ring a front doorbell in order to communicate with an occupier. A member of the public who has concerns about the welfare of an occupant can knock on the door to ask if the person is all right or to ask if the person is safe. This appeal concerns the authority of the police to engage in the same conduct in order to address a plague of domestic violence in Katherine in the Northern Territory.

52 The appellant's primary argument is that the police have no power merely to knock on the door of an abused occupier living with the abuser simply to ask "Are you ok?". The alternative argument is that our social norms deprive the police of a licence to do so in the very circumstance in which the occupier might desperately hope for the police to enquire about their welfare: where the occupier is known by the police to have been abused by a co-habitant in the past so that the police intend, if the enquiry or circumstances reveal it to be necessary, to exercise a protective power.

53 The broad context in which the issue arises is a visit by the police to the unit occupied by the appellant, Ms Roy, and her co-habiting partner, Mr Johnson. Mr Johnson suffered from a medical condition and was a vulnerable person. Ms Roy described herself as his carer. She was subject to a domestic violence order ("DVO") protecting Mr Johnson but the police suspected Ms Roy of abusing and manipulating Mr Johnson, particularly when alcohol was involved, and they were aware that she had previously stabbed him. The unchallenged police evidence was that "one of the main reasons" for their visit was their concern for Mr Johnson's welfare. The police never entered the unit occupied by Ms Roy and Mr Johnson. Ms Roy answered the door in a state of intoxication and was requested to take a breath test. The breath test was positive for alcohol, suggesting a violation of a condition of the DVO which required her not to remain in Mr Johnson's presence while intoxicated.

54 Ms Roy's central submission is that although members of the general public have an implied licence to enter the curtilage of a property for the purpose of knocking on the front door to communicate with the occupier, the police have no implied licence to do so if their purpose for communicating is related to investigating a crime, such as domestic violence, that one of the occupiers is suspected of committing, even if the other occupier is a suspected victim of the crime. Ms Roy also submitted that the police have no licence to enter the curtilage of the premises if the purpose of enquiry is accompanied by an intention, however contingent or speculative, that the police might exercise coercive power. In other

words, the police would lose their licence to enter the curtilage to enquire about the welfare of a victim of domestic violence in the circumstances in which such an enquiry would be of the greatest value to a victim of abuse.

55 Neither of these submissions should be accepted. The background norms of our society do not imply that a home is a sanctuary from which to abuse an occupier behind closed doors. Nor do they provide sanctuary from police knocking on the door, to make the same enquiry that would be made by any decent and moral person who is concerned that the occupant might be abused, with the intention of exercising any powers if it is necessary to protect that occupant. The appeal must be dismissed.

Background

56 On 1 June 2017, on the application of a third party, the Local Court of the Northern Territory, sitting at Katherine, made a DVO against Ms Roy. The protected person was her partner, Mr Johnson. The order imposed five conditions upon Ms Roy for a period of 12 months. Conditions 1, 2, 4 and 5 restrained her from doing the following, directly or indirectly: (1) approaching, contacting or remaining in the company of Mr Johnson when consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance; (2) approaching, entering or remaining at any place where Mr Johnson is living, working, staying, visiting or located if consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance; (4) causing harm or attempting or threatening to cause harm to Mr Johnson; and (5) intimidating or harassing or verbally abusing Mr Johnson. Condition 3 provided that Ms Roy must "submit to a breath test and/or breath analysis when requested by police in relation to this order". The order was made with the consent of Ms Roy.

57 In 2018, a police officer, Constable Elliott, was concerned for the welfare of Mr Johnson. He knew from speaking to Ms Roy previously that Mr Johnson suffered from seizures and that she was Mr Johnson's carer. He had seen Ms Roy with Mr Johnson at a bottle shop where Ms Roy was in charge of Mr Johnson's "BASICs card" and money. He believed that Mr Johnson might be the subject of economic abuse[42]. He became suspicious and, upon making enquiries, discovered that there had previously been eight "incidents". No evidence was given about the nature of those incidents but Constable Elliott learned that on a previous occasion Ms Roy had stabbed Mr Johnson. In late March 2018, Constable Elliott had seen Ms Roy involved in what he described as "social order offences". He had warned her about possible breaches of her DVO and had taken her to a sobering up shelter.

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42 See *Domestic and Family Violence Act* (NT), s 8.

In the weeks before April 2018, Constable Elliott had observed antisocial behaviour coming from the unit that Ms Roy shared with Mr Johnson.

