


Law: Case note annotated example PDF


Note: this annotated resource uses a published case note: Alana Richards, 'Duty of care owed by police officers and development of the law of negligence in light of the *Smith v Victoria* decision', *Australian Civil Liability*, November 2018, pp. 105.108.

The structure of your case note may differ depending on the assessment instructions and the case.



A case note is a document that provides a description of the facts and reasoning of the judgment, and an analysis of the judgment's impact. In a case note assignment, the job of the student is to convince the marker that they understand the case and the legal issues. This would normally mean referring to relevant legal rules, both legislative and common law, and explaining what the ambiguity or legal issue was before the court.

This annotated resource is designed to help you with **part 1 (the case note)** part of your assessment.



This resource does **not** include the 'research assignment' component of the assessment. Please refer to our LearnHQ page on Law Essays.

Content warning

This case note refers to some sensitive material, including family violence. If you need support, please contact Monash's [counselling services](#).

Legend

 Good practice

 Needs improvement

 Comment

Annotