HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

LAURA CULLEN APPELLANT

AND

STATE OF NEW SOUTH WALES RESPONDENT

Cullen v New South Wales
[2026] HCA 19
Dates of Hearing: 8 October & 2 December 2025
Date of Judgment: 17 June 2026
S47/2025

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

D R J Toomey SC with H S Y Chiu SC and B C A Jones for the appellant (instructed by MTM Legal)

G O'L Reynolds SC and H N Newton for the respondent (instructed by Crown Solicitor for NSW)

CATCHWORDS

Cullen v New South Wales

Tort – Negligence – Duty of care – Scope of duty – Vicarious liability – Public authorities – Police – Crowd control – Protest march – Where police intervened in protest march to prevent risk to public safety – Where appellant injured when knocked to ground during arrest of third party – Whether police owed duty to exercise reasonable care in undertaking crowd control to avoid physical injury to members of crowd and bystanders foreseeably at risk of injury from operational response – Whether duty extends to injury suffered by appellant – Whether breach of duty – Whether police actions unreasonable having regard to apprehended threat to public safety – Whether alternative courses of action reasonable.

Words and phrases –"agony of the moment", "assumed duty", "assumption of responsibility", "breach of duty", "bystander", "careless act", "causation", "criminal acts of others", "crowd control", "duty of care", "flag burning", "foreseeably at risk", "general police liability", "imposed duty", "infringement of rights", "innocent passers-by or bystanders", "level of generality", "melee", "negligence", "physical injury", "police intervention", "police operations", "police services", "positive negligent conduct", "precautions", "profession of particular skill", "protest march", "public safety", "reasonable care", "reasonable foreseeability of risk", "reasonable person", "reasonably foreseeable", "reasonably necessary", "risk of harm", "scope of duty", "scope of liability", "social utility", "standard of care", "statutory function", "threat to public safety", "tool of analysis", "undertaking of responsibility", "vicarious liability".

Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D.
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 4, 198, 199, 200, 230, 231.
Police Act 1990 (NSW), ss 6, 13, 14.

GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ.

Introduction

1 The appellant suffered serious injuries when she was knocked to the ground while watching an Invasion Day protest march in Sydney on 26 January 2017, a national public holiday declared as "Australia Day".[1]

2 The appellant was knocked to the ground when a police officer, Leading Senior Constable Livermore, was effecting an arrest on Mx Williams, a participant in the march. In the Supreme Court of New South Wales, the primary judge (Elkaim A-J) found that: (1) the actions of members of the Operational Services Group ("OSG") of the New South Wales Police Force, who entered the crowd of protesters in an attempted performance of their function of crowd control, caused a melee that led to the appellant's physical injury; and (2) the respondent ("the State") was vicariously liable for the negligence of the OSG officers. The primary judge gave judgment in the appellant's favour in the agreed amount of $800,000.[2] A majority of the Court of Appeal of the Supreme Court of New South Wales (Gleeson and Kirk JJA, White JA dissenting) allowed an appeal by the State and set aside the primary judge's orders.[3]

3 By grant of special leave, the appeal to this Court raised three issues: (1) whether the OSG officers owed a duty of care that extended to the risk of the physical injury suffered by the appellant; (2) if so, whether that duty was breached; and (3) if so, whether it is appropriate for the scope of the OSG officers' liability to extend to the appellant's injuries caused by that breach. For the following reasons, the OSG officers owed a duty of care, when intervening in the protest march, to avoid the risk of physical injury to a class of persons that included the

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1 See *Holidays Act 1910* (SA), s 3(1) and Sch 2 Pt 2; *Holidays Act 1958* (ACT), s 3(1)(a)(ii); *Public and Bank Holidays Act 1972* (WA), s 5 and Second Schedule; *Public Holidays Act 1981* (NT), s 5 and Sch 2; *Holidays Act 1983* (Qld), s 2(1) and Schedule; *Public Holidays Act 1993* (Vic), s 6(c); *Statutory Holidays Act 2000* (Tas), s 4(b); *Public Holidays Act 2010* (NSW), s 4(b).

2 *Cullen v New South Wales* [2023] NSWSC 653. See *Law Reform (Vicarious Liability) Act 1983* (NSW), Pt 4.

3 *New South Wales v Cullen* (2024) 116 NSWLR 377.

appellant, namely members of the crowd and bystanders who were foreseeably at risk of physical injury resulting from such police operations. However, that duty was not breached because the actions of the OSG officers were not unreasonable in the context of the apprehended threat to public safety to which the OSG officers were responding. It follows that the third issue concerning the scope of the OSG officers' liability does not arise for determination. The appeal must be dismissed.

Facts

Preparation for the protest march

4 Although no finding was made below, the march appears to have been an authorised public assembly within s 23 of the *Summary Offences Act 1988* (NSW). On 18 January 2017, Mr Bassi, the secretary of the Indigenous Social Justice Association, received written notification from the Commander of the Redfern Local Area Command of the New South Wales Police Force that there was no opposition to the Association's proposed public assembly and march on 26 January 2017. The notification foreshadowed several conditions on the march, including that "there will be no flag or effigy burning". As White JA observed, the foreshadowed condition could not readily be enforced because the organisers of the march could not control the behaviour of march participants. Further, there was no law prohibiting a march participant from breaching the agreed conditions for the march by burning a flag.

5 The notification of non-opposition was drafted by Acting Inspector Baker, who was responsible for planning and coordinating the police preparations for the march. His overriding objective in drafting the notification was community safety.

6 The police operations for the march were planned and carried out in the exercise of the New South Wales Police Force's statutory function under the *Police Act 1990* (NSW) "to provide police services for New South Wales",[4] which includes "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way".[5] The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that "[i]t is

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4 *Police Act*, s 6(2)(a).

5 *Police Act*, s 6(3)(b).

lawful for a police officer ... to use such force as is reasonably necessary to exercise the function".[6]

7 Inspector Baker also prepared written "Operational Orders" to direct police operations for the march, in which he designated himself as the "Forward Commander". The document included detailed instructions for the responsibilities of the numerous police officers who were engaged to supervise the march. This included a team of seven OSG officers, who were trained in riot and public order management.

8 An annexure to the Operational Orders, entitled "Actions On", listed "potential issues that may impact on this event" and set out details of responses, while noting that "every incident may have unique factors which affect or influence our planned operational response". Under the heading "[d]etection of an offence during a static gathering or mobile procession", the annexure noted that "[a] hastened reaction to an incident could inflame a situation and result in injury to police" and instructed officers to "[a]lways consider whether an investigation or appropriate follow-up can be progressed via other means and at a later time". Under the heading "[f]ire – burning flags, effigies or other articles, flares etc", the annexure required "immediate and appropriate action to prevent or respond to a serious incident where a ... serious risk to public safety or property [was] imminent". The annexure correctly noted that the act of burning a flag, effigy or other article by a person who owns the property was not an offence; "however their actions can endanger public safety".

Events during the march leading up to the appellant's injuries

9 The march was attended by approximately 5,000 people. The march progressed up Broadway, in the inner city of Sydney, towards Victoria Park when it made an unplanned stop at the corner of Buckland Street in Chippendale. Using a microphone amplified through portable loudspeakers, Mr Dunn-Velasco addressed the crowd. Constable Lowe, who had been allocated the role of filming the march, videoed Mr Dunn-Velasco's speech using a Sony Handycam which she held above her head.

10 At around 1:10pm, after Mr Dunn-Velasco had commenced to speak, Inspector Baker was told that Mr Dunn-Velasco may light a flag. Inspector Baker was told by Sergeant Hogan, an OSG officer, that Mr Dunn-Velasco had been seen

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6 *Law Enforcement (Powers and Responsibilities) Act*, s 230.

with what appeared to be lighter fluid in his right pants pocket. Inspector Baker told Sergeant Hogan that if Mr Dunn-Velasco "tries to burn the flag and there's a risk to public safety, you should extinguish the fire". Inspector Baker was concerned because he was uncertain what liquid Mr Dunn-Velasco was carrying and how it would react if ignited, particularly in the densely packed crowd. He was also concerned about how the crowd would react if a fire was started in close proximity to them.

11 At around 1:12pm, and again at 1:14pm, Inspector Baker spoke to Mr Bassi, asking him to speak to Mr Dunn-Velasco to ensure there was a peaceful protest and, by plain implication, to ask him not to burn a flag or effigy. On the first occasion, Mr Bassi said that he would, but that he did not think that Mr Dunn-Velasco would listen to him.

12 At around 1:16pm, Mr Dunn-Velasco ended his speech with the words "I am going to do something about it". He then bent down twice, on the second occasion squirting liquid onto an Australian flag that was about the size of a pillowslip. At this point, and apparently before any fire had been lit, the OSG officers "rush[ed] unannounced into", "rapidly entered" or "charged through" the crowd towards Mr Dunn-Velasco.[7] At least one of the OSG officers' fire extinguishers was discharged, emitting a chalky, smoky cloud, and the air became thick with gas and a chemical smell. Mr Dunn-Velasco seems to have tried to keep the flag away from the OSG officers. Within a few seconds there was significant pushing going on by officers against Mr Dunn-Velasco and people around him, and vice versa. Many members of the crowd in the area became angry.

The circumstances in which the appellant sustained her injuries

13 At this time, Constable Lowe was continuing to video the events. She was about 15 metres from where Mr Dunn-Velasco had knelt down. Mx Williams struck Constable Lowe's left arm and knocked the camera to the ground. Senior Constable Livermore witnessed the assault upon Constable Lowe and attempted to arrest Mx Williams. In the struggle that ensued, Senior Constable Livermore and Mx Williams collided with the appellant on a median strip. The appellant hit her head on the road and suffered serious physical injury. Mx Williams was

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7 *Cullen v New South Wales* [2023] NSWSC 653 at [134]; *New South Wales v Cullen* (2024) 116 NSWLR 377 at 383 [16], 403 [124], 408 [155].

subsequently charged with and found guilty of assaulting Constable Lowe in the execution of her duty as a police officer.

Proceedings below

Primary judge

14 The primary judge held that Senior Constable Livermore's arrest of Mx Williams was lawful. That holding has not since been challenged. The primary judge further held that Senior Constable Livermore was not liable, and that the State therefore was not vicariously liable, in battery for the injuries sustained by the appellant.[8] However, his Honour found that Senior Constable Livermore (and therefore the State) was liable in negligence for the manner in which he arrested Mx Williams.[9] The appellant challenged the former holding unsuccessfully in the Court of Appeal,[10] while the State successfully challenged the latter holding.[11] The appellant does not seek to challenge the Court of Appeal's conclusions on either issue in this Court.

15 His Honour found that the risk of injury "to the crowd" was reasonably foreseeable, as well as that "chaos and panic ... was likely to arise by the sudden arrival of the [OSG] officers, together with the discharging of the fire extinguishers".[12] In this Court, the State accepted that any police intervention into such a march is "apt to trigger a measure of emotional crowd reaction".

16 The primary judge found that Inspector Baker's instruction justified the OSG officers being put on alert and being ready to extinguish a fire, but that the conditions for immediate action stated in the "Actions On" document (ie a serious risk to public safety or property that was imminent) were not present.[13] His Honour

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8 *Cullen v New South Wales* [2023] NSWSC 653 at [162].

9 *Cullen v New South Wales* [2023] NSWSC 653 at [171]-[176].

10 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 402 [116], 405 [134], 420 [237].

11 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 397 [92], 420 [236].

12 *Cullen v New South Wales* [2023] NSWSC 653 at [132].

13 *Cullen v New South Wales* [2023] NSWSC 653 at [71], [77].

considered that the acts of the OSG officers in discharging the fire extinguisher(s) before they reached Mr Dunn-Velasco were useless if they were intended to extinguish an apprehended fire, and were also dangerous.[14] The primary judge also found that there was no need for the OSG officers to take the actions they decided upon, saying that "[i]t is a crucially salient feature of this matter that there was no reason for the OSG officers to intervene with fire extinguishers 'blazing'".[15]

17 The primary judge held that the OSG officers owed a duty of care to avoid a reasonably foreseeable risk of injury to the appellant as a person "present at the rally".[16] The primary judge found that the OSG officers breached that duty in "rushing unannounced into the crowd with fire extinguishers operating".[17] In his Honour's words, "the actions of the OSG team were reckless and out of proportion to the danger possibly threatened and certainly in comparison to the risk of injuring members of the crowd either by direct contact with the rushing officers or through the panic and confusion that was likely to emerge".[18] The primary judge went on to find that the actions of the OSG officers set up a "domino effect, culminating in the injury to the [appellant]".[19] The primary judge concluded that the appellant was "a bystander, who fell victim to the actions of the police in their pursuit of entirely unrelated persons and events".[20]

18 The primary judge appears to have assumed that, in rushing into the crowd and in discharging their fire extinguisher(s), the OSG officers were exercising a statutory power and, consequently, a special statutory power within the meaning of s 43A of the *Civil Liability Act 2002* (NSW).[21] The primary judge's finding that

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14 *Cullen v New South Wales* [2023] NSWSC 653 at [77].

15 *Cullen v New South Wales* [2023] NSWSC 653 at [128].

16 *Cullen v New South Wales* [2023] NSWSC 653 at [133].

17 *Cullen v New South Wales* [2023] NSWSC 653 at [134].

18 *Cullen v New South Wales* [2023] NSWSC 653 at [141].

19 *Cullen v New South Wales* [2023] NSWSC 653 at [144].

20 *Cullen v New South Wales* [2023] NSWSC 653 at [114].

21 *Cullen v New South Wales* [2023] NSWSC 653 at [135]-[138].

the OSG officers acted "recklessly or unreasonably in the terms of s 43A(3)"[22] reflects the heightened requirement of that section for the establishment of civil liability.

Court of Appeal

19 Gleeson and Kirk JJA found that Mx Williams was not part of the crowd into which the OSG officers rushed and was not participating in the melee said to have been provoked by the alleged breach of duty. Their Honours also found that Mx Williams "was not caught up in, nor participated in, the pushing and shoving that occurred in connection with the OSG officers going in towards Dunn-Velasco to prevent the flag being lit. Williams, Lowe, Livermore and the [appellant] were all outside of that group."[23]

20 The Court of Appeal was unanimous in holding that the OSG officers were not exercising a special statutory power when taking the impugned action and therefore in holding that s 43A of the *Civil Liability Act* was not engaged.[24] Those holdings have not been challenged in this Court.

21 The Court of Appeal unanimously agreed with the primary judge that the OSG officers owed a duty of care but differed as to the formulation of that duty. White JA held that the OSG officers had a "duty to take reasonable care for the safety of the bystanders who might be affected by a breach of the peace".[25] Gleeson and Kirk JJA adopted a narrower formulation. Identifying the risk of harm posed by the actions of the OSG officers as "the risk of the OSG officers' actions inflicting physical injury on persons in the immediate vicinity of an operational response during the protest march",[26] their Honours correspondingly confined the class of persons to whom the duty to take reasonable care was owed to "persons in the immediate vicinity of an operational response by OSG officers during the

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22 *Cullen v New South Wales* [2023] NSWSC 653 at [138].

23 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 399-400 [102].

24 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 389 [46], 391 [54], 405 [133], 417 [221]-[222].

25 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 415 [199].

26 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 395 [79].

protest march".[27] Their Honours made no finding as to whether the appellant fell within the class of persons to whom the duty of care formulated by them was owed.

22 Gleeson and Kirk JJA disagreed with the finding of the primary judge that the OSG officers had failed to exercise reasonable care, irrespective of how the duty was formulated.[28] Their Honours found the OSG officers instead to have acted reasonably in "taking decisive action and pre-emptively to prevent the lighting of the flag, given the unknown risk of harm had a fire been lit".[29] Their Honours went on to hold in any event that "the chain of causation was broken for legal purposes by Williams' criminal action",[30] which they found was "not the kind of thing which reasonably can be characterised as occurring in the ordinary course of things after the putative breach".[31] White JA differed from the majority in respect of both breach and causation.[32]

Duty of care

23 Subject to statutory displacement or modification, "[a] duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class".[33] "[A] postulated duty of care must be stated in reference to the kind of

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27 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 394 [72].

28 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 395-397 [80]-[88].

29 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 397 [87].

30 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 398 [94].

31 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 401 [109].

32 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 405 [132], 418 [226], 421 [247].

33 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at 240 [169].

damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member."[34]

24 Here, the appellant's postulated duty of care was a duty on the part of the OSG officers to exercise reasonable care in undertaking crowd control to avoid physical injury to members of the crowd and bystanders who were foreseeably at risk of physical injury resulting from such police operations. That formulation of the duty should be accepted. The formulation adopted by the majority of the Court of Appeal, confining the class of persons to whom the duty was owed to those in the immediate vicinity of the OSG officers' actions, was impermissibly narrow.

25 In a paradigm case of physical injury suffered by a plaintiff as a result of the defendant taking some positive action, the class of persons to whom the defendant owes a duty of care comprises those persons exposed to a reasonably foreseeable risk of physical harm from the defendant's action. The existence of a duty of care in such a case does not depend upon the foreseeability of the precise manner in which the plaintiff's injuries were sustained: "it is sufficient if it appears that injury to a class of persons of which [the plaintiff] was one might reasonably have been foreseen as a consequence".[35] Thus, the duty of care in this case is properly established at a high level of generality,[36] leaving consideration of the relationship between the defendant's conduct and the plaintiff's injuries to breach of duty, causation and scope of liability.[37]

26 In accordance with these well-established principles, a police officer owes a duty of care when engaging in conduct that involves reasonably foreseeable

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34 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487. See also *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 345 [43]-[44].

35 *Chapman v Hearse* (1961) 106 CLR 112 at 121. See also *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99.

36 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 585 [106]; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 371 [22]; *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at 250 [361]; 427 ALR 67 at 165.

37 *Civil Liability Act*, ss 5B, 5C and 5D.

physical injury to another.[38] Examples include the duty owed by police to other road users when driving in the performance of police duties;[39] to suspects who have been shot in the course of pursuit or arrest;[40] and with respect to persons in detention.[41]

27 In *Robinson v Chief Constable of West Yorkshire Police*, the Supreme Court of the United Kingdom recognised such a duty of care owed by members of the police to avoid causing foreseeable physical injury to innocent passers-by or bystanders to a police arrest.[42] Adopting the language of Lord Mance to describe a "now established area of general police liability", the State accepted in argument in this appeal that the duty of care owed by members of the police extends to liability for "positive negligent conduct which foreseeably and directly inflicts physical injury on the public".[43] The State accordingly accepted that the OSG officers owed a duty of care in the performance of the function of keeping and preserving the peace in the crowd at the march.

28 The State argued in the appeal that the scope of the duty of care owed by the OSG officers did not extend to taking reasonable care not to provoke negative crowd reactions which might trigger criminal violence that occasions physical injury to a bystander. The State argued that the OSG officers ought not in principle

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38 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 59; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at 754 [55], 758 [67], 760 [70]. See also, eg, *New South Wales v Tyszyk* [2008] NSWCA 107 at [150], [153]; *Victoria v Richards* (2010) 27 VR 343 at 345-346 [10], 351-352 [31]; *Australian Capital Territory v Crowley* (2012) 7 ACTLR 142 at 189 [273]; *Jennings v Police* (2019) 133 SASR 520 at 537-538 [58]-[61].

39 *Gaynor v Allen* [1959] 2 QB 403; *Blight v Warman* [1964] SASR 163; *Marshall v Osmond* [1983] QB 1034; *Schilling v Lenton* (1988) 47 SASR 88; *Schultz v Feltus* (1988) 7 MVR 399.

