HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN

LAURA CULLEN
Appellant

AND:

STATE OF NEW SOUTH WALES
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

Part I: Certification: Internet Publication

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Part: II: Statement of Issues on the Appeal

2. First, can Cullen establish that she was owed a duty of care of the scope relied upon by her.[1] In particular, can Cullen overcome the problems listed at [23] – [38] below.

3. Secondly, whether Cullen can establish breach of the duty of care she has articulated. In particular, whether such a breach can be established having regard to the matters set out at [41] – [52] below and the standard of care under s 43A of the *Civil Liability Act 2002 (NSW)* ("CLA").[2]

4. Thirdly, whether Cullen has established factual causation under s 5D(1)(a) of the CLA.[3]

5. Fourthly, whether it is "appropriate" in the circumstances (CLA s 5D(1)(b)) for the scope of the State's liability to extend to Cullen's injury particularly given that the proximate cause of her injury was the deliberate and intentional criminal act of Williams.

Part: III: Judiciary Act: Section 78B

6. This case raises no constitutional issues.

Part: IV: Material Facts

7. ***The Key Facts.*** Given Cullen's summary of the facts in AS, it is necessary for the State to emphasise certain additional facts and provide some additional detail and context. The specific errors in Cullen's statement of facts are dealt with at [12] – [13] below. The background facts are set out in the judgment of White JA (CA [136] – [150]) which were adopted by the CA majority: CA [7]. Because the primary judge did not make adequate fact findings (CA[6]) most of the factual findings were made by the CA majority.

8. On 18 January 2017, Superintendent Freudenstein gave approval to Raul Bassi to hold a public assembly and procession on 26 January 2017: CA [136]. Bassi undertook to take control and responsibility for organising and conducting the assembly and procession: see *Summary Offences Act* s. 23(1)(e): CA [8]. That approval included a condition that there be no flag or effigy burning: CA [137]. Bassi agreed to the various conditions: CA [8](3). Acting Inspector Luke Baker prepared Operational Orders in relation to the rally: CA [10]. These are summarised at CA [140] – [142].

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[1] See [15] – [17] below.
[2] The issue of a higher standard of care arises on the notice of contention: see Part VI below.
[3] This issue also arises on the notice of contention.

9. The rally proceeded without incident until the procession reached the end of Buckland Street and Broadway. Senior Police observed that a Mr Dunn-Velasco ("DV") had been seen with an Australian flag and what appeared to be lighter fluid: CA [13], [14]. Inspector Baker asked Bassi, the person controlling the rally, to intervene and stop DV from setting the flag alight: CA [16].[4] Bassi agreed to do so but said that he did not think DV would listen to him: CA [16], [145]. Inspector Baker[5] directed Sergeant Hogan that if DV attempted to burn the flag and there was a risk to public safety he should extinguish the fire: CA [14], [144]. DV invited the crowd to move into a close circle around him: CA [145]. DV then addressed the crowd. DV then bent down "squirting liquid onto an Australian flag" (CA [16]) whilst next to him another protester held out a lighter near the flag (Ex B: commencement of BuzzFeed footage [RBFM 586]) when "other people [were] in close proximity": CA [16]. At that point the OSG officers intervened and one or perhaps two fire extinguishers were deployed: CA [13] – [14], [17], [144] – [145].

10. When the OSG officers (a team of at least four: AS [23]) intervened, "one or two [were] carrying fire extinguishers": CA [17]. The fire extinguishers were small: CA [146]. The officers "pushed through the crowd fairly rapidly in order to get to Dunn-Velasco": CA [17]. The "fire extinguisher/s emitted a chalky smoky cloud" which affected air quality to some degree: CA [17]. DV attempted to keep the flag away from the OSG officers (CA [18]) and significant pushing occurred between police and DV and people around him: CA [18]. Some members of the crowd became angry and (possibly) a state of panic materialised: CA [18]. The "pushing and shoving that occurred in connection with the OSG officers going in towards Dunn-Velasco [occurred] to prevent the flag being lit": CA [102].

11. Whilst all of this was occurring Constable Lowe was about 15 metres away from DV: CA [19]. Lowe was videoing the protest, having been allocated that role earlier (CA [13]) and having been directed to pay particular attention to any person committing offences or breaching the conditions of the march: CA [13]. One Williams saw Lowe videoing what was occurring and smashed the camera out of Lowe's hand causing the camera to fall and its battery to separate from the camera: CA [21]. Constable Livermore, who was standing a couple of metres away from Lowe, then moved towards Williams to attempt to effect an arrest of Williams for assault: CA [21]. Williams then moved away and Livermore followed and then sought to grab and arrest Williams: CA [21]. In the course of that attempted arrest

[4] A matter which would have had certain consequences under s. 24 of the *Summary Offences Act.*
[5] Inspector Baker had a particular concern about fire given that a fire had occurred on the equivalent march the previous year, a concern which was "motivated by considerations of safety": CA [9].

Livermore and Williams fell down knocking over Cullen in the process. Cullen fell heavily with her head hitting the ground, which caused the injuries for which she later sought compensation: CA [21]. It is important to note that Constable Livermore's actions were held not to be tortious by the CA ([92], [227] – [235]) who also held that he was utterly without fault in his arrest of Williams: CA [111]-[116], [237]. On the appeal to this court Cullen does not challenge those findings in relation to Livermore.

12. ***Disputed Facts.*** The State disputes the following matters in Cullen's statement of facts in AS: (i) at AS [7] and [26] Cullen asserts that Lowe was 10 to 15 metres from DV; in fact, the finding made by the CA majority was that this distance was approximately 15 metres: CA [19]; (ii) at AS [20] Cullen states that "there was no serious risk of injury" posed by DV's attempt to light the flag; no such finding was made; in fact, there was a risk of unknown extent which was difficult to assess given the potential use of an accelerant to light a fire within a crowd: CA [85]; (iii) at AS [23] Cullen states that DV had not yet taken a lighter from his pocket at the point when the OSG officers responded; in fact DV was spraying the flag with an accelerant while next to him another protester held out a lighter in order to light the flag: Ex B, at start of BuzzFeed footage [RBFM 586]; (iv) at AS [27]-[29] Cullen states that the location of Williams' assault of Lowe was in the same area as the "melee" and "pushing and shoving"; however, Williams' assault of Lowe was 15 metres from that area: CA [19]; Williams was not participating in the "melee", nor "pushing and shoving" and nor were Lowe, Livermore or Cullen part of that group: CA [102]; (v) at AS [30] Cullen states that the primary judge's observation at J [64], that it was difficult to separate the OSG response from Williams' assault was not challenged, nor overturned; in fact, it was challenged and the majority found that Williams' assault of Lowe was quite separate from the OSG response: CA [102]; (vi) at AS [38] Cullen submits that the issue of Cullen not being in the immediate vicinity around DV was not the subject of argument in the CA; that is incorrect: the State contended in the CA that Williams' assault of Lowe and Cullen's accident were in a separate area to that of the OSG's response, which the majority CA accepted: CA [102]; (vii) at AS [52] Cullen submits that it was foreseen that unnecessary police action might inflame the *entire crowd* and cause injury; that is incorrect, what was foreseen was that if a police response inflamed individuals in the crowd, there was a risk to police in responding "without sufficient support": CA [141]; (viii) at AS [21], [56] and [59] Cullen submits that crowd safety was not threatened by DV's actions with the flag and that the crowd kept a safe distance during the speech; that is incorrect: the CA held that when DV started to squirt liquid on the flag "[o]ther people [were] in close proximity":

CA [16]); (ix) at AS [13] Cullen submits that the State conceded factual causation both at trial and before the CA; that is not correct: see [73] below.

13. In addition, Cullen in AS inappropriately attempts to alter the factual findings made by the CA by referring at [14]-[31] to evidence and argumentative inferences from that evidence.

14. ***Cullen's Two Cases in Negligence.*** In the courts below, Cullen ran two cases in negligence.[6] The first can be dealt with briefly because it was rejected by all judges in the CA and is not the subject of appeal to this Court. That case was that Livermore acted negligently in his attempt to arrest Williams. The CA not only rejected that case but found that Livermore had behaved in an exemplary fashion: CA [111]-[116], [237].

15. The second case (the subject of this appeal) was that the OSG officers' intervention into the crowd of protesters was negligent and that it indirectly caused Cullen's injuries. On this second case, Cullen asserted that the OSG officers owed her a duty of care in relation to the *manner* in which they engaged in that intervention. She maintained that that duty was owed to all bystanders – including those (like Cullen) 15 metres or more away.

16. The risk of harm alleged[7] by Cullen was that the police intervention may cause the crowd to "react unfavourably and become unruly" (CA [60]) and that the "negative reaction" thus provoked (CA [77]) may have the consequence "that people would react in a criminally violent manner to the actions of the OSG officers" (CA [77]) and that a foreseeable consequence of that may be "to cause harm to those who are *in close physical proximity* to where Mr Dunn-Velasco was" (CA [72]).

17. It is most important to note that Cullen's case was that the police should have taken reasonable care not to "provoke" (CA [101], [102], [103]), [182]), "antagonise" (CA 98]) or "inflame" (CA [88], [226], [242]) the crowd by their intervention lest the risk of harm noted at [16] above eventuate.

18. The breach of duty relied upon by Cullen[8] focused upon the following acts of alleged negligent intervention: (i) the number (at least four)[9] of police who intervened; (ii) the police rushed in quickly; (iii) carrying one (possibly two) small fire extinguishers; (iv) without a prior announcement.

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[6] An additional case in battery was rejected by the CA: CA [111]-[116].
[7] In *Electricity Networks v Herridge* (2022) 276 CLR 271 at [20] it is noted that the identification of the risk of harm is relevant to the existence and content of any duty of care.
[8] CA [43]: "what was impugned was [the OSG officers] rushing towards [DV] and using one or more fire extinguishers on the flag, which it was said caused a crowd reaction, which led to the actions of Williams, which led in turn to the harm to [Cullen]".
[9] AS [23] refer to "at least four OSG officers".

19. The alternative course which Cullen suggested should have been adopted (CA [83], [84]) (which Cullen said would have been compliant with the duty she alleged) was: (i) only one officer should have intervened – not four: CA [84]; (ii) that officer should have walked in – not rushed: CA [84]; (iii) there should only have been one small fire extinguisher – not two; (iv) an announcement should have been made prior to the intervention: CA [83].[10]

20. On causation in fact (CLA s 5D(1)(a)), Cullen's case was that but for the negligent manner of the OSG officers' intervention, she would never have been injured. That is, Cullen asserted that, if the OSG officers had intervened in a manner which was not negligent, she would not have been injured.

21. On the scope of the State's liability (CLA s 5D(1)(b)), Cullen's case was that the State's liability appropriately extended to the consequences of Williams' intentional criminal act notwithstanding that Williams' criminality was the proximate cause of Cullen's injuries (which were sustained during Williams' arrest).

Part: V: Appellant's Argument

22. ***Duty alleged.*** The scope of the duty of care relied upon below by Cullen has been noted at [15] – [17] above.