58 In April 2018, the Northern Territory Police Force in Katherine conducted Operation Haven. This operation involved police activities designed to address concerns about domestic violence and alcohol-related crime. The trial judge described domestic violence in the Northern Territory as a "plague ... especially in a place like Katherine". The police activities included proactive "compliance checks" at the premises of persons subject to a DVO. Members of the Police Force were aware that most of the domestic violence in the Northern Territory occurs "in the home behind closed doors".

59 On 6 April 2018, as part of Operation Haven, three police officers visited the unit that Ms Roy shared with Mr Johnson. The police officers were Constables Elliott and Dowie and Senior Sergeant Evans. The unit was part of multi-dwelling units of public housing, which units were side by side or facing each other. Entries through the external fence led to common pathways through the yard outside the high density unit dwellings. The police officers entered the curtilage, which included the yard and the common area of the unit dwellings, and walked up one of the common pathways which led to an alcove within which was the main front door of the unit occupied by Ms Roy and Mr Johnson.

60 The main front door was open but a fly-screen door in front of it was closed. Constable Elliott knocked on the fly-screen door. He looked through the fly-screen and saw Mr Johnson sitting on a couch and Ms Roy lying on the floor. Although there is no finding as to the precise words he used, he called upon Ms Roy to come to the door for a DVO check. Constable Elliott noticed that when she got up from the floor she was very lethargic. When she approached him, Constable Elliott could smell a very strong odour of liquor on her breath. He saw that her eyes were bloodshot and she was slurring her speech a lot more than on past occasions when he had spoken with her. He asked her to submit to a breath test. She agreed. The test was taken in the alcove or on the step outside the front door. The test gave a positive reading for alcohol. Ms Roy was taken to the watch-house, where five attempts were made to take a breath sample from her for analysis. It was thought that a sufficient sample could not be obtained due to her state of intoxication.

The trial and the appeals

61 Ms Roy was charged by the respondent, Sergeant O'Neill, with one count of contravention of s 120(1) of the *Domestic and Family Violence Act* (NT). That section provides that a person commits an offence if the person engages in conduct that results in a contravention of a DVO. The conduct relied upon was not particularised but the trial was apparently conducted on the implicit basis that the offence was a breach of either condition 1 or 2 of Ms Roy's DVO by Ms Roy remaining in the presence of Mr Johnson while intoxicated.

62 The trial was held before Judge Woodcock in the Local Court of the Northern Territory. The trial judge held that the police officers did not have the power under the *Domestic and Family Violence Act* or the *Police Administration Act* (NT) to enter private property so that there was no basis for their request for a breath test. The trial judge observed that Constable Elliott "did not extend his state of mind to an endeavour [to justify the direction for a breath test] by s 126 of the *Police Administration Act*", which would have empowered him to enter the premises if he believed on reasonable grounds that a contravention of a DVO had occurred or was occurring. The evidence from the breath test was excluded. The trial judge found Ms Roy not guilty.

63 An appeal was brought by Sergeant O'Neill to a single judge of the Supreme Court of the Northern Territory[43]. The grounds of appeal all focused upon the finding by Judge Woodcock that the police officers had no power to enter the curtilage of a private residence to check compliance with the conditions of a DVO, although such entry would necessarily have involved the purpose of lawful communication with the occupiers, Ms Roy and Mr Johnson. The appeal was dismissed by Mildren A-J. His Honour held that the police do not have an implied licence to enter private property for the "mere purpose of investigating whether a breach of the law has occurred"[44]. Despite the absence of any finding to this effect by Judge Woodcock, and despite the lack of any such assertion in a notice of contention, Mildren A-J referred with apparent approval to Ms Roy's submission that the sole purpose that the police had in knocking on Ms Roy's door was to submit her to a breath test. His Honour rejected the police's submission that the purpose of the compliance check was concern for the welfare of Mr Johnson, asserting that if Constable Elliott had that purpose then it would have been expected that he would have enquired about the welfare of Mr Johnson.

64 Sergeant O'Neill brought a further appeal to the Court of Appeal of the Supreme Court of the Northern Territory. The Court of Appeal (Southwood and Kelly JJ and Riley A-J) held that the police had a dual purpose in entering the curtilage of the premises. The first purpose was "to determine whether the terms of a DVO were being honoured" and the second was "to check on the well-being of the protected person under the Order"[45]. The Court of Appeal held that the police officers had an implied licence to enter the curtilage of the property because these purposes involved lawful communication with the occupier of the unit and did not

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43 See *Local Court (Criminal Procedure) Act* (NT), s 163(3).

44 *O'Neill v Roy* (2019) 345 FLR 8 at 26 [44].