40 *Beim v Goyer* [1965] SCR 638; *Zalewski v Turcarolo* [1995] 2 VR 562.

41 *Howard v Jarvis* (1958) 98 CLR 177; *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283; *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

42 *Robinson* [2018] AC 736 at 761 [74], 769 [97], 777 [120].

43 cf *Robinson* [2018] AC 736 at 769 [97].

be held liable for the consequences of the criminal acts of others, nor for the provocation of emotional reactions. Moreover, the State argued that to impose a common law duty of that scope would be inconsistent or incongruent with the proper and effective discharge by the police of their statutory responsibility to provide police services in such a situation under the *Police Act*. In particular, the State argued, it would be likely to engender a "safety first" approach to police intervention in a protest crowd, which would constrain the legitimate scope of intervention given that any intervention is apt to trigger an adverse reaction from protesters, who are likely to be emotionally committed to the cause in support of which they are protesting.

29 Contrary to the State's contentions, the duty of care owed by the OSG officers is not usefully expressed as a duty to avoid the risk of an emotional crowd reaction, or a duty not to provoke negative reactions in a crowd. These attempted reformulations incorrectly imply that the appellant's case depends upon establishing an affirmative duty to prevent injury resulting from the crowd's reaction to a police operation. As in *Robinson*, the appellant's complaint is not that the OSG officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured.[44]

30 It was not in dispute that there was a reasonably foreseeable risk of harm to bystanders such as the appellant resulting from police action taken to address a threat to public safety during the protest. There was no factual basis for confining the reasonably foreseeable risk to injury directly inflicted by the OSG officers or injury occurring within a defined area adjacent to any police intervention. To the contrary, the Operational Orders identified the police mission in broad terms, as to facilitate the march "with minimum disruption to traffic and members of the public whilst ensuring the safety of police, community participants and spectators and preventing damage to property". The relevant risk of harm was the reasonably foreseeable risk of physical injury to bystanders resulting from a police intervention into the march to address a threat to public safety. As a bystander, the appellant was owed a duty of care by the OSG officers in intervening in the march to avoid reasonably foreseeable risks of physical injury.

31 The State's argument that the duty of care owed by the OSG officers should not extend so as to render them liable for the criminal acts of others seeks to draw too much from the decision of this Court in *Modbury Triangle Shopping Centre*

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44 cf *Stovin v Wise* [1996] AC 923 at 945; *Robinson* [2018] AC 736 at 759 [69(4)], 761 [73].

Pty Ltd v Anzil.[45] Although the distinction may at times be difficult to draw, there is an important difference in tort law between "careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts [by a third party] ... for which the common law generally imposes no liability".[46] *Modbury* is an illustration of the latter.[47] The present case is an instance of the former. In a case such as the present, an intervening action of a third party will not negate liability in negligence "if the intervening action was in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence".[48]

32 The decisions of this Court in *Sullivan v Moody*[49] and *Tame v New South Wales*,[50] on which the State relies for its argument of inconsistency or incongruity with the statutory functions of police, were not directed to the paradigm case, such as the present, of reasonably foreseeable physical injury resulting from a careless act of a defendant. Unlike in *Sullivan* and *Tame*, the imposition of a duty of care in the present case is not inconsistent with the performance by police of functions intended to preserve and protect public safety. To the contrary, public safety includes the safety of any individual member of the public. To the extent that the OSG officers were exercising statutory functions, there is no tension between, on the one hand, the statutory function under the *Police Act* of protecting "persons

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45 (2000) 205 CLR 254.

46 *Robinson* [2018] AC 736 at 759 [69(4)]. See also *Smith v Leurs* (1945) 70 CLR 256 at 262; *AA* (2026) 100 ALJR 170 at 248 [352]-[354]; 427 ALR 67 at 162-163; Nolan, "The Duty of Care After *Robinson v Chief Constable of West Yorkshire Police*" (2017-2018) 9 *The UK Supreme Court Yearbook* 174 at 194.

47 *Modbury* (2000) 205 CLR 254 at 266-267 [29]. See also *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 436 [24]; *Wallace v Kam* (2013) 250 CLR 375 at 386 [25]; *Kozarov v Victoria* (2022) 273 CLR 115 at 149 [104]-[105].

48 *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 518. See also *Stansbie v Troman* [1948] 2 KB 48 at 51-52; *Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070 at 1074, 1084; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1030; *Pitt Son & Badgery Ltd v Proulefco* (1984) 153 CLR 644 at 648.

49 (2001) 207 CLR 562.

50 (2002) 211 CLR 317.

from injury or death ... whether arising from criminal acts or in any other way",[51] in the performance of which they were empowered under the *Law Enforcement (Powers and Responsibilities) Act* to use "such force as is reasonably necessary",[52] and, on the other hand, a common law duty to exercise reasonable care to prevent reasonably foreseeable physical harm to others when taking action in the performance of that function. The statutory responsibilities and the common law duty were and are mutually reinforcing.

Breach of duty

33 Section 5B of the *Civil Liability Act* is "directed to questions of breach of duty".[53] The section provides:

> "(1) A person is not negligent in failing to take precautions against a risk of harm unless—
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> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
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> (b) the risk was not insignificant, and
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> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken,
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> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,

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51 *Police Act*, s 6(3)(b).

52 *Law Enforcement (Powers and Responsibilities) Act*, s 230.

53 *Adeels Palace* (2009) 239 CLR 420 at 433 [13].

(d) the social utility of the activity that creates the risk of harm."

34 Argument in this Court proceeded on the assumption that s 5B applied to the assessment of breach of duty in this case.[54] The alleged negligence having occurred through positive acts of the OSG officers, the appellant argued that the "precautions" to be considered under s 5B involved the OSG officers: (1) taking less forceful action; or (2) taking no action at all. In either case, assessment of the alleged breach of duty depends on the correct identification of the relevant risk of injury, because that identification is necessary to assess what would be a reasonable response to that risk.[55]

35 The ultimate question to which the non-exhaustive considerations in s 5B are directed is whether the allegedly careless conduct conformed with the conduct of a reasonable person. In answering that question, the guiding principles remain those stated by Mason J in *Wyong Shire Council v Shirt*,[56] according to which the standard of response to be ascribed to a reasonable person requires consideration of "the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have". Ipp JA, who chaired the panel that published the *Review of the Law of Negligence* in September 2002, leading to the passage of the *Civil Liability Act*, explained that the matters set out in s 5B(2) in substance are a "reiteration" of Mason J's statement.[57] Section 5B(2) does not expressly address the need to consider the defendant's "conflicting responsibilities" but there is no doubt that they have to be considered. In this case, that involves considering such responsibility as the OSG officers had to prevent a fire breaking out or spreading in a crowd.

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54 cf *Drinkwater v Howarth* [2006] NSWCA 222 at [24]; *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 at 397 [173]; *Council of the City of Greater Taree v Wells* (2010) 174 LGERA 208 at 222 [54]-[55]; *Reed v Warburton* [2011] NSWCA 98 at [21].

55 *Dederer* (2007) 234 CLR 330 at 338 [18]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 454 at 489 [106].

56 (1980) 146 CLR 40 at 47-48.

57 *Waverley Council v Ferreira* (2005) Aust Torts Reports ¶81-818 at 68,079 [45].

36 The appellant contended that the relevant risk of harm extended "to the risk to everyone in the crowd suffering harm from the resultant confusion and chaos that might arise from the OSG officers' activity, however that harm is realised". That is, the risk of harm extended to the indirect consequences of the melee that resulted from the actions of the OSG officers and included consequences resulting from criminal conduct that was part of, or a reaction to, the melee.

37 The appellant's case on breach was put in two ways. First, the appellant identified the OSG officers' "disproportionate" response to the threatened setting alight of the flag when considered against any risk that act would have posed. It was submitted that "the method by which the OSG officers chose to intervene was unnecessary and unreasonable", particularly having regard to its foreseeable and foreseen impact on the crowd. The appellant relied upon the alternative, less forceful, ways that the primary judge found that the OSG officers could have intervened as "precautions" that would have been taken by a reasonable person in the position of the OSG officers.

38 Second, the appellant sought to rely on "the nub" of the primary judge's conclusion, being that the OSG officers' intervention in the circumstances was entirely unnecessary. On that basis, the appellant argued that the intervention itself amounted to a breach of duty, and that it was unnecessary to have regard to findings about the proportionality or otherwise of the intervention as a response to an apprehended risk to public safety.

39 Although the relevant risk of harm can be expressed in more than one way, the appellant's formulation in this Court was appropriate. That is, s 5B(1)(a) was satisfied because there was a foreseeable risk of physical harm to participants in the march and to bystanders, such as the appellant, from the confusion and panic that might be caused by the OSG officers' actions in intervening in the march, whether that harm was inflicted by the officers directly or otherwise resulted from their actions. Contrary to the conclusion of Gleeson and Kirk JJA, the primary judge's expression of the relevant risk of harm did not involve error. The primary judge was also correct to find that the relevant risk of harm was not insignificant, being a risk of physical harm of the kind that might be sustained in a confused and panicked crowd. Accordingly, s 5B(1)(b) was satisfied.

40 As to s 5B(1)(c), the issue is whether a reasonable person in the position of the OSG officers would have taken one of the precautions identified by the primary judge: that is, one of two less forceful responses to the threatened setting alight of the flag, or no action at all. Those less forceful precautionary responses identified by the primary judge comprised limiting the OSG action to "announcing their

arrival to the crowd" or "[a] single officer with a fire extinguisher walking through the crowd to arrive at the scene of the possibly impending ignition".[58]

41 In applying s 5B(1)(c), neither the primary judge nor the Court of Appeal made explicit findings about the factors required to be considered by s 5B(2)(a) to (c). As to s 5B(2)(a) and (b), based on the content of the "Actions On" document, the State recognised in argument in the appeal a likelihood that bystanders (and participants) could sustain physical injuries if the OSG officers did not take care in performing their functions at the march, and that the likely seriousness of the harm included serious physical injuries. As to s 5B(2)(c), the State did not suggest that the burden of taking those precautions to avoid the risk of harm was significant (especially as they would have involved less intrusive intervention in the march than in fact occurred).