23. ***Statutory Context.*** In a case involving a disputed duty of care involving a statutory authority it is necessary to start[11] with the relevant statutory context, its terms, scope and purpose. A number of statutory provisions are relevant to the issue of duty of care in this case. These are discussed by the majority at [42]-[45] and by White JA at [170]. The principal provisions are as follows. Section 6 of the *Police Act* 1990 (NSW) provides that the NSW Police Force has a number of functions: to provide "police services" for NSW; to exercise any function conferred on it by the *Police Act* or any other Act; and to do anything necessary for or, incidental to, the exercise of its functions. Section 6(3) provides that "police services" *include* services by way of prevention and detection of crime, the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way. The prescribed form of oath referred to in s 13 of the *Police Act* obliges officers to cause His Majesty's Peace to be kept and observed and to prevent to the best of their power all offences against that peace: CA [171]-[172]. Also important is s 4(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("*LEPRA"*) which notes that that Act does not limit "the functions, obligations and

[10] The content of that announcement has never been articulated by Cullen.
[11] *Electricity Networks v Herridge* (2022) 276 CLR 271, at [20], [32].

liabilities that a police officer has as a constable at common law" and that the functions that a police officer may lawfully exercise (whether or not under that Act) including "powers of protecting property". Section 4(2) of *LEPRA* refers to the powers of police "to deal with breaches of the peace". Section 14(1) of the *Police Act* notes that a police officer has the functions conferred or imposed on a constable by or under any law (including the common law) of the State. Also relevant is s 230 of *LEPRA* which provides for the use of "such force as is reasonably necessary" when exercising any function. These various statutory provisions clearly envisage that various "police services" and various other powers and functions (including incidental powers) are able to be exercised by the police as those matters have been understood by the courts and the community over time.

24. ***History.*** The police have long exercised various public powers, functions, and duties which come within the notion of "police services"[12] in s 6(3) of the *Police Act*. These have been discussed in many cases and include the following: a duty to prevent breaches of the peace and maintain public order; a duty to investigate criminality; a duty to prevent and combat crime; a duty to enforce the law and bring offenders to justice; a duty to protect persons (including police officers); a duty to protect property and prevent it from being damaged; and a duty to apprehend criminals.

25. ***Incongruity: private duty of care and public duties, powers and functions.*** It is well established that the courts will not uphold the existence of a duty of care if that alleged private duty is not congruent[13] with the public duties or functions of a defendant statutory authority. That principle applies to incongruity between the alleged private law duty of care and the relevant statutory framework. It also applies to incongruity between the alleged duty of care and the public duties and functions of a statutory authority which have been recognised by the courts.

26. These principles of incongruity, incompatibility and disconformity[14] have been applied to alleged duties of care involving the police by the High Court: *Stuart v Kirkland Veenstra* (2009) 237 CLR 215 at [113]; *Tame v NSW* (2002) 211 CLR 317 at [26], [57]-[58], [126], [123], [298], [335]-[336].[15] They have also been applied in police negligence cases by intermediate courts of appeal: *Thompson v Vincent* (2005) Aust Torts Reports 81-799 at [154] ("public law duties of police… not consonant with recognition of private law duty of

[12] Probably a matter of legislative fact, although an inclusive list is found in s 6(3).
[13] Or even does not "sit well": *CAL No 14 Pty Ltd v MAIB* (2009) 239 CLR 390 at [41].
[14] Cf. *Electricity Networks v Herridge* at [27]: "inconsistent…incompatible…incoherent".
[15] See also (more generally) *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 at [146], [150]. [152]; *Sullivan v Moody* (2001) 207 CLR 562 at [55]-[62] and *Electricity Networks v Herridge* at [27].

care in favour of a particular member of the public"); *Cran v SNSW* (2004) 62 NSWLR 95 at [40] ("chilling effect of a risk of civil liability"; "detrimentally defensive frame of mind"); *State of New South Wales v Tyszyk* [2008] NSWCA 107 at [125] ("tendency to discourage the due performance of …its statutory duties"); *Halech v State of South Australia* (2006) 93 SASR 427 at [110] ("it would constrain the proper performance of those duties to impose a duty of care"- Besanko J citing Hayne J). In *ACT v Crowley* (2012) 7 ACTLR 142 Lander, Besanko and Katzmann JJ noted the following at [274]:

> "The discharge by the police of their public duties cannot be constrained or limited by the fear that in carrying out those duties police officers may be forced to be liable to suspected criminals, victims or bystanders, because that will impede the discharge of those duties."[16]

27. It is submitted that recognition of a duty of care of the scope relied upon by Cullen would not be congruent (etc) with the various public duties, functions and powers of the police – statutory and otherwise. More particularly, it is submitted that a duty of that scope: (i) would tend to impede the police in their discharge of their duties and functions as police; (ii) would constrain the due performance of those duties; and (iii) would not be consonant or congruent with the public duties and functions of police.

28. It is also submitted that the recognition of a duty of care of the scope relied upon by Cullen ("the Cullen duty") would also not be congruent (etc) with the requirements of the various public duties and functions of the police in circumstances such as arose in the present case. For example: (i) the public duties will often require speed of action and due dispatch, but the Cullen duty requires that the police must walk in and not "rush"; (ii) the public duties may require the use of force (often considerable force) but the Cullen duty has a tendency to inhibit substantially the use of force; (iii) the public duties may require the deployment of police in numbers but the Cullen duty requires that those numbers be kept to a minimum; (iv) the public duties may involve activity which tends to provoke or antagonise protesters, but the Cullen duty requires that such provocation be eliminated or kept to a bare minimum; (v) the public duties may require the police to engage in activity which may be regarded by some as heavy-handed or insensitive whereas the Cullen duty requires that such activity be eliminated or kept to a bare minimum; (vi) the existence of the Cullen duty would tend to inhibit the due performance by police of their duties in a protest situation; for example it would inhibit arrests, interventions to deal with incidents, minatory conduct to discourage

[16] At [276] the Court refers to *Calveley v Chief Constable* [1989] AC 1228 at 1238F: "prejudice the fearless and efficient discharge by police officers of their ….public duty."

violence or aggression, the use of riot shields, batons and other riot paraphernalia, the deployment of mounted police etc; (vii) the Cullen duty 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; (viii) the Cullen duty requires that disquiet, unrest and upset among the protesters be eliminated or minimised, but the due performance of the public duties may often require that the police upset some people; (ix) the protection of persons and property may require that a spare fire extinguisher or other equipment be carried, but the Cullen duty treats that as a breach of duty; (x) the due protection of persons and property may require the proleptic deployment of an extinguisher to prevent the lighting of a fire, but the Cullen duty (apparently) treats that as a breach of duty; and (xi) the due performance of police duties and functions in a protest situation may in some situations require a measure of intimidation and even minatory conduct on the part of the police (eg to discourage violence), but the Cullen duty requires that those techniques be eliminated or minimised.