45 *O'Neill v Roy* (2019) 345 FLR 29 at 39 [37].

involve an interference with the occupier's possession, or injury to the person or property of either occupier. The appeal was allowed.

65 Ms Roy has two grounds of appeal to this Court. One ground asserts a specific error by the Court of Appeal in what was said to be its conclusion that an implied licence entitled the police officers to enter upon the curtilage of Ms Roy's premises for the purposes of investigating Ms Roy for a criminal offence because they did so with the additional purpose of communicating with another occupant of the same dwelling. The other ground of appeal asserts a general error by the Court of Appeal in its conclusion that the police were not trespassers on the curtilage of the premises. The grounds of appeal, as presented in submissions, raise essentially two issues. First, did the police officers commit a trespass when they entered the curtilage of the unit occupied by Ms Roy or did they have an implied licence to enter and to approach the front door to communicate with Ms Roy and Mr Johnson? Secondly, if the police officers had such an implied licence, did that licence terminate, with the effect that the police became trespassers, when Constable Elliott asked Ms Roy to provide a sample of her breath?

Legal principles concerning implied licences

An implied licence to enter onto land

66 A person who enters the land of another must justify that entry by lawful authority including consent or licence of the person with the right to immediate possession, generally described as the occupier[46]. If a licence to enter is not express then it can be implied from the particular factual circumstances.

67 The implication upon which Ms Roy relies on this appeal is an implication in law, not an implication in fact. The two are closely related. An implication in law is based upon background facts and conventions rather than reasons of desired public policy. It is akin to a presumption and it is based upon "an incident of living in society"[47], "the reasonable requirements of society"[48], "the habits of the

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46 See *Halliday v Nevill* (1984) 155 CLR 1 at 10; *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [43].

47 *Halliday v Nevill* (1984) 155 CLR 1 at 19.

48 *Tararo v The Queen* [2012] 1 NZLR 145 at 172 [15].

country"[49], or "background social norms"[50]. A licence will only be implied as a matter of law if there is nothing "in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated"[51]. And this implied licence can be revoked at any time[52], which will require the invitee to leave the land as soon as is reasonably practicable[53].

68 In *Halliday v Nevill*[54] the joint judgment of Gibbs CJ, Mason, Wilson and Deane JJ described the core, or most common, instance of a licence implied by law to enter land as follows:

> "The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house."

69 An implied licence to enter land, and to remain on the curtilage of the property outside the front door, for the purpose of communicating with the occupier of premises is reinforced by the presence of a bell or knocker on the door: "The knocker says, 'Come and knock me'; the bell says, 'Come and ring me'"[55]. Contrary to the submissions of Ms Roy on this appeal, where the implied licence concerns entry for the purpose of communication with the occupier of a premises,

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49 *McKee v Gratz* (1922) 260 US 127 at 136.

50 *Florida v Jardines* (2013) 569 US 1 at 9.

51 *Halliday v Nevill* (1984) 155 CLR 1 at 7.

52 *Halliday v Nevill* (1984) 155 CLR 1 at 7.

53 *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [43]. See also *Davis v Lisle* [1936] 2 KB 434 at 438-439, 441; *Lambert v Roberts* [1981] 2 All ER 15 at 19; *Dobie v Pinker* [1983] WAR 48 at 59.

54 (1984) 155 CLR 1 at 7.

55 *Smith v London and Saint Katharine Docks Co* (1868) LR 3 CP 326 at 331, quoted in *Lipman v Clendinnen* (1932) 46 CLR 550 at 557.

the communication need not be one that is desired by, or for the benefit of, the occupier. For instance, as Dixon J said in *Lipman v Clendinnen*[56], a customer who returns to a shop to complain about the quality of goods purchased or the change received has an implied licence to enter the shop "during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was".

70 The circumstances in which a licence to enter land will be implied in law are not limited to the common instances of lawful communications with, or deliveries to, the occupants of a premises. As the joint judgment in *Halliday* explained, the path or driveway is "held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property"[57]. Other examples of a licence implied in law include entry upon a driveway for the purposes of recovering an item of property or an errant child[58]. In *Halliday* it was also held that a member of the police force, acting in the ordinary course of his duties, had an implied licence to enter an open driveway for the purpose of questioning or arresting a person who was not the occupier of the property but whom the officer had observed committing an offence on a public street in the immediate vicinity of that driveway[59].

When trespass occurs despite an implied licence

71 If an implied licence to enter is limited to a particular purpose and if the sole purpose of entry is entirely outside that particular purpose, then the entrant will be a trespasser. Thus, in *Barker v The Queen*[60], although Mr Barker had an express licence to enter the property to look after it while the owner was away, it was open to the jury to conclude that he entered as a trespasser if his sole purpose was to commit theft so that his entry "was quite unrelated to the invitation or

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56 (1932) 46 CLR 550 at 559, quoting from *Indermaur v Dames* (1866) LR 1 CP 274 at 287.

57 *Halliday v Nevill* (1984) 155 CLR 1 at 7-8.

58 *Halliday v Nevill* (1984) 155 CLR 1 at 7.

59 *Halliday v Nevill* (1984) 155 CLR 1 at 8.

60 (1983) 153 CLR 338 at 348.

licence which he had". In *TCN Channel Nine Pty Ltd v Anning*[61], an employee of the appellant who had an implied licence to enter the curtilage of the property to ask the occupier for permission to film was a trespasser because her purpose of entry was not to communicate. It was solely to make a film recording, irrespective of any communication with the occupier.

72 On the other hand, a person who enters for one or more of the purposes within an implied licence will not usually be a trespasser even if they have some other purpose that falls outside the scope of the licence: a person's entry to a premises for an authorised purpose "is not made unlawful because he enters with another and alien purpose in mind"[62]. For this reason, in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*[63], Barwick CJ and Menzies J held that an entry onto land was not a trespass even though it involved both a lawful and licensed purpose of removing display plan goods and an unlawful and unlicensed purpose of removing the plaintiff's own goods. And in *Barker v The Queen*[64], Mason J gave an example of a person who enters a shop for the purpose of stealing, saying that the person is not a trespasser at the moment of entry if the entry is accompanied by another purpose within the ambit of the shopkeeper's implied invitation. This implication in law of a licence in instances of mixed purposes reflects the realities and incidents of social life. The realities and incidents of social life do not require the drawing of imperceptible, jurisprudential distinctions based upon whether a purpose within a licence is or is not accompanied by other subjective motivations or purposes that might lie outside the licence, especially where the other subjective motivations or purposes might be conditional, subservient, or uncertain, or might never be acted upon. If such distinctions were drawn the operation of an implied licence would be practically unworkable. Of course, as will be seen below, once the invitee acts upon any such motivation in a manner inconsistent with the licence the invitee will become a trespasser.

73 The only, rare, exception to this principle concerning mixed purposes is where the occupier, expressly or impliedly, makes clear that the licence is for an exclusive purpose and does not extend to entry for a mixed purpose. In those unusual circumstances, described by Brennan and Deane JJ in *Barker v The Queen*

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61 (2002) 54 NSWLR 333 at 348 [69], 349 [75], [78].

62 *Barker v The Queen* (1983) 153 CLR 338 at 347.

63 (1968) 121 CLR 584 at 598-599, approving the approach of Sugerman J in *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 69 SR (NSW) 311 at 330-331. See also *Barker v The Queen* (1983) 153 CLR 338 at 365.

64 (1983) 153 CLR 338 at 348. See also at 361-362.

as circumstances permitting entry only where it is "exclusively for the particular purpose"[65], a person who enters also with an alien purpose will be a trespasser. For instance, no implied licence will arise for entry for the purpose of communication with the occupier, even when that purpose is accompanied by the purpose of delivering a parcel, if a sign is hung on a front gate saying "Entry is permitted only for the delivery of parcels. Parcels must be left on the doorstep without knocking on the door."

When an implied licensee later becomes a trespasser

74 At any point in time a person is either a trespasser or is not a trespasser in relation to the same land[66]. If a person's licence to be present on land concludes, is exceeded, or is revoked then the person will be a trespasser unless the person has some independent legal authority to be present on the land. Therefore, a person who is not a trespasser upon entry to land can become a trespasser if the purpose of their licence is exhausted, if the licence is revoked, or if the person performs acts that are beyond the scope of their licence[67].

75 The most common instance where a right to enter or remain on land by implied licence will cease, making the entrant a trespasser from that point in time, is where the implied licence is revoked. An example is *Davis v Lisle*[68]. In that case, police officers entered a garage to make an enquiry of the occupier about the presence of a motor lorry that had been responsible for an earlier obstruction. The occupier of the garage told the officers to leave but they did not do so. Even if the officers had an implied licence to enter the garage the licence would have terminated when they were told to leave. As Lord Hewart CJ said[69]:

> "It is one thing to say that the officers were at liberty to enter this garage to make an inquiry, but quite a different thing to say that they were entitled to remain when, not without emphasis, the appellant had said: 'Get outside.

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65 (1983) 153 CLR 338 at 365.

66 *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584 at 598-599, 606.

67 *Barker v The Queen* (1983) 153 CLR 338 at 357. See also at 345.

68 [1936] 2 KB 434.

69 *Davis v Lisle* [1936] 2 KB 434 at 437-438.

> You cannot come here without a search warrant.' From that moment on ... the officers ... were trespassers".

76 An example where a person becomes a trespasser by performing acts beyond the scope of the licence was colourfully given by Scrutton LJ, who said that when "you invite a person into your house to use the staircase, you do not invite him to slide down the banisters"; at the point of sliding down the banisters the invitee becomes a trespasser[70]. Thus, in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*[71], Kitto J held that the defendant's servants became trespassers when they took physical steps for the unauthorised purpose of taking goods that were not subject to display plan agreements.

Implied licences for the police to enter or remain on land

77 Unless there are specific circumstances indicating otherwise, such as a notice saying "Police keep out"[72], the implied licence to enter land applies to all members of the public, including police officers, who "reasonably think that they have ... legitimate business with the occupier"[73]. The police have the same implied licence as other members of the public to approach and knock on a front door, or ring a front doorbell, for the purpose of lawful communication with an occupier. The licence implied in law for all members of the public with a purpose of communicating with an occupier is not negated by the presence of some additional, perhaps contingent, subjective motivation. So too, the implied licence for police to communicate with an occupier is not negated by a subjective, perhaps contingent, motivation for the communication to investigate an occupier for the commission of a criminal offence.

78 The case that establishes that police do not lose the implied licence to communicate where the motive for communication is to investigate the occupier for an offence is *Robson v Hallett*[74]. This decision, or the principle recognised in

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70 *The Carlgarth; The Otarama* [1927] P 93 at 110, quoted with approval on this point in *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65 at 69.

71 (1968) 121 CLR 584 at 606.

72 See *Halliday v Nevill* (1984) 155 CLR 1 at 19.

73 See *Lambert v Roberts* [1981] 2 All ER 15 at 19; *Dobie v Pinker* [1983] WAR 48 at 59.

74 [1967] 2 QB 939.

it, has been acknowledged or applied for more than half a century[75]. In *Robson v Hallett*, three police officers, without a warrant, entered the curtilage of premises occupied by people including Dennis and Thomas Robson. The police were investigating a misdemeanour that had happened that night. When Thomas Robson opened the door, Constable Paxton asked him where he had been that night. In the events which followed, Dennis and Thomas Robson committed various assaults, including upon Constable Paxton. Their convictions for the assault of Constable Paxton were upheld at the Durham Quarter Sessions. They appealed to the Divisional Court on the ground that the police officers had trespassed when they entered the curtilage of the premises. Their appeal was dismissed. Diplock LJ considered that "no one has thought it plausible up till now to question" the existence of an implied licence for any person "who has lawful reason for doing so" to proceed from the gate to the front door of a premises "to inquire whether he may be admitted and to conduct his lawful business"[76].

79 Like other members of the public, and without any other specific powers, police officers will be trespassers if (i) the sole purpose for their entry onto the premises is outside the scope of any implied licence, (ii) they remain on the land after the licence is revoked, or (iii) they act in a manner inconsistent with the licence. An example of the police entering premises with a sole purpose that is outside the implied licence is *Florida v Jardines*[77]. In that case, a majority of the Supreme Court of the United States reiterated that although the implied licence to approach the front door was not negated by the "mere 'purpose of discovering information'", the sole purpose in that case was to search the premises: "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search"[78]. An example of trespass when police act outside the scope of the licence is *Tasmania v Crane*[79]. In that case the police were held to have an implied licence to enter a property in order to make enquiries of the occupier concerning a poppy crop being grown on nearby land, which the landowners had alleged to be grown by somebody without the landowners' consent. When the

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75 *Halliday v Nevill* (1984) 155 CLR 1 at 19; *Barbaro v Spyrou* (1991) 13 MVR 449 at 455; *R v Bradley* (1997) 15 CRNZ 363 at 368; *Arnold v Police* [2004] SASC 74 at [9]; *Tararo v The Queen* [2012] 1 NZLR 145 at 149-150 [18]-[20], 154 [33], 171 [11]-[12]; *R v Daka* [2019] SASCFC 80 at [76].

76 *Robson v Hallett* [1967] 2 QB 939 at 953-954. See also at 951 (Lord Parker CJ).

77 (2013) 569 US 1.

78 *Florida v Jardines* (2013) 569 US 1 at 9 n 4.

79 (2004) 148 A Crim R 346.

police officers began to walk around the building to investigate they exceeded their licence and became trespassers.