42 However, consideration of each of the postulated alternatives shows that they were not precautions that a reasonable person would have taken. The correct approach to the question posed by s 5B(1)(c) is to determine whether a reasonable person would have taken the precautions identified by the primary judge having regard to the potentially competing factors in s 5B(2)(a) to (d) and the State's conflicting responsibilities as applicable to the facts of the case as found.

43 The suggested alternative that no action be taken at all to prevent Mr Dunn-Velasco from setting fire to the flag cannot be accepted in the light of the unchallenged evidence of Inspector Baker and the concessions made by the appellant's expert witness, Mr Halpin. Inspector Baker gave evidence that he was not certain what liquid Mr Dunn-Velasco was carrying and how it would react if it was ignited, particularly in a dense crowd. Inspector Baker was also "concerned about how the crowd would react if a fire was started in close proximity".[59] Those views were supported by the evidence of Mr Halpin, who conceded that there was a "level of danger" posed by the situation which, as Gleeson and Kirk JJA observed, "illustrate[d] the nature of the difficult circumstances facing the officers in deciding how to respond".[60]

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58 *Cullen v New South Wales* [2023] NSWSC 653 at [134].

59 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 383 [14].

60 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 396 [85].

44 In the light of the concerns expressed by Inspector Baker (the designated "Forward Commander"[61]) and the objective risk of danger as conceded by Mr Halpin, it would not have been reasonable for the OSG officers to have taken no action at all. Indeed, as Mr Halpin conceded in terms put by Gleeson and Kirk JJA, "if [the] forward commander ... formed the opinion that there was a threat posed to public safety, then it would be appropriate for that person to do something about it".[62] The circumstances warranted decisive action. Gleeson and Kirk JJA were correct to conclude that if "the OSG officers [had] taken either of the precautions suggested by the primary judge [ie the OSG officers announcing their presence or a single OSG officer approaching Mr Dunn-Velasco with a fire extinguisher], that would have been inconsistent with a decisive pre-emptive response and a fire may have been lit".[63] In the face of the apprehended risk of danger, there would have been little social utility in either of the precautionary responses, with the second alternative involving a potentially equal probability of serious harm to OSG officers, members of the crowd and bystanders as the action the OSG officers in fact took. On the other hand, a response which was decisive and calculated to be effective in pre-emptively defusing the threat to public safety from setting fire to the flag using an accelerant in proximity to the crowd had considerable social utility.[64]

45 The suggested alternative of the OSG officers "announcing their arrival to the crowd" could not be said to be a "decisive" response considering the objective risk of danger in the circumstances of Mr Dunn-Velasco's actions. Mr Halpin accepted that, given Inspector Baker's concerns, a reasonable first step would be to ask the organiser to prevent a fire being lit.[65] Inspector Baker took this step on two occasions shortly prior to the incident. Mr Bassi indicated that he would speak to Mr Dunn-Velasco, but that he did not think that Mr Dunn-Velasco would listen to him. In those circumstances, it is difficult to see how the OSG officers doing no more than drawing attention to their presence in the vicinity of the crowd, or signalling an intention to enter the crowd, would have served to defuse the risk of

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61 See above at [7] and *New South Wales v Cullen* (2024) 116 NSWLR 377 at 382 [11].

62 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 396-397 [86].

63 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 397 [87].

64 See *Civil Liability Act*, s 5B(2)(d).

65 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 396 [86].

danger, in light of the organiser's indication of Mr Dunn-Velasco's resolve and the fact that the OSG officers' presence in uniform had been a constant throughout the course of this protest march and this particular stop in the march. The OSG officers announcing their intention to enter the crowd might equally have led the crowd to impede them in doing so.

46 The remaining suggested alternative – limited to a single officer walking through the crowd with a fire extinguisher – also would have been an unsatisfactory response under the circumstances. As Gleeson and Kirk JJA recognised, there were "[p]lainly" risks to the safety of the OSG officers in taking action to address the identified threat, including the risk that members of the crowd might attempt to injure the OSG officers.[66] There would be obvious risks to the personal safety of an individual officer sent into the crowd without backup. That person simply walking into the crowd, again, could not be said to be a "decisive" response to the risk of danger from the actions of Mr Dunn-Velasco. The presence of a second fire extinguisher would also seem to have been prudent in the face of the risk of danger, given that a single fire extinguisher may have failed or been disabled in some way by an unwelcoming crowd. Of course, against these considerations weighed the possibility that a crowd may react detrimentally to a considerable police presence. But these were matters of judgement that the OSG officers were best placed to assess in the moment. It was not open on the evidence for the primary judge to conclude that sending a lone officer with a fire extinguisher into the crowd was an alternative that a reasonable person would have taken in the circumstances.

47 Each of the three suggested precautions (the two involving lesser force than in fact used and the taking of no action at all) also fails to take into account the dynamic nature of the situation that presented itself. Events proceeded quickly: Inspector Baker was informed at 1:10pm that Mr Dunn-Velasco had been seen with what appeared to be lighter fluid; Inspector Baker attempted to talk to Mr Bassi twice – once at 1:12pm and again at 1:14pm; and at around 1:16pm, Mr Dunn-Velasco bent down to attempt to light the fire. Further, the OSG officers' actions were taken in the dynamic and unpredictable context of a protest march in which there were competing threats to the safety of members of the crowd and any intervening OSG officers. The degree of pressure under which a decision must be

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66 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 396 [84].

made is a factor that is relevant in assessing whether a reasonable person would have taken precautions against a risk of harm.[67]

48 It follows that none of the postulated alternative precautions would have been effective to address the identified threat to public safety presented by Mr Dunn-Velasco's actions or to mitigate the risk of harm to bystanders such as the appellant. Put in the language of s 5B(1)(c) of the *Civil Liability Act*, a reasonable person in the position of the OSG officers would not have taken either of the less forceful responses identified by the primary judge, nor would they have taken no action at all. Judging the conduct of the OSG officers at the time that they entered the crowd against the conduct of a reasonable person in their position, the appellant did not demonstrate that the OSG officers breached their duty of care.

Conclusion

49 The appeal must be dismissed. As the State did not seek an order for costs against the appellant there will be no order as to costs.

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67 See *Leishman v Thomas* (1957) 75 WN (NSW) 173 at 175. See also, eg, *Byrnes v Snare* (1986) 60 ALJR 507; 66 ALR 296; *Robinson* [2018] AC 736 at 761-762 [75], 777 [121].

EDELMAN J.

A variant of a century-old torts problem

Palsgraf

50 On 29 May 1928, the New York Court of Appeals decided *Palsgraf v Long Island Railroad Co*.[68] That decision has been described as a "legal institution"[69] and "[p]erhaps the most celebrated of all tort cases", about which "[a]lmost everyone who writes on negligence has a word to say".[70] Law school classrooms in the United States have been said to celebrate "*Palsgraf* Day" with dramatic reenactments of the case and interpretive poems.[71] The brilliant decision of Cardozo CJ on a duty of care in that case, despised by legal realists and adored by doctrinal scholars, was "finally canonised"[72] in English law in *Bourhill v Young*,[73] where the scope of an imposed duty of care was crystallised around a criterion of reasonable foreseeability. In this country, since the demise of proximity as a criterion of duty, the reasoning established in *Palsgraf* and applied in *Bourhill* has been the foundation from which courts have identified the limits of a duty of care.[74]

51 In *Palsgraf*, a railway guard on a platform pushed an unsteady man in an attempt to help the man board a moving railway car. The push caused the man to drop a small package wrapped in newspaper. The small package contained fireworks. The fireworks exploded. The explosion caused scales, located around 30 feet (less than ten metres) away at the other end of the platform,[75] to fall. The falling scales injured Mrs Palsgraf. In the New York Court of Appeals, the central

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68 (1928) 162 NE 99.

69 Cowan, "The Riddle of the Palsgraf Case" (1938) 23 *Minnesota Law Review* 46 at 46.

70 Prosser, "Palsgraf Revisited" (1953) 52 *Michigan Law Review* 1 at 1.

71 Cardi, "The Hidden Legacy of *Palsgraf*: Modern Duty Law in Microcosm" (2011) 91 *Boston University Law Review* 1873 at 1874.

72 Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 200 [8.50].

73 [1943] AC 92 at 108-109.

74 See, eg, *Jaensch v Coffey* (1984) 155 CLR 549 at 560-561; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487; *Tame v New South Wales* (2002) 211 CLR 317 at 331 [12], 355 [103], 401 [249]. See also Weinrib, "The Passing of *Palsgraf*?" (2001) 54 *Vanderbilt Law Review* 803 at 806.

75 (1928) 162 NE 99 at 105.

question was whether the railway company, through the railway guard, owed a duty of care to Mrs Palsgraf. The answer given by a majority was "no".

52 The reasons of the majority of the New York Court of Appeals were written by Cardozo CJ. The Chief Judge had recently been present at a vigorous debate convened by the Reporter of the American Law Institute for the *Restatement of the Law of Torts*, which reached the same conclusion that the lower court decision was wrong to have found a duty of care.[76] In reasons which were, in a delightful circle of authority, subsequently adopted by the Reporter of the *Restatement*,[77] Cardozo CJ explained that no wrong had been committed because, with "nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station", the railway company was under no duty in relation to Mrs Palsgraf:[78]

> "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension ... Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some."