29. These various examples – which are not exhaustive – show that in relation to this protest (and no doubt others) the due performance by the police of their public duties, functions and powers is apt to pull one way and compliance with the duty alleged by Cullen is apt to pull in the opposite direction. It is submitted that police in doing their job at protest marches should not be constantly on tenterhooks for fear that anything they do (or omit to do) may *provoke* some emotional reaction in someone which may result (albeit indirectly) in criminal conduct which may occasion personal injury.

30. ***Control.*** Nor does the factor of control assist the plaintiff. In *Stuart* at [113] three justices referred to "the degree and nature of control exercised over the risk of harm that has eventuated" as a significant factor on duty. Reference was there made to *Graham Barclay* at [150] where two justices referred to *Agar v Hyde* (2000) 201 CLR 552, noting that "a form of control over the relevant risk of harm, which, …, is remote, in a legal and practical sense does not suffice to found a duty of care". In *Graham Barclay* at [152] it was also noted that "[c]ontrol over some aspect of a relevant physical environment is unlikely to found a duty of care where the relevant harm results from the conduct of a third party beyond the defendant's control" citing *Modbury Triangle v Anzil* (2000) 205 CLR 254. And in *Stuart* at [114] it was noted that where (as in this case) some person other than the defendant "alone… was the source of [the] risk" the factor of control will be absent. In the present case the control exercised by the police over the risk of harm that eventuated was slight,

indeed bordering on the evanescent. The police did not organise the march: the organiser was Bassi who had a form of control and responsibility noted under the relevant statute.[17] Accordingly, it was Bassi whom the police asked to discourage the ignition of the flag: CA [16]. Nor did the officers have any control over the third-party criminal (Williams) who was effectively responsible for the injury to the plaintiff. The element of control in the present case was only partial and only in relation to a very small area "in close proximity to"[18] the area of the police intervention. The police were dealing with an inherently uncontrollable situation. They had no control over Williams and little if any control over DV. They also had little if any control over the crowd or its reaction to their intervention. And the potential control that the police could exert was restricted by the limits of their statutory powers and duties.

31. ***Third party criminal act***. The criminal act of the third party (Williams) should also be treated as outside the scope of any duty in the present case. As noted at [30] above, this issue is connected to the absence of control. One starts from the general proposition that there is no duty at common law to control someone to prevent him from doing damage to a third-party: *Smith v Leurs* (1945) 70 CLR 256 at page 262. There are clear policy grounds for the courts to be reluctant to hold the police responsible in tort to members of the public generally for criminal behaviour. Here, as the majority noted, there was distinct, significant criminal action by Williams (CA [109]) and Williams' act was a "free, deliberate and informed act": CA [109]. The police had no duty to prevent the criminal acts by Williams, had no control over Williams and no knowledge of what Williams had planned to do. Their absence of control over Williams was one of the reasons why they had no control over the source of the risk of harm and little if any control over the harm that ultimately eventuated. The fact that the conduct which is the cause of the plaintiff's injury is criminal conduct "is of great importance in deciding not only what, if any, duty is owed to prevent its commission but also questions of breach and causation": *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [24].[19]

32. ***Vulnerability and Dependence.*** AS do not emphasise Cullen's vulnerability and dependence upon police as a factor supporting her own duty of care. Cullen had no "special vulnerability" (*Modbury* at [43]) and special dependence upon the police. In *Stuart* at [113] it was noted that an evaluation of the relationship between the holder of the power and the

[17] *Summary Offences Act 1988* (NSW), s 23.
[18] To quote counsel for Cullen in the NSWCA: CA [72].
[19] See also *Modbury Triangle v Anzil* (2000) 205 CLR 254 at [19], [20]-[23], [42]-[43], [111], [117].

person to whom it is said that a duty of care is owed will require examination of "the degree of vulnerability of those who depend on the proper exercise of the relevant power". In that regard, reference was made to *Graham Barclay* at [149]; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 and *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [44]-[46], [91]-[93] and [100]. In *Burnie* at page 551 reference was made to the plaintiff being "in a position of special vulnerability and dependence" and being "specially vulnerable to danger if reasonable precautions are not taken" by the defendant, where the plaintiff had no control and the defendant had a large measure of control. In *Crimmins* at [93] McHugh J referred to a situation where "the plaintiff could not reasonably be expected to adequately safeguard himself or herself…from harm". In the present case, the plaintiff (who was not in the immediate vicinity of the police incursion) cannot be said to have been in a position of special vulnerability and dependence upon the police in relation to the risk of harm that materialised, namely, the criminal act of Williams.

33. ***Cullen not in immediate vicinity.*** Moreover, the actions of the OSG officers cannot be said to have inflicted personal injury on persons in the immediate vicinity of the operational response: CA [79]. There was no infliction of injury by the police on Cullen: the relevant harm occurred indirectly through a number of emotional reactions through to the actions of Williams. Nor was Cullen in the immediate vicinity of the operational response: CA [72], [79], [102]. In that regard, it is notable that Lord Mance in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at [97] referred to "police liability for positive negligent conduct which foreseeably and *directly* inflicts physical injury on the public".[20] The notions of "immediate vicinity" and directness are to be compared with the indirect chain of causation here which passed through at least two intermediate emotional responses, namely, the crowd reaction and the reaction of Williams.