80 Apart from the licence which is implied in law by the common law, there are cases "provided for by the common law and by statute" where police officers have "special rights to enter land"[80]. In those special cases, a balance is struck "between public authority and the security of private dwellings"[81]. Examples of those special cases include the common law power for a police officer to enter a home to arrest a person at or immediately after the time of commission of a misdemeanour or who is suspected on reasonable grounds of being the offender of a felony[82], and arguably also in some cases of breach of the peace or apprehended breach of the peace[83].

81 An example of an implied licence possessed by police officers which ordinary members of the public do not possess is the licence recognised in *Halliday* to enter the curtilage of a property to question or arrest a person who is not an occupier of the property and whom the officer had observed committing an offence[84]. However, that circumstance, described as "hedge-hopping", was said by Lord Diplock to involve "very different considerations" from those where the person to be subject to coercive process is the occupier[85]. The recognition of a common law implied licence to enter private land to assert any coercive power against the occupier or the occupier's guests would disturb the proper balance between public authority and the security of private dwellings. It would cut across the common law regime of special cases, described above, which license the entry onto land for the purpose of exercising only particular coercive powers and only

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80 *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [43].

81 *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [45], quoting *Halliday v Nevill* (1984) 155 CLR 1 at 9.

82 *Halliday v Nevill* (1984) 155 CLR 1 at 12; *Plenty v Dillon* (1991) 171 CLR 635 at 647. See also *Nolan v Clifford* (1904) 1 CLR 429 at 444; Hale, *History of the Pleas of the Crown* (1800), vol 2 at 85; Stephen, *History of the Criminal Law of England* (1883), vol 1 at 193.

83 Stephen, *History of the Criminal Law of England* (1883), vol 1 at 193; *Halsbury's Laws of England*, 5th ed (2019), vol 84A at 113. Compare the discussion in *Kuru v New South Wales* (2008) 236 CLR 1 at 17 [50]-[51].

84 *Halliday v Nevill* (1984) 155 CLR 1 at 8.

85 *Morris v Beardmore* [1981] AC 446 at 456.

in particular circumstances. It would also be inconsistent with the foundation of the implied licence in the habits and reasonable expectations of social life if the common law were to extend the licence in *Halliday* to permit a police officer to enter the curtilage of a property for the sole purpose of asserting any coercive power over the occupier or the occupier's guests.

82 On the other hand, statutory provisions can build upon the common law implied licence, extending it by implication in limited circumstances such as where it is "necessary to prevent ... statutory provisions from becoming inoperative or meaningless"[86]. An example is *Pringle v Everingham*[87]. In that case, the Court of Appeal of the Supreme Court of New South Wales held that even after the revocation of the implied licence of police officers to be present in a car park on the private property of a hotel, the police officers were entitled to remain in order to complete a breath test that was in progress. As Hunt A-JA said, the issue was whether the police officers were entitled to remain in the car park to complete a breath test after any implied licence had been revoked[88]. The purpose of the legislation[89] which authorised a police officer to require a driver to undergo a breath test on a "road or road related area" was held to require that the test be able to be completed[90].

83 Any necessary implication from the conferral of a statutory coercive power of authority to remain on private land will depend upon the text and purpose of the legislation. However, the greater the intrusion into a person's rights the more clarity of expression that will be required[91]. Other than statutory powers to arrest a person reasonably suspected of having committed an offence, which have often been held to provide a police officer with power at least to follow the person onto private

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86 *Coco v The Queen* (1994) 179 CLR 427 at 436.

87 (2006) 46 MVR 58. See also *Lambert v Roberts* [1981] 2 All ER 15; *Dobie v Pinker* [1983] WAR 48 at 50, 68-69; *Fisher v Ellerton* [2001] WASCA 315 at [30]-[31].

88 *Pringle v Everingham* (2006) 46 MVR 58 at 76-77 [77].

89 *Road Transport (Safety and Traffic Management) Act 1999* (NSW), s 13(1).

90 *Pringle v Everingham* (2006) 46 MVR 58 at 77 [79].

91 *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at 1200 [159]; 373 ALR 1 at 41-42; see also 93 ALJR 1164 at 1172 [4]; 373 ALR 1 at 4. See also *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 467-468 [102].

property, including the person's own property, in order to effect the arrest[92], a statutory implication will not usually extend further than to permit a police officer to remain on the curtilage of land in order to exercise a coercive power where the police officer was already lawfully present. Hence, it will be very difficult to imply a power to enter the curtilage of a property for the sole purpose of exercising a coercive power, and even more difficult to imply a power to enter a dwelling house on the property to do so[93].