53 The application of the important reasoning concerning reasonable perception of risk to persons such as Mrs Palsgraf did, however, depend on a close analysis of the facts. For instance, the only negligence of the railway company that was alleged to establish the relation between Mrs Palsgraf and the railway company was the conduct of the railway guard. There appears to have been no suggestion, for instance, that the railway company had been careless in the placement of or failure to secure the scales. As Prosser observed in 1953:[79]

> "It is difficult to escape the conclusion that anything on a railroad platform so easily knocked over, whether by a paltry explosion of fireworks which damaged nothing else, or by a jostling and panicky crowd, had no business being there; and if there was negligence in having the scale, it was certainly negligence toward the plaintiff herself, who was standing beside it. There is no mention of this at all, undoubtedly because the idea never occurred to

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76 Prosser, "Palsgraf Revisited" (1953) 52 *Michigan Law Review* 1 at 4-5.

77 American Law Institute, *Restatement of the Law of Torts* (1934), §281, Comment g, Illustration 3.

78 (1928) 162 NE 99 at 100-101.

79 Prosser, "Palsgraf Revisited" (1953) 52 *Michigan Law Review* 1 at 7-8.

> counsel; but it occurs every year to some one of my law school freshmen, who then concludes that he is brighter than the New York Court of Appeals." (footnote omitted)

This case

54 The facts of this case, as found by the primary judge and the Court of Appeal of the Supreme Court of New South Wales,[80] raise a similar problem to that posed by the scenario in *Palsgraf*. During an emotionally charged "Invasion Day" rally in Sydney, which involved a march by a large group of about 5,000 people, officers from the New South Wales Police Force Operations Support Group ("OSG") saw a small flag being doused in what appeared to be an accelerant by a person speaking to the crowd, Mr Dunn-Velasco. Mr Dunn-Velasco had space between him and the crowd which surrounded him. But part of the surrounding crowd was densely packed. The protest was emotional and anti-authority. The video footage shows an airborne water bottle.

55 After seeing the flag about to be lit with what appeared to be an accelerant, a number of OSG officers rushed into that crowd from behind without announcing their arrival. No finding was made about the conflicting evidence concerning how many OSG officers rushed into that crowd, but the primary judge referred to evidence of a friend of Ms Cullen who said that she saw "four to five police in riot gear run down to the crowd".[81] Simultaneously, at least one fire extinguisher was discharged by one of the OSG officers although it appears that there was not yet any fire. Following the rush into the crowd by the OSG officers, some members of the crowd became angry and some may also have been somewhat "panicky".[82]

56 The primary judge described the circumstances that ensued as "chaos".[83] The panic created by the actions of the OSG officers "initiated" actions by Mx Williams.[84] Mx Williams was about ten to 15 metres away from Mr Dunn-Velasco and the primary judge treated Mx Williams and Mr Dunn-Velasco as part

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80 See especially *Cullen v New South Wales* [2023] NSWSC 653 at [47], [61], [86(b)], [93], [132], [136], [144]; *New South Wales v Cullen* (2024) 116 NSWLR 377 at 383 [14], 384 [19], 403 [124].

81 *Cullen v New South Wales* [2023] NSWSC 653 at [47].

82 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 384 [18]; *Cullen v New South Wales* [2023] NSWSC 653 at [146].

83 *Cullen v New South Wales* [2023] NSWSC 653 at [132], [144], [146].

84 *Cullen v New South Wales* [2023] NSWSC 653 at [144].

of the same crowd. That treatment was either supported by, or not inconsistent with, the evidence of all witnesses as set out by the primary judge.

57 The action taken by Mx Williams involved swinging their right arm to strike the left arm of Constable Lowe, who was filming the crowd by holding a camera with an outstretched arm. Mx Williams achieved their intended effect of knocking Constable Lowe's camera to the ground. Another constable, Leading Senior Constable Livermore, saw Mx Williams' actions and attempted to arrest them. In the course of a struggle between Leading Senior Constable Livermore and Mx Williams, they both collided with Ms Cullen. Ms Cullen fell to the road, hitting her head and suffering serious injury.

58 As explained below, the legal rules concerning the scope of a duty of care relied upon by the majority of the Court of Appeal (Gleeson and Kirk JJA) bore a striking resemblance to those adopted by Cardozo CJ in *Palsgraf*. Those rules should now be recognised as clearly established law. But, for the reasons below, the majority of the Court of Appeal erred in the application of those rules by concluding that the scope of the duty owed by the OSG officers did not extend to Ms Cullen. In that respect, this case illustrates the highly context-sensitive nature of determinations about the scope of a duty of care. Despite some factual similarities with *Palsgraf*, the scope of the duty of care owed by the OSG officers did extend to preventing injury to Ms Cullen. Nevertheless, the majority of the Court of Appeal were correct that the OSG officers did not breach their duty of care and were not liable so that the respondent, the State of New South Wales, was not vicariously liable.

The scope of the duty of care owed by the OSG officers

The scope of a duty of care imposed by law

59 A duty of care is not "the judicial regulation of safety".[85] As Cardozo CJ explained in *Palsgraf*,[86] the commission of a wrong such as negligence "imports the violation of a right". The duty owed correlates with the right that was infringed. For a private duty, one which is not "owed to the public at large",[87] the duty is relational or "relative to the individual affected";[88] the duty is owed only in relation to a particular person or class of persons affected by the defendant's conduct. All

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85 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 488 [151].

86 (1928) 162 NE 99 at 101.

87 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 558 [87].

88 *Bourhill v Young* [1943] AC 92 at 108.

persons have rights to their bodily integrity, liberty, and property, which the law imposes duties upon others to respect.[89] But, contrary to the dissent of Andrews J in *Palsgraf*,[90] these duties are not absolute. They are limited in their relation to others. As Professors Goldberg and Zipursky have explained, "[i]f one has a duty of care to another, that other person figures (or should figure) in one's deliberation in a certain way".[91] The scope of the duty of care that is imposed by law on all persons for unintended conduct is limited by reference to whether a reasonable person in the defendant's position would foresee a risk that the rights of the plaintiff, or a class of persons including the plaintiff, would be infringed by the defendant's conduct.[92]

60 One difficult issue is how demanding the test is for reasonable foreseeability of risk. That issue was not explored in this case. It suffices to say, consistently with doubts expressed by McHugh J, that it is likely to be an error to treat the test as requiring no more than a risk that is not "far-fetched or fanciful".[93] That expansive denotation does not cohere with the need for a risk of injury (infringement of rights to person or property) to feature in the deliberation of a reasonable person in the defendant's position before that risk can fall within the scope of a duty.

61 Another difficult question can be the level of generality at which to describe the scope of the duty owed by reference to the risk of injury to a class of persons including the plaintiff that must be reasonably foreseen. For instance, it would be far too specific a description of the scope of the duty of care owed by the railway guard in *Palsgraf* to require that he foresee a risk arising from pushing "upon a moving train another passenger carrying a package which, though innocent in appearance, contains fireworks, and which, if joggled from the boarding passenger's arm, will fall to the tracks, explode, shake the platform, knock down

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89 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 978 [89]-[90]; 418 ALR 639 at 664-665.

90 (1928) 162 NE 99 at 103: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."

91 Goldberg and Zipursky, "The Moral of *MacPherson*" (1998) 146 *University of Pennsylvania Law Review* 1733 at 1838.

92 *Jaensch v Coffey* (1984) 155 CLR 549 at 568; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487; *Tame v New South Wales* (2002) 211 CLR 317 at 331 [12], 355 [103], 401 [249].

93 *Tame v New South Wales* (2002) 211 CLR 317 at 352 [97].

the scales, and thus injure the intending passenger".[94] But it would be too general a description of the scope of the duty of care to describe the risk that must reasonably be foreseen as any physical injury to passengers on the platform from pushing another passenger. The right level of generality at which to characterise the scope of the duty of care will usually be a higher level than the particular facts which are examined in relation to breach of duty.[95] That is because the duty of care that is imposed by law exists prior to the actual conduct which might breach that duty.

The scope of an assumed duty of care

62 Independently of a duty that is imposed by law, a duty of care might also arise from an undertaking of responsibility assumed by the defendant.[96] For instance, it has been said that, at common law, an occupier of premises owes a duty to take care to avoid injury to visitors due to the occupier's "own voluntary act in consenting to the presence of the visitors to the premises". The content of that duty is determined by "a construction placed upon conduct".[97] But, referring to the duty of care imposed by law, as recognised by Lord Atkin in *Donoghue v Stevenson*,[98] it has also been said that "[t]he duty of the occupier is ... rooted at bottom in [a] duty to [their] neighbour in Lord Atkin's sense".[99] Both statements are true. A duty of care can be assumed independently of, and in addition to, one that is imposed by law.

63 When compared with an imposed duty of care, there is a different role for reasonable foreseeability of risk of injury for a duty assumed by a defendant. Where a defendant assumes responsibility to a person or class of persons by an express or implied undertaking to take reasonable care in the action undertaken (or to ensure that reasonable care is taken or even to ensure a result), the scope of the duty—the people who are the objects of the duty as well as the content of the

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94 Cowan, "The Riddle of the Palsgraf Case" (1938) 23 *Minnesota Law Review* 46 at 56.

95 Sappideen et al, *Fleming's The Law of Torts*, 11th ed (2024) at 186 [8.10].

96 *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at 245-250 [342]-[359]; 427 ALR 67 at 159-165.

97 *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 281.

98 [1932] AC 562.