34. ***A duty not to provoke emotional reactions?*** A further difficulty is that there are difficulties in Cullen asserting that the police are under a duty not to provoke emotional or psychological reactions in members of the public. The various duties, functions and powers of the police noted above will very often mean that their effective exercise would be inconsistent with a duty requiring police officers to take care in discharging those duties,

[20] In *Fuller-Wilson v State of New South Wales* (2019) Aust Torts Reports 82-413 at [70] Basten JA stated that Lord Reed's judgment in *Robinson* was inconsistent with the decision of the High Court in *Graham Barclay* and added that, if *Robinson* were to be accepted in Australia, it may be on the narrower basis identified by Lord Mance at [97].

powers and functions to protect members of the public from emotional disturbance: *Tame* at [26]. Indeed provoking some form of emotional reaction - particularly in a protest situation - may be part and parcel of the performance of a police officer's duties. In *Robinson* at [60] Lord Reed referred to *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495 as a case where damages had been sought in respect of a psychiatric illness allegedly suffered as the result of "insensitive treatment by officers investigating an incident" and noted that the House of Lords had rejected a duty of care because "on ordinary principles, behaviour which is merely insensitive is not normally actionable, even if it results in a psychiatric illness".[21]

35. ***No precedent.*** Finally there would be appear to be no precedent for a duty of care of the scope relied upon by Cullen. As just noted, there are difficulties about a duty not to *provoke* emotional reactions.[22] It is also difficult to assert that the police should be under a duty of care not to "provoke" or "inflame" a situation by insensitive behaviour. Cullen has not so far supported the scope of her alleged duty by reference to any authority. There does not seem to be any authority which supports such a case.

36. ***Cullen's Argument on Scope of Duty.*** Faced with these difficulties on the scope of duty, AS raise a number of matters.

37. First, AS at [2](a)-(b), [39]-[50] focus on the scope of the duty of care formulated by the CA majority at CA [71], [72] and [79] and assert that if the words "persons in the immediate vicinity"[23] are changed to "bystanders"[24] then the scope of the majority's duty applies to Cullen. However, that ignores the formulation of the scope of the duty by the majority at [79] which refers to "the risk of the OSG officers' actions *inflicting physical injury* on persons in the immediate vicinity of [the] operational response". That duty is obviously confined to the police inflicting physical injury on those in their immediate vicinity and would not extend to the police engaging in "provocative" activity which then causes an emotional reaction in the crowd as an indirect result of which a bystander 15 metres away reacts by committing a criminal offence which results in physical injury to the plaintiff.

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[21] See also: *Brooks* at [17] and the observations at [30] that a duty not to cause offence would tend to inhibit a robust approach and impede fearless and timely performance by police and result in "an unduly defensive approach in combating crime"; and *Calveley v Chief Constable* [1989] AC 1228 at 1236 B, 1238 A – F.

[22] The CA, in describing Cullen's case, uses the word "provoke" (or a synonym) on multiple occasions: CA [98], [101], [102], [103], [182].

[23] Picking up the formulation of counsel for Cullen in the CA that the duty is owed "to those who are in close physical proximity to where [DV] was": CA [72].

[24] Or the term "immediate vicinity" is given a very broad interpretation to include the area outside where the police are located.

Accordingly the majority held that the duty discussed at CA [71], [72] and [79] was not breached: CA [88]. In any event, even the duty adopted by the CA majority is problematical given the matters noted at [23] – [35] above.

38. Secondly, AS at [53] submit that "the relevant risk of harm must extend to the risk to everyone in the crowd suffering harm from the resultant confusion and chaos that might arise from the OSG officers' activity, however that harm is realised". However, that submission seeks to generalise the scope of the duty in an inappropriately broad way and also obscures the fact that any duty relied upon by Cullen must encapsulate a case that encompasses any *police activity* which *provokes* an emotional reaction in one or more protesters which then causes a further emotional reaction that triggers a criminal offence that results in the plaintiff being injured. A duty of that scope is unsustainable.

39. ***Breach of Duty.*** The primary judge dealt with breach at J [133]-[140]. The CA majority dealt with breach at [80]-[88]. White JA agreed with the primary judge at [226]. The majority held that there was no breach of the duty found by the majority or of the alternative duty articulated by Cullen: CA [88]. Importantly, at CA [88] the majority stated that they did "not agree with the primary judge's assessment that the actions of the OSG officers were calculated to inflame the situation and create a melee as happened".

40. The plaintiff's case below was that the manner of police intervention was disproportionate (despite the imminent ignition of an Australian flag with accelerant) because of the number of police officers who intervened, because one or two carried small fire extinguishers, and because they moved quickly without a prior announcement. The primary judge formulated the approach which the police should have taken as follows (J [134]):

> "In this case simply announcing their arrival to the crowd would probably have sufficed. A single officer with a fire extinguisher walking through the crowd to arrive at the scene of the possibly impending ignition would have achieved all of the objectives the OSG team seems to have in mind."

41. The first problem with that approach of the primary judge (adopted by Cullen in argument in the CA) is that the actions of the police were very close to those which the judge said "would…have sufficed": J [134]. Thus: one officer, not four; one fire extinguisher, not two; walking, not rushing; announcing their arrival, not intervening "without warning". The closeness of the suggested "reasonable" course to what actually happened obviously makes it difficult for the plaintiff to establish that what the police did was "unreasonable".

Moreover (as will be noted at [44], [49] – [51] below) each of the relevant integers in the allegedly "unreasonable" approach is clearly justifiable and not unreasonable.

42. Secondly, as noted at [39] above, the CA held at [88] that "the actions of the OSG officers were [not] calculated to inflame the situation and create a melee as happened". That finding alone is sufficient to destroy Cullen's case.

43. Thirdly, the police had a number of other obligations and responsibilities which needed to be considered in determining whether their intervention exhibited a lack of reasonable care: CA [81]-[82]. These are discussed at [27] – [29] above and included the "risk posed to the crowd by an attempt to light the flag": CA [81]. The countervailing obligations and responsibilities included the following: the need to prevent breaches of the peace; the need to protect persons and property; the need to safeguard the safety of other police; the need to prevent crime; the need to enforce the law; the need to prevent violence and disorder; the need to apprehend criminals; the need to preserve evidence; the need to detect crime and to bring offenders to justice; the need to prevent disturbances in public places. Those various responsibilities required numbers, speed and acting without warning plus additional fire equipment should it fail or be taken out of commission.

44. Fourthly, there was an obvious need for speedy and decisive action (often stressed in the cases) to deal preemptively with the serious risk of fire in a crowd, particularly where accelerant was involved: CA [81], [86]-[87].

45. Fifthly, as will be noted in more detail at [49] – [51] below, the other acts of reasonable compliance suggested by the primary judge were impractical (CA [82]) and obviously so.

46. Sixthly, as to magnitude of risk and probability of its occurrence, a crowd reaction is not a risk of great magnitude, although it is not unlikely. Conversely, a risk of serious injury as an indirect result of criminality consequential upon a crowd reaction is of greater magnitude, but is not particularly likely and certainly not the "natural and probable result" of a police incursion: *Dorset Yacht v Home Office* [1970] AC 1004 at 1032D per Lord Reid. That Williams' conduct was criminal conduct is relevant to breach and the reasonableness of the police response must be gauged only after taking that criminal conduct into account: *Adeels Palace v Moubarak* at [24].

47. Seventhly, s 5B(2)(d) of the CLA refers to the social utility of the activity that creates the risk of harm. There is a clear social utility in the various acts of the police in suppressing crime, preventing breaches of the peace, maintaining public safety, and otherwise performing their various duties at rallies and protests. Indeed AS [76] concedes as much.

48. Eighthly, as the majority noted at CA [84]-[85], the OSG officers needed to make a rapid decision under pressure in the field (*Woodley v Boyd* [2001] NSWCA 35 at [37]) and any assessment of reasonableness must take full account of that, particularly when their actions and decisions are viewed with the benefit of hindsight: CA [87]. Where a situation is dynamic, potentially dangerous and difficult, many variables (both known and difficult to ascertain) need to be balanced. In that situation there is a need for quick decision-making and the police must be allowed a substantial margin of latitude in their assessment of what reasonable care requires: CA [84].

49. Ninthly, there was obviously a need for more than one police officer. Nor was the presence of four (or so) officers inappropriate. One officer could easily be blocked or overcome by force. And "there were risks to the safety of the police officers" (CA [84]) which needed to be taken into account. They needed to be able to protect one another in a potentially dangerous situation and a single officer would be very vulnerable. Moreover, a single officer could easily have been prevented by the crowd from stopping the lighting of the flag and otherwise doing what the situation required.

50. Tenthly, there was an obvious need for more than one extinguisher. A single fire extinguisher may fail and a fire ignited by an accelerant in a crowd of protesters is potentially very dangerous and may cause other fires requiring a number of extinguishers. The crowd or some violence by an individual may have rendered an extinguisher inoperable and an officer with a single appliance could easily have been disabled. The presence of a single additional extinguisher was an obvious prudential matter. An additional fire extinguisher was not only not negligent – a second extinguisher as a fail-safe was a vital necessity.

51. Eleventhly, there are obvious reasons why a failure by the police to announce their arrival to the crowd was not unreasonable: CA [83]. They were present in their blue uniforms and highly visible and therefore did not need to announce that they were police. If the announcement referred to a particular objective to be sought by the police, there was a risk that the crowd would impede the achievement of that object if it was announced. Moreover, there is no reason why such a preliminary announcement was advisable, let alone mandatory. And what would be the content of the announcement? That has never been clearly specified by Cullen.

52. Twelfthly, Cullen's expert (Mr Halpin) referred to a number of matters which make her case on breach of duty very difficult (CA [85]-[86]): (i) rallies are dynamic situations where

at times officers need to make decisions quickly (CA [85]; TS220.45 [RBFM 225]); (ii) officers need to make decisions based on what they see or experience in front of them (CA [85]; TS221.3 [RBFM 226]); (iii) lighting a fire within a crowd involves a level of danger (TS221.40 [RBFM 226]); (iv) a variable relevant to the level of danger is whether an accelerant is used (CA [85]; TS222.29 [RBFM 227]); (v) if an unknown accelerant is used, that creates an unknown degree of risk, which is difficult to assess (CA [85]; TS222.33, 223.37 [RBFM 228]); (vi) if a person is about to light a fire and people move closer, those people are potentially exposed to an increased risk (CA [85]; TS224.34 [RBFM 229]); (vii) if the forward commander had safety concerns about a fire that was about to be lit, a first reasonable step would be to ask the organiser to prevent that fire (CA [86]; TS225.13, 29 [RBFM 230]), which is what the commander did (CA [16]); (viii) if the organiser could not, or would not, prevent the lighting of the fire, that would be a cause for concern for the forward commander (CA [86]; TS225.34 [RBFM 230]); (ix) if the senior officer present genuinely formed the opinion that there was a threat posed to public safety, then it would be appropriate for that officer to do something about it (CA [86]; TS226.43 [RBFM 231]); (x) if it was practical and due account was taken of other risks, it would be appropriate to attempt to prevent the lighting of the fire (TS227.5 [RBFM 232]); and (xi) once an officer decided upon the best action to take, that action would need to be decisive to prevent the risk from eventuating (CA [86]; TS227.10-16 [RBFM 232]).

53. ***Cullen arguments on Breach of Duty – Cullen's New Case.*** Cullen addresses the issue of breach of duty at AS [54]-[60]. Cullen's approach is surprising for a number of reasons.