Did the police officers have an implied licence to enter the curtilage of the unit occupied by Ms Roy and Mr Johnson?

84 It is convenient to focus first upon Ms Roy's ground of appeal which alleges specific error by the Court of Appeal in what is described as a finding of an implied licence for the police officers to enter upon the curtilage of Ms Roy's premises for the purposes of investigating whether she was committing a criminal offence. In support of this ground of appeal, Ms Roy submitted that when Constable Elliott entered the curtilage he did not have any purpose of checking the welfare of Mr Johnson. Ms Roy submitted that Constable Elliott's only purpose was to direct her to take a breath test and that such a coercive purpose was not within the scope of the implied licence.

85 If the factual foundation for Ms Roy's submissions on this ground were correct then her submission should be accepted. As explained above, outside special circumstances recognised by the common law, a police officer has no implied licence to enter land for the sole purpose of subjecting an occupier to a coercive process. But the factual assertion underlying Ms Roy's submission is contrary to the reasoning of the Court of Appeal, which reasoning is directly supported by the unchallenged evidence of Constable Elliott.

86 As Judge Woodcock found, and as the Court of Appeal held, the purpose for which the police officers had attended the unit of Ms Roy and Mr Johnson was to conduct a "check" in relation to compliance with the DVO. On this appeal, Ms Roy properly accepted that this purpose was not in dispute. But, she submitted,

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92 *Dinan v Brereton* [1960] SASR 101 at 104; *Eccles v Bourque* [1975] 2 SCR 739 at 744; *Kennedy v Pagura* [1977] 2 NSWLR 810 at 812; *McDowell v Newchurch* (1981) 9 NTR 15 at 18; *Halliday v Nevill* (1984) 155 CLR 1 at 16; *Lippl v Haines* (1989) 18 NSWLR 620 at 622, 632-633; *R v Feeney* [1997] 2 SCR 13 at 49-50 [47]; *Wheare v Police (SA)* (2008) 180 A Crim R 396 at 405-408 [28]-[37]; *Police (SA) v Williams* (2014) 246 A Crim R 317 at 341-343 [287]-[291]; *Bennett v Police (SA)* (2016) 261 A Crim R 80 at 89 and following.

93 *Dobie v Pinker* [1983] WAR 48 at 60-61. See also *Clowser v Chaplin* [1981] 1 WLR 837 at 841-842; [1981] 2 All ER 267 at 270.

contrary to the "dual purpose" finding of the Court of Appeal, but consistently with the finding of Mildren A-J, the police's purpose involved no concern for the welfare of Mr Johnson.

87 The second purpose in the dual purpose finding by the Court of Appeal, namely the police's concern to check upon the welfare of Mr Johnson, followed almost inevitably from the first, namely the purpose of conducting a "check". The very nature of Operation Haven, and the compliance checks that it involved, was to address the effects upon victims of domestic violence that Judge Woodcock described as a "plague" and much of which, as the police were aware, occurred behind closed doors. Further, Constable Elliott's evidence was that the welfare of Mr Johnson was "actually one of the main reasons I went [to the unit] ... I had a pretty serious concern ... that there's been quite a bit of manipulation going on in that relationship". He later added that a further reason "as to why I actually went to this house on the day ... is [that] Ms Roy had actually stabbed her partner, Mr Johnson, who is a vulnerable person". And in cross-examination he said that he went to the unit because he believed "that there may have been domestic violence occurring at that premises that we weren't aware of". That evidence was uncontradicted and unchallenged at trial.

88 The finding of the Court of Appeal that the police officers had a purpose of enquiring about the welfare of Mr Johnson is sufficient foundation for the conclusion that the police had an implied licence to enter the curtilage of the premises, including walking down the common pathway and standing in the alcove at the main front door of the unit occupied by Ms Roy and Mr Johnson. That implied licence would not have been negated by any other subjective motivation for the enquiry such as to investigate Ms Roy, whether or not that motivation was certain or uncertain, and whether or not it was contingent upon other events such as Ms Roy being present at the unit.

89 For these reasons, any subjective intentions or motivations of the police related to their desire to communicate with the occupiers, such as to investigate an offence involving breach of the DVO or to direct Ms Roy to take a breath test, did not negate their implied licence to enter the curtilage. Nevertheless, in light of the focus upon the intention of the police in Ms Roy's submissions, it is necessary to explain what must have been meant by a statement of the Court of Appeal concerning the intention of Constable Elliott. In a separate part of the Court of Appeal's reasons from that which considered the purpose of the police, the Court of Appeal said that Constable Elliott "was intending to obtain a sample of [Ms Roy's] breath for analysis"[94]. That statement was made in the context of describing Constable Elliott's belief that Ms Roy was "a continuous alcohol-related offender". The statement was not based upon any direct evidence from

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94 *O'Neill v Roy* (2019) 345 FLR 29 at 30-31 [3].