99 *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 316.

duty—is a matter of construction of the express or implied undertaking,[100] not determined simply by whether the risk of injury (infringement of rights to person or property) is reasonably foreseeable.[101] The construction of the express or implied undertaking requires that all relevant circumstances be considered. And, unlike imposed duties, the scope of an undertaken duty, for which responsibility is assumed, can extend to taking positive action to *prevent* injury. The duty to prevent an injury will generally fall within the scope of an assumed duty if it is the very kind of thing likely to happen unless positive action is taken.[102]

An imposed duty of care arose in this case

64 The intervention by the OSG officers was not said in this Court to be pursuant to any statutory power.[103] They were acting with the same liberty, and subject to the same legal constraints, as any member of the general public. And, contrary to the reliance by the State of New South Wales upon *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[104] any liability of the OSG officers in this case would be based upon their positive acts in creating risk, not upon any alleged omission to act to prevent actions by third parties.[105] As Lord Reed said of police officers, in the Supreme Court of the United Kingdom in *Robinson v Chief Constable of West Yorkshire Police*,[106] the duty of care that applies is not merely the duty arising from an assumption of responsibility but is also "the ordinary

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100 *The Commonwealth v Sanofi* (2024) 282 CLR 30 at 87 [168]. See also *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 434-435 [44]-[46]; *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208 at 236 [72]-[73].

101 *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at 250 [361]; 427 ALR 67 at 165-166.

102 See *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 367-368, 374, 381. See also *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at 140 [79]; *New South Wales v Bujdoso* (2005) 227 CLR 1 at 9-10 [32].

103 cf *Cullen v New South Wales* [2023] NSWSC 653 at [135]-[136]. Any reliance on s 43A of the *Civil Liability Act 2002* (NSW) was abandoned by the State of New South Wales in this Court.

104 (2000) 205 CLR 254.

105 See *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 at 248 [353]-[354]; 427 ALR 67 at 163; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at 761 [73].

106 [2018] AC 736 at 752 [48].

common law duty of care to avoid causing reasonably foreseeable injury to persons and reasonably foreseeable damage to property".

65 The existence of a duty of care based upon an assumption of responsibility in this case can be put to one side because the case was not run on the basis of a duty arising from an undertaking by the OSG officers to assume responsibility for the situation. It suffices to say that rather than merely running a case based upon an imposed duty, Ms Cullen could have run a case based on a duty assumed by the OSG officers to Mr Dunn-Velasco and the crowd around him (extending to Ms Cullen). There are very strong grounds upon which it could have been concluded that the OSG officers had undertaken to assume responsibility for the care of the crowd which included Mr Dunn-Velasco, at least by the time that they rushed into that crowd in an attempt to control the actions of Mr Dunn-Velasco.

66 As to the imposed duty of care, it can be accepted that there are numerous similarities between the fact pattern in this case and that in *Palsgraf*. Like the conduct of the railway guard in *Palsgraf*, the conduct of the OSG officers was not directed towards Ms Cullen specifically. And like Mrs Palsgraf, who was less than ten metres away from the railway guard, Ms Cullen was ten to 15 metres away from the OSG officers when they conducted their rushed response into the crowd arising from the conduct of Mr Dunn-Velasco.

67 The majority of the Court of Appeal correctly noted the importance of identifying the relevant risk of infringement of a person's rights at the right level of generality.[107] Like the reasons of Cardozo CJ in *Palsgraf*, the risk of infringement was not characterised by the majority at the high level of generality that "members of the crowd would be knocked to the ground".[108] And, again similarly to *Palsgraf*, their Honours identified the risk when the OSG officers rushed in towards Mr Dunn-Velasco with fire extinguishers as "the risk of the OSG officers' actions inflicting physical injury on persons in the immediate vicinity of an operational response during the protest march".[109]

68 The difficulty in the application of the scope of the duty of care identified by the majority of the Court of Appeal arose from their Honours' reliance upon the "immediate vicinity". It may be that, like the majority of the New York Court of Appeals in *Palsgraf*, who concluded that the railway company owed no duty of care to Mrs Palsgraf "standing far away",[110] the majority of the Court of Appeal

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107 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 393 [69]-[70].

108 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 395 [76].

109 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 395 [79].

110 (1928) 162 NE 99 at 99.

considered that, at 15 metres away, the OSG officers were too far away from Ms Cullen for the scope of their duty of care to extend to her when they conducted a rushed response into the crowd. By contrast, as the majority of the Court of Appeal noted,[111] a duty of care was found by the Supreme Court of the United Kingdom to be owed by police to a pedestrian who was within the immediate vicinity of an arrest, being only within a yard of the person arrested.[112] The difficulty with the reasoning of the majority of the Court of Appeal is that the criterion is reasonable foreseeability in the particular circumstances, not a fixed measure of distance. In this case, it was reasonably foreseeable by persons in the position of the OSG officers that their actions in conducting a rushed response into that crowd could injure anyone in the crowd. Although, at another point in their reasons, the majority of the Court of Appeal appear to have considered that Ms Cullen was not in the same crowd as that into which the OSG officers conducted a rushed response,[113] that factual premise is incorrect.[114]

69 The characterisation at the right level of generality of the risk of infringement of a person's rights which must be reasonably foreseeable is a question of evaluation. That evaluation will be acutely fact sensitive, although a strong guide to the right level of generality is the detail that should feature in the deliberation of a reasonable person in the position of the defendant. If the majority of the Court of Appeal intended to exclude Ms Cullen from the scope of the duty of care owed by the OSG officers by reason merely of the distance between them then, with respect, that was an error.

70 For three reasons, the scope of the duty of care owed by the OSG officers extended to injuries to people in the crowd surrounding Mr Dunn-Velasco arising from conduct of the OSG officers in rushing into that febrile crowd. The crowd extended at least 15 metres from Mr Dunn-Velasco to Constable Lowe, who was filming in the crowd, and Mx Williams, who struck Constable Lowe in the crowd. These three reasons distinguish this case from *Palsgraf*.

71 First, the crowd into which the OSG officers rushed was densely packed in part and, although more dispersed in parts, was a single crowd to which Mr Dunn-Velasco was speaking and a single crowd in which Constable Lowe was recording. The crowd surrounding Mr Dunn-Velasco was a much smaller subset of the larger

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111 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 392 [61]-[62].

112 *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at 742 [13], 761 [74].

113 See also *New South Wales v Cullen* (2024) 116 NSWLR 377 at 400 [103]: "outside the relevant crowd".

114 Above at [56].

group of participants in the march with the size of that larger group being around 5,000 people.[115]

72 Secondly, it is apparent from the decisions below and from the video footage that the crowd which included Mr Dunn-Velasco, whilst temporarily calm, was emotional. Indeed, one of the rally organisers described Mr Dunn-Velasco's speech as containing "emotional statements ... not unusual at rallies like the 2017 Invasion Day Rally".[116]

73 Thirdly, reasonable persons in the position of the OSG officers would have been aware that their actions as police officers, in rushing into that febrile crowd, could have inflamed the crowd. An annexure to Operational Orders prepared for the Invasion Day rally, entitled "Actions On", contained a careful balancing of this concern with the need to protect the public in situations of serious risks to public safety or property. The document explained:

> "Unless an immediate response is required, police should be careful not to intervene in a situation without sufficient support. A hastened reaction to an incident could inflame a situation and result in injury to police. Always consider whether an investigation or appropriate follow-up can be progressed via other means and at a later time."

In relation to a particular incident involving the burning of a flag, specific advice was given in the document. The document explained that burning a flag that a person owns is not an offence but could endanger public safety. The first matter noted was that incidents were required to be "brought to the attention of the Team/Field Supervisor". The document suggested that the Team/Field Supervisor would take action including conversing with officers and assessing the situation. The document also observed:

> "If required, take immediate and appropriate action to prevent or respond to a serious incident where a person has been injured or a serious risk to public safety or property is imminent. This includes taking action to contain or isolate the hazard."

74 It may be that the OSG officers would have owed no duty of care to people in a separate crowd, even though it might be possible that panic could spread to the separate crowd leading to conduct by different people in that crowd which caused injury. But within a single crowd, dense in parts, and within the space of 15 metres in circumstances in which it was reasonably anticipated that the situation could be inflamed by (what was described in the document as) "[a] hastened

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115 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 382 [12].

116 *Cullen v New South Wales* [2023] NSWSC 653 at [42].

reaction", it was reasonably foreseeable that the OSG officers conducting a rushed response into the crowd could cause a crowd reaction of anger, confusion, or panic which could result in injury to Ms Cullen and others within the crowd.

75 Since the scope of the duty of care owed by the OSG officers must exist at a higher level of generality than the particular conduct to be examined for any breach of that duty, it would not have made a difference to the description of the scope of the duty owed if the particular circumstances of the breach of duty involved the OSG officers rushing into the crowd brandishing batons and assaulting members of the crowd for the purpose of subduing Mr Dunn-Velasco and his audience. That hypothetical conduct would, much more obviously, be a breach of duty but it would be a breach of the same duty of care owed to the crowd as that which was owed in the circumstances which actually occurred, namely a duty to take reasonable care to avoid injury to those in the crowd arising from the OSG officers conducting a rushed response into the crowd.

76 The State of New South Wales objected to any such formulation of the imposed duty of care of the OSG officers on the basis that the scope of a postulated duty should exclude deliberate criminal conduct of third parties. Sometimes such issues of scope of duty are expressed as involving a "superseding cause" which "breaks the chain of causation", a confusing metaphor (made worse in the Latin description[117]) which sometimes also conceals reasoning about remoteness of consequential loss or mitigation of loss.[118] But where the issue arises in respect of the scope of a duty to avoid injury (infringement of rights to person or property), an imposed duty will extend to criminal conduct of third parties if that was the type of conduct that was the very kind of thing likely to happen within the formulated scope of the duty of care and therefore reasonably foreseeable as arising as a consequence of the defendant's conduct.[119] As this Court said in *Chapman v Hearse*,[120] when assessing reasonable foreseeability of injury the court takes into account all conduct, even if wrongful:

> "the fact that the intervening act of a third person is a negligent one will not make it a superseding cause of harm to another for an injury which the

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117 *Novus actus interveniens*.

118 See, for instance, *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 528. See also *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2025] AC 406 at 428 [56]; *BDW Trading Ltd v URS Corporation Ltd* [2026] AC 409 at 447 [55].