54. First, Cullen makes little or no response to the problems with her case on breach, which the CA majority found to be substantial, regardless of how the duty of care is formulated: CA [88].

55. Secondly, in order to avoid the difficulties on breach Cullen attempts to put an entirely new case which was never run in the courts below. That new case is not based on the *manner* of the police intervention being unreasonable (e.g. too many police, one too many extinguishers, no announcement etc), which was the case run below. Cullen's new case is that it was wholly *unreasonable for the police to have intervened at all*: AS [60]. However, that case has never been argued below, has not been considered by the judges below and was not put to the various witnesses – including Cullen's own expert, who conceded that some action to prevent the lighting of the fire was appropriate: CA [86]; TS226.33-227.5

[RBFM 231-232], and if that new case had been run below, the State would have conducted its case differently.

56. This new case seems to have been formulated because of the difficulties (noted above) of the case presented below – including the problems with causation: see [68] – [72] below. Moreover, there are obvious difficulties with Cullen's new case and the arguments advanced in support of it.

57. First, contrary to AS [56] it is obviously not unreasonable for the police to engage in some form of intervention in order to attempt to prevent the lighting of a fire with accelerant in the middle of a crowded protest contrary to the restrictions on that protest. It is impossible to suggest otherwise and Cullen's own expert conceded as much: TS226.33-227.5 [RBFM 231-232].

58. Secondly, contrary to AS [56] – [58], it is incorrect to suggest that there was no threatened breach of the peace and, even if that were true, police intervention to prevent a fire from being ignited with accelerant was not inappropriate given their various other powers and responsibilities.

59. Thirdly, contrary to AS [57] and [59] it is incorrect to suggest that as a matter of law NSW police have no duty to prevent breaches of the peace. The following cases say otherwise: *Horne v Coleman* (1929) 46 WN (NSW) 30, at 31; *Thompson v Vincent* at [152]; *State of New South Wales v Klein* (2006) Aust Torts Reports 81-862 at [16].

60. ***Scope of State's Liability: s 5D(1)(b).*** Causation *in fact* under s. 5D(1)(a) is dealt with in Part VI below. Section 5D(1)(b) of the CLA imposes an additional requirement that it be "appropriate for the scope of the negligent person's liability to extend to the harm…caused". And s 5D(4) provides that for the purpose of determining the scope of liability, the court is to consider "amongst other things" whether or not and why responsibility for the harm should be imposed on the negligent party.

61. The primary judge did not address this issue at all. The majority addressed this issue at CA [93]-[110] where various matters are noted in support of the conclusion that it was not "appropriate for the scope of [the State's] liability to extend to" Cullen's injury. The majority reached that conclusion noting at [110] that "even if we had reached a different view with respect to the issues of duty and breach… we would still have upheld the [State's] appeal, insofar as it related to liability arising from the actions of the OSG officers, because causation was not established". The majority stated their principal conclusions at [109]:

> Here, we do not consider that it is appropriate for the scope of liability arising from a duty of care of the kind found by the primary judge to extend to harm caused by the actions of another adult person in the crowd, some 15 metres away from the conduct found to be in breach, undertaking a free and deliberate act of assaulting a police officer in order to impede her gathering evidence in the execution of her duty. That is not the very kind of thing the putative duty was imposed to prevent. It is not the kind of thing which reasonably can be characterised as occurring in the ordinary course of things after the putative breach. It was the distinct, significant criminal action of Williams that led to Livermore undertaking the arrest. And it was the difficulty of effecting that lawful arrest which led to the respondent being injured.

62. Moreover, the matters discussed at [23] to [35] above on scope of duty are also relevant to the issue of scope of liability.

63. ***Cullen arguments on scope of liability in s 5D(1)(b).*** At AS [61]-[76], Cullen makes a number of points in relation to scope of liability under s 5D(1)(b).

64. First, at AS [71] it is submitted that the presence of an "independent, free and deliberate choice" by a third-party to commit a criminal act does not of itself determine causation and that an assessment must be made of the relevant surrounding circumstances. However, the CA majority took account of that matter: CA [95], [109].

65. Secondly, at AS [73] the distance of 15 metres between the OSG officers and Williams' criminal act is said to be irrelevant. However, the importance of that distance as a relevant factor is that the police had no direct control over that particular physical environment nor any particular control over the criminal conduct of Williams: *Graham Barclay* at [152].

66. Thirdly, at AS [75] it is asserted that because a hostile response towards the police involving criminal conduct was in fact foreseen as a possibility by the police it was therefore the very thing which fell within the scope of the duty of the OSG officers to take reasonable care to prevent. That is a non-sequitur. And mere foreseeability does not ground a duty of care. Nor (unlike cases like *Dorset Yacht*) did the State have control of and responsibility for the criminal miscreant. Nor were Williams' actions the "natural and probable result" of the police intervention: *Dorset Yacht* at 1032D per Lord Reid. Moreover, that argument assumes that Cullen has established that the prevention of such criminal conduct was within the scope of the duty of the police. As noted at [23] – [38] above, that has not been established. And, even if it had been, that does not of itself determine the scope of liability under s 5D(1)(b) in Cullen's favour: *Wallace v Kam* (2013) 250 CLR 375 at [23]; the scope of liability must take due account of "the purposes and policy" of this area of the law: see [23] – [35] above.

67. Finally, at AS [76] various policy matters are raised in support of extending the scope of liability to the circumstances of this case. A number of those policy matters favour the police in this context, e.g. the importance of the role of police in maintaining public safety. And other policy matters support the constriction of the scope of the liability of police in protest situations: see [23] – [35] above. Moreover the emphasis at AS [76] on the police having a duty not to "inflame" (or "provoke") a crowd is controversial and underlines the absence of any supporting precedent for such a case in the case law: see [35] above. And the suggestion that independent criminal action by a third party is the sole reason relied upon by the State to avoid legal responsibility substantially mischaracterises the State's case: see CA [93]-[110] and [23] – [35] above.