Constable Elliott that he intended to obtain a sample of Ms Roy's breath. It must have been derived from his evidence that "I believe[d] ... she was going to be intoxicated because every time I've dealt with her ... she has always been intoxicated". The finding of intention must mean, and can only be justified as meaning, that Constable Elliott intended to obtain a sample of Ms Roy's breath if circumstances so required, as he expected that they would. Plainly, if Ms Roy had not been present at the unit then Constable Elliott could not have obtained a sample of her breath; his only action could have been to communicate with Mr Johnson. And there is also no basis to infer from the evidence that if, contrary to Constable Elliott's expectation, Ms Roy were present and plainly sober then Constable Elliott would still have sought a sample of her breath. Constable Elliott had an intention to obtain a breath sample but it was a contingent, speculative intention.

90 These circumstances illustrate the unworkability of an approach which denies an implied licence to any officer who might have a contingent intention to exercise coercive power. A police officer could never be confident of having a licence to knock on the door of a person suspected of domestic violence merely to enquire about compliance with a DVO or the welfare of a co-habitant, since any police officer in those circumstances would intend to exercise coercive power if it were required for protection of an occupier. One possibility would be for the courts to develop, and police officers to act upon, extremely fine philosophical distinctions between background conditional intentions and conditional, speculative intentions. That would be hopeless in practice. The other possibility is that proactive policing would be dead. The police could no longer knock on the door of the very occupiers who might be in the most desperate need, to ask "Are you ok?".

Did the police officers become trespassers when they asked Ms Roy for a sample of her breath?

91 Ms Roy submitted, and the respondent did not dispute, that the request for a breath sample by Constable Elliott was a direction under reg 6(1)(a) of the *Domestic and Family Violence Regulations* (NT), which provides that a defendant "must comply with ... a reasonable direction by an authorised person to submit to a breath test to assess whether the defendant may have alcohol in his or her breath". For the purposes of that direction, it is "not necessary that the authorised person suspects that the defendant has consumed alcohol"[95]. Ms Roy submitted that the implied licence to be on her property did not extend to making a coercive direction.

92 As explained above, the making of a coercive direction is beyond the scope of the licence generally implied by law to enter the curtilage of a property. Unless

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95 *Domestic and Family Violence Regulations* (NT), reg 6(2).

that direction were supported by a separate source of authority to be present upon the land, the making of the direction would involve a trespass. One possible source of authority in this case might be a necessary implication from reg 6(1)(a), permitting an authorised person to remain on land which they entered with an implied licence. Such a necessary implication would not merely arise from an asserted need to avoid stultification of the purpose of the legislation. It might arguably also be supported by the need for coherence with regs 7(1)(b) and 7(3), which permit a police officer to detain, and if necessary arrest, a defendant for the purposes of conducting a breath analysis if the officer suspects on reasonable grounds that the defendant may have consumed alcohol. If a police officer, lawfully present upon the property of Ms Roy with an implied licence, has the power to remain on the land to arrest her in order to conduct a breath analysis then it would border on the bizarre to conclude that the officer does not have the power to remain on the land to direct her to submit to a breath test in the event that she should decline to do so voluntarily.

93 There is, of course, no suggestion that Ms Roy did not comply voluntarily with the request for a breath test. No question of coercion would arise unless and until Ms Roy refused to consent to provide a breath test, and Constable Elliott decided to invoke the power conferred by reg 6(1)(a). Ultimately, it is unnecessary to consider the extent of any necessary implication of authority to remain on the land that might arise from reg 6(1)(a). In her submissions Ms Roy accepted that once the powers under s 126(2A)(b) of the *Police Administration Act* were enlivened, those powers would provide an independent source of authority for the police to remain on the land. Section 126(2A)(b) provides that a member of the police force may "by reasonable force if necessary, enter a place if he believes, on reasonable grounds, that ... a contravention of an order under the *Domestic and Family Violence Act* has occurred, is occurring or is about to occur at the place". Constable Elliott's observations of Ms Roy's lethargy, her bloodshot eyes, the slurring of her speech, and the strong smell of alcohol plainly provided reasonable grounds for his belief that she was intoxicated in the presence of Mr Johnson in contravention of her DVO.

Conclusion

94 The appeal should be dismissed.