119 *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 518.

120 (1961) 106 CLR 112 at 125, quoting *Ferroggiaro v Bowline* (1957) 315 P 2d 446 at 448.

> original actor helped to bring about if the original actor at the time of [their] negligent conduct should have realized that a third person might so act".

Here, criminal actions of the general nature undertaken by someone like Mx Williams should have been anticipated, and were therefore within the terms of the scope of the duty owed by the OSG officers to take reasonable care to avoid injury to those in the febrile crowd when rushing into that crowd. The injury that was reasonably foreseeable to those in the crowd included injuries by criminal actions of people like Mx Williams because, like the criminal damage caused by the Borstal boys when they escaped due to careless supervision by the defendant's officers, the criminal actions were "the 'very kind of thing' which [was] likely to happen".[121]

77 Contrary to the submissions of the State of New South Wales, there is no "incongruity" with other legal duties[122] in the recognition of a duty upon the OSG officers to take care in their rush into the crowd against the risk of a crowd reaction of anger, confusion, or panic which could result in injury to those within the crowd. It is entirely congruous with the exercise or performance of police powers and duties, generically described by the State of New South Wales as "the various public duties, functions and powers of the police – statutory and otherwise", for those powers and duties to be exercised or performed with care.

78 The State of New South Wales asserted that the imposition of a duty of care "would tend to make police overly defensive and less robust and less fearless in performing their public duties in a protest situation when their public duties require that they be robust and fearless", and that the existence of a duty of care to persons such as Ms Cullen "would tend to inhibit the due performance by police of their duties in a protest situation", including discouraging "violence or aggression, the use of riot shields, batons and other riot paraphernalia, the deployment of mounted police etc". In theory, it might be arguable that legislation could confer upon the police unconstrained powers of violence against the general public, rendering incongruent the existence of a duty of care in the exercise of those powers and duties. But any Parliament with power to do so, impairing the most fundamental rights of the general public in such a serious way, would need to express the legislation in a manner that revealed such an intention with the most extraordinary

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121 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1030.

122 Relying upon cases including *Tame v New South Wales* (2002) 211 CLR 317 at 335 [26], 342 [57]-[58], 361 [123], 362 [126], 418 [298], 430-431 [335]-[336] and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 254 [113].

clarity.[123] None of the provisions to which the State of New South Wales pointed comes close to revealing such an intention.[124]

The OSG officers did not breach their duty of care

The common law test for breach of a duty imposed by law

79 Once it is concluded that a duty of care was imposed by law upon a defendant to take care in relation to conduct that might reasonably foreseeably infringe the plaintiff's rights to person or property, the next question is whether the defendant failed to take reasonable care. This is an objective question of whether the response of the defendant was one that would have been taken by a reasonable person in the defendant's position based upon the circumstances as they existed immediately before the event.[125] Unlike later Roman law, which had two different standards of negligence—*culpa levis in abstracto* and *culpa levis in concreto*—to distinguish between different degrees to which a defendant's qualities would be taken into account,[126] Australian law has only one imposed standard. It is a standard that is abstracted from, and thus ignores, "the particular aptitude or temperament" and the experience of the defendant.[127] But the standard does take into account some characteristics of the defendant, such as whether the defendant is a child.[128]

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123 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]; *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34]; *Hurt v The King* (2024) 281 CLR 286 at 325 [106].

124 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 4, 198-200, 230-231; *Police Act 1990* (NSW), ss 6, 13-14.

125 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 455-456 [105]; *Sullivan Nicolaides Pty Ltd v Papa* [2012] 2 Qd R 48 at 50 [2]; *Marien v Gardiner* (2013) 66 MVR 1 at 10 [34]; *Reardon v Seselja* (2021) 95 MVR 273 at 288 [53]. See also Hambly et al, *Luntz & Hambly's Torts: Cases, Legislation and Commentary*, 10th ed (2026) at 244 [3.2.43].

126 Thomas, *Textbook of Roman Law* (1976) at 250-251.

127 *Imbree v McNeilly* (2008) 236 CLR 510 at 528-529 [53]-[54].

128 *McHale v Watson* (1966) 115 CLR 199 at 213; *Imbree v McNeilly* (2008) 236 CLR 510 at 533 [69].

80 In *Wyong Shire Council v Shirt*,[129] Mason J held that in order to determine whether the defendant's response was one that would have been taken by a reasonable person in the defendant's position, it was necessary to balance three factors: "[(i)] the magnitude of the risk [ie the consequence] and [(ii)] the degree of the probability of its occurrence, along with [(iii)] the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have". The process of balancing these factors described by Mason J is a tool of analysis to assess the response of a reasonable person in the defendant's position. But although the tool of analysis is binding authority,[130] it is not a mathematical "calculus" of negligence, a term—derived from Learned Hand J's mathematical expression of these factors[131] and enthusiastically embraced by scholars of law and economics—deprecated in Australia.[132]

81 The application of this tool of analysis demonstrates that the greater the magnitude of the consequence, the higher the probability of its occurrence, and the less inconvenient the alleviating action, the more precautions that will be taken in the possible responses of a reasonable person: "[n]o reasonable [person] handles a stick of dynamite and a walking-stick in the same way".[133] Nevertheless, the third factor concerning the circumstances of alleviating action and any conflicting responsibilities of the defendant takes into account a wide range of matters, including the end to be served by the action taken and the urgency of the response. In relation to the end to be served, as Denning LJ said in *Watt v Hertfordshire County Council*,[134] a "commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking

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129 (1980) 146 CLR 40 at 47-48. See also *New South Wales v Fahy* (2007) 232 CLR 486 at 504-505 [56]; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 353-354 [68]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 260 [88]; *Kozarov v Victoria* (2022) 273 CLR 115 at 149 [105].

130 *New South Wales v Fahy* (2007) 232 CLR 486 at 504-505 [56], 511 [78], 518 [99], 528 [133], 550 [213]. Compare *Babet v The Commonwealth* (2025) 99 ALJR 883 at 897 [49]; 423 ALR 83 at 97.

131 *United States v Carroll Towing Co* (1947) 159 F 2d 169 at 173.

132 *New South Wales v Fahy* (2007) 232 CLR 486 at 491 [6], 504-505 [56]-[57], 525 [125].

133 *Paris v Stepney Borough Council* [1951] AC 367 at 381, quoting Winfield, *A Text-Book of the Law of Tort*, 5th ed (1950) at 412. See also Stallybrass, *Salmond's Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 10th ed (1945) at 438n.

134 [1954] 1 WLR 835 at 838; [1954] 2 All ER 368 at 371.

considerable risk". And, in relation to the urgency of the response, as Windeyer J said, the "urgency of the errand can be taken into account in determining what speed is reasonable and what risks may be justified for its performance".[135]

82 Where the end to be served is the saving of life or limb, and particularly where that end is a duty of the defendant, in circumstances of urgent action considerable latitude will be afforded in the assessment of the response of a reasonable person. As Street CJ said in *Leishman v Thomas*,[136] it will not be a breach of duty if, in the "agony of the moment", a person makes an error of judgment which "wiser counsels and more careful thought would have suggested was unwise". This is particularly so in an emergency, where a person is not required to "exercise … that mature judgment required ... under circumstances where [there is] an opportunity for deliberate action".[137]

The common law test for breach of an assumed duty

83 Where a duty of care is not imposed by law but instead arises from a defendant's undertaking of an assumed responsibility to take reasonable care, the assessment of breach of the assumed duty usually proceeds by reference to the same considerations so that the assumed duty is to take the care that a reasonable person in the defendant's position would take. However, the standard of care for an assumed duty can sometimes be a higher standard than that which is imposed by law if such a higher standard is what was objectively undertaken. Thus, it has been said that where there is an objective "profession of particular skill" by some person, "[a] higher standard of care is applied".[138] For instance, all other things being equal, better judgment will usually be expected in the response of a person responding to an emergency in their capacity as a professional, such as a professional firefighter responding to a fire.[139]

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135 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 125.

136 (1957) 75 WN (NSW) 173 at 175.

137 *Cordas v Peerless Transport Co* (1941) 27 NYS 2d 198 at 201-202, quoting *Kolanko v Erie Railroad Co* (1925) 212 NYS 714 at 717.

138 *Imbree v McNeilly* (2008) 236 CLR 510 at 532 [69].

139 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 119. See also *Rogers v Whitaker* (1992) 175 CLR 479 at 487; *Anikin v Sierra* (2004) 79 ALJR 452 at 460 [46]; 211 ALR 621 at 631; *Queensland v Masson* (2020) 94 ALJR 785 at 816 [139]; 381 ALR 560 at 600.

The Civil Liability Act *test for breach of duty*

84 The test for breach of duty under the *Civil Liability Act 2002* (NSW) is set out in ss 5B and 5C. The operation of those sections, and particularly the level of generality at which a relevant risk is characterised, were considered in detail by a majority of this Court in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd*.[140] In their focus upon the foreseeability of risk, ss 5B(1)(a) and 5B(1)(b) of the *Civil Liability Act* preclude liability for breach of duty unless conditions for a duty of care are met. Those conditions, matching the explanation of a duty of care above, require a risk of harm to be "foreseeable (that is, it is a risk of which the person knew or ought to have known)" and, emphasising the real content of foreseeability, that "the risk was not insignificant".