Part: VI: Two Notice of Contention Issues

68. ***Causation in Fact.*** Causation in fact is dealt with by the primary judge at J [142]-[151]. At CA [94] the majority adopt the primary judge's conclusion on factual causation at J [149] that "but for the police intervention no issue would have arisen with … Williams".

69. The difficulty with these approaches is that they misstate[25] the relevant test of factual causation. The test is not whether "but for" the intervention of the police Cullen would not have been injured. That involves an incorrect comparison of what actually happened with what would have happened if the police had *never intervened at all*. It is trite law that the correct approach is to compare what actually happened with a different counterfactual, namely, what would have happened if the police had not been negligent: CLA s 5D(1): "[a] determination that negligence caused particular harm", "the negligence was a necessary condition of the occurrence of harm"; s 5D(3): "if the negligent person had not been negligent". On this question Cullen bears the onus of proof: CLA s. 5E.

70. On the correct test the court needed to compare what actually happened with what would have happened if the police intervention had been conducted in a non-negligent fashion. That involves a determination of how a non-negligent intervention would have occurred. According to Cullen that would have involved an intervention by one officer, with a prior announcement, carrying one fire extinguisher, walking not running. On that argument, Cullen would then have to prove that if the intervention had been by a single police officer (etc) Cullen would never have been injured.

[25] Or misapply.

71. Moreover, that assumes that the non-negligent mode of police intervention is as Cullen suggests. The State submits that (assuming a finding of negligence) a non-negligent mode of intervention would have been even closer to what occurred than Cullen suggests.

72. The difficulty for Cullen is that she has not proved that her injury would not have occurred if there had been a non-negligent intervention by the police. And, given the closeness of her suggested non-negligent action to what actually happened, that will not be easy for Cullen to establish in this Court on a review of the record. The State submits that it is likely that a similar crowd reaction would have occurred even if the police had intervened in a non-negligent fashion to attempt to prevent the fire from being ignited. And, on the evidence of Williams, there is no reason to think that he would not have reacted in the same way as he did even if the police had intervened non-negligently. In short, causation in fact has not yet been established by Cullen and cannot be established on the evidence.

73. At AS [13] Cullen submits that the State "is [now] raising factual causation for the first time, having both at the trial and before the Court of Appeal conceded it." This is incorrect. No such concession was made at trial or in the CA. The State denied factual causation in its defence[26] and submitted that causation was not established in both its written[27] and oral[28] submissions at trial. In the CA, the State challenged (notice of appeal at [8]-[9]) the primary judge's causation findings (which related solely to causation in fact, as noted at CA [94]) and submitted that causation was not established. Moreover, the CA majority went on to make findings on factual causation (CA [94]) presumably because they thought that it was an issue on the appeal.

74. ***Section 43A of the Civil Liability Act.*** The text of s 43A is set out at CA [34]. The primary judge held (J [135]) - [141]) that the higher standard of care in s 43A(3) applied although he gave no reasons for that conclusion. The majority held that he was wrong: CA [34]-[46]. White JA came to the same conclusion: CA [214]-[221]. It is submitted that the primary judge was correct and that the judges of CA were wrong on this issue.

75. The police in intervening were exercising a number of statutory powers. See the discussion at [23] – [24] above and [77] below. White JA at CA [218] held that the police were exercising a statutory power: CA [218]. The majority found it unnecessary to resolve that question: CA [43] and [46].

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[26] Defence to ASOC at [45c] and [58] [RBFM 357-358].
[27] RBFM 415-416 at [104]-[105].
[28] TS269.48-270.9 [RBFM 274-275]; TS319.21-27 [RBFM 324].

76. Secondly, the majority and White JA concluded that the relevant power (or powers) being exercised were not "special statutory powers:" within s 43A because they were powers of a kind that persons generally are authorised to exercise without specific statutory authority (CA at [46], [218]-[221]). It is submitted that those conclusions were erroneous.

77. In their intervention the police were exercising a number of statutory powers which were of a kind that persons generally are not authorised to exercise (without specific statutory authority). Those powers included the following: a duty to protect persons from criminal acts (and otherwise); a duty to safeguard property; a duty to detect and prevent crime;[29] a duty to enforce the law; a duty to prevent breaches of the peace; a duty to maintain the King's peace; a duty to apprehend criminals and bring offenders to justice; a duty to protect fellow police officers from criminal acts and from injury; and a duty to prevent property from being damaged. The police also had various incidental powers and a power to use reasonable force, in performing their functions and duties.

78. These various powers are not qualitatively identical with or coextensive with the powers possessed by ordinary civilians.[30] Consequently, s 43A was applicable and the more onerous standard of care in s 43A(3) applied in the present case. For reasons noted at [39] – [52] above Cullen has not established breach of that standard or even the general law standard.

Part: VII: Time estimate

79. The respondent estimates 2.5 hours for argument.

Dated: 20 June 2025

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[29] The prospect of criminality on the part of participants in the assembly was increased once the restriction on lighting flags was breached: *Summary Offences Act*, s 24.
[30] In particular, a police officer has a *duty* to prevent breaches of the peace and to maintain the peace, not just a *right* to do so: cf CA [218].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	*Civil Liability Act 2002* (NSW)	1/1/2019 to 29/2/2020	ss 5B, 5C, 5D, 5E, 43A.	Version at time proceedings commenced below.	23/5/2019
2.	*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)	1/1/2017 to 30/3/2017	ss 4, 230.	Version in force at time of incident.	26/1/2017
3.	*Police Act 1990* (NSW)	6/1/2017 to 30/6/2017	ss 6, 13, 14, 201.	Version in force at time of incident	26/1/2017
4.	*Summary Offences Act 1988* (NSW)	1/11/2014 to 30/6/2017	ss 23, 24.	Version in force at time of incident	26/1/2017