85 Having characterised the risk for the purposes of a duty of care at the right level of generality, the issue for breach of duty under the *Civil Liability Act* then descends to the particular facts and asks, in s 5B(1)(c), if, "in the circumstances, a reasonable person in the person's position would have taken those precautions". This test for breach of duty does not expressly distinguish between duties of care that arise by imposition of law and those which arise by an assumption of responsibility. Instead, the test closely resembles that which was expressed in *Wyong Shire Council v Shirt*[141] but implicitly extends also to circumstances of an assumption of responsibility where the standard of care assumed is higher due to the defendant's professed skill or experience. The requirement that a reasonable person under s 5B(1)(c) be in the defendant's position imports some objective characteristics of the defendant, such as whether the defendant is a child, but does not include the defendant's aptitude, temperament, knowledge, or experience unless the person assumes responsibility by professing a higher degree of skill or experience than would otherwise reasonably be expected.[142]

No breach of duty occurred in this case

86 The primary judge and the dissenting judge in the Court of Appeal held that the OSG officers had breached the duty of care that they owed to Ms Cullen. Both the primary judge and the dissenting judge in the Court of Appeal characterised the risk upon which the duty of care was based in a broadly similar way to the manner in which it is expressed in these reasons, namely a duty to take care with respect to the risk that the OSG officers conducting a rushed response into the

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140 (2022) 273 CLR 454 at 486-487 [97]-[99], 489-494 [106]-[119].

141 See *Waverley Council v Ferreira* (2005) Aust Torts Reports ¶81-818 at 68,079 [45].

142 See Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) at 44-45, 107-108; *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW), Explanatory Note at 2.

crowd could cause a crowd reaction of anger, confusion, or panic which could result in injury to Ms Cullen and others within the crowd.[143]

87 The primary judge considered that the OSG officers were in breach of their duty:[144]

> "The situation was peaceful. Mr Dunn-Velasco had not lit the flag and there was probably little danger even if he did. Of course, police are called upon to make quick decisions but that does not give them permission to intervene where intervention is either not necessary or can be achieved in a non-violent manner."

88 The dissenting judge in the Court of Appeal agreed with this reasoning, explaining that the actions of the OSG officers were "calculated to inflame the situation and create a melee as happened".[145] By this reference to "calculated", his Honour could not be taken to have meant that the actions of the OSG officers were intended to achieve the result of inflaming the situation, but rather that inflaming the situation would have been an expected result of their intervention by rushing into the crowd with at least one fire extinguisher being discharged.

89 With great respect to the primary judge and the dissenting judge in the Court of Appeal, even accepting this assessment of the situation, it was not a breach of their duty for a number of OSG officers to rush into the crowd while discharging at least one fire extinguisher. The three postulated alternatives are carefully canvassed in the joint reasons:[146] (i) the OSG officers doing nothing at all; (ii) the OSG officers announcing their arrival to the crowd; or (iii) a single officer walking through the crowd with a fire extinguisher. I agree with their Honours' assessment that none of these three postulated alternatives was a viable and reasonable alternative. Two points can be emphasised.

90 First, the issue of breach of duty is not concerned with whether any of the postulated alternatives to the response of the OSG officers was a better alternative, either in hindsight or with careful foresight. The issue is whether the conduct of the OSG officers was within the range of reasonable responses for persons in their position.

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143 *Cullen v New South Wales* [2023] NSWSC 653 at [132]; *New South Wales v Cullen* (2024) 116 NSWLR 377 at 418 [224].

144 *Cullen v New South Wales* [2023] NSWSC 653 at [128].

145 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 418 [226].

146 Reasons of Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ at [40]-[48].

91 Secondly, the assessment of whether the conduct of the OSG officers was within the range of reasonable responses requires consideration of two important factors in the common law test, incorporated in the *Civil Liability Act*, being the social utility of the activity that creates the risk of harm,[147] and the urgency of the circumstances and agony of the moment (in light of the responsibilities of the OSG officers for the safety of the crowd).[148] Although the OSG officers might reasonably have anticipated the prospect of a flag being burned with the associated threat to safety of the crowd, the immediate prospect of Mr Dunn-Velasco lighting a flag, doused in an accelerant, in close proximity to a crowd which was densely packed in places required a rapid decision to be made in an emotional environment where the OSG officers had responsibility for the safety of the crowd.

92 Both of these matters, when properly assessed without applying the calm satisfaction of hindsight, reinforce the conclusion that the OSG officers acted as reasonable people in their position would have acted, even if any one of the three postulated alternatives might have been viable and reasonable.

Causation and scope of liability

93 The conclusion that the OSG officers did not breach any duty of care owed to Ms Cullen is sufficient to dismiss this appeal. In order to go further to consider whether any breach of duty caused the injury to Ms Cullen and, if so, the scope of consequential liability, it is usually necessary to identify the counterfactual circumstances of what the OSG officers would otherwise have done, acting lawfully.[149] But, for reasons of caution in the event that their conclusions on the nature of the duty of care and breach of duty were wrong, the majority of the Court of Appeal examined the issue of scope of liability without identifying the counterfactual by proceeding from the primary judge's reasoning that the (unidentified) lawful conduct that the OSG officers would have undertaken would have meant that "no issue would have arisen with Mx Williams".[150] Even on this assumption, the majority said, the OSG officers would not be liable for negligence because the injury to Ms Cullen was beyond the scope of their liability.[151]

94 The difficulty that arises in this area is due to the rule, described as "causation" in the heading to Div 3 of Pt 1A of the *Civil Liability Act*, that in

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147 *Civil Liability Act*, s 5B(2)(d).

148 *Civil Liability Act*, s 5B(2)(c).

149 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 209-210 [36]-[37], 247 [151], 261 [178].

150 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 398 [94].

151 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 401 [110].

addition to the usual[152] causal rule that "the negligence was a necessary condition of the occurrence of the harm",[153] it is also necessary that it be "appropriate for the scope of the negligent person's liability to extend to the harm so caused".[154] In considering that "scope of liability", the court is to consider "whether or not and why responsibility for the harm should be imposed on the negligent party".[155]

95 The scope of liability rule in s 5D(1)(b) conflates two issues: (i) the scope of a duty of care not to injure another (infringe another's rights), and (ii) the scope of liability for loss consequential upon such an injury. Where the issue is really one of the scope of the duty owed, therefore, the liability will include "the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid".[156] The scope of liability for loss that is consequential upon such an injury is a separate issue from the scope of the duty owed. Sometimes issues of scope of liability for loss are described as issues of "remoteness". The reasoning of the majority of the Court of Appeal, which focused upon the injury to Ms Cullen, was concerned with the scope of a duty of care. It was not concerned with the scope of further, consequential liability.

96 A colourful example of limits to the scope of a duty of care rather than the scope of consequential liability, which was reiterated in this Court in the context of s 5D(1)(b),[157] was given by Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*:[158]

> "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

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152 Subject to *Civil Liability Act*, s 5D(2).

153 *Civil Liability Act*, s 5D(1)(a).

154 *Civil Liability Act*, s 5D(1)(b).

155 *Civil Liability Act*, s 5D(4).

156 *Wallace v Kam* (2013) 250 CLR 375 at 385 [24].

157 *Wallace v Kam* (2013) 250 CLR 375 at 386 [24].

158 [1997] AC 191 at 213.

97 The scope of a duty of care necessarily includes the persons to whom the duty is owed. As explained above, whether it is appropriate for a duty of care to extend to the plaintiff, or a class of persons including the plaintiff, will depend upon whether the circumstances, characterised at the right level of generality, were reasonably foreseeable or whether the defendant otherwise undertook to assume responsibility to take care to avoid or prevent injury to the plaintiff or a class of persons including the plaintiff.

98 Although expressed using the metaphor of "breaking the chain of causation", the reasoning of the majority of the Court of Appeal that the injury to Ms Cullen was not within the "scope of liability" of the OSG officers was really concerned with the scope of the duty owed by the OSG officers. In the part of their reasons which considered this issue as one of "scope of liability", the majority effectively denied that the OSG officers owed a duty of care in the course of their conduct that extended to Ms Cullen:[159]

> "It may be reasonably arguable that pushing, shoving and so forth was the 'very kind of thing' which was likely to happen and which the putative duty was intended to avoid. But we do not accept that a decision by a person who was outside the relevant crowd to commit a criminal assault in order to impede the gathering of evidence of possible offences is in the same class. It would be surprising were the law to impose a duty of care the purpose of which extended to preventing the undertaking of such action."

99 For the reasons explained above, in considering the scope of the duty of care owed by the OSG officers, this conclusion of the majority cannot be accepted. It was reasonably foreseeable that the OSG officers conducting a rushed response into the crowd could cause a crowd reaction of anger, confusion, or panic which could result in injury to Ms Cullen and others within the crowd. One of the very kinds of things that were likely to happen was that a physical injury would be suffered by conduct which was criminal. It seems that the reasoning of the majority of the Court of Appeal on this point was essentially premised upon Ms Cullen being "outside the relevant crowd". If that premise were correct then, as explained above, there would be much force in the reasoning of the majority. But the premise is not correct.[160]

Conclusion

100 These reasons have focused upon the duty of care owed by the OSG officers, consistently with the manner in which this case was argued and decided below, despite the OSG officers not being parties to the litigation. The assumption

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159 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 400 [103].

160 Above at [71], [74].

of Ms Cullen and the State of New South Wales, as parties to the litigation, was that the State was vicariously liable for any liability to Ms Cullen and accordingly that the State would be liable for the agreed quantum of $800,000 in damages if the OSG officers were liable. The description of the liability by the Court of Appeal as "vicarious"[161] was accurate. Although this Court mistakenly described the *Law Reform (Vicarious Liability) Act 1983* (NSW) as based on the "master's tort" theory (a theory that the attribution of the act of the servant means that the tort is committed by the master), the effect of that statute was held to be that, when police officers commit a tort, the liability of those officers for damages is attributed to the State.[162] The liability of the State for torts of the police is true vicarious liability, in the same way that a master was liable for a servant's tort.[163]

101 The State of New South Wales did not seek a costs order in this Court and undertook that, if successful, it would not seek to enforce the costs order made by the Court of Appeal. The only order should be that the appeal is dismissed.

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161 *New South Wales v Cullen* (2024) 116 NSWLR 377 at 391 [56], 403 [122].

162 *New South Wales v Ibbett* (2006) 229 CLR 638.

163 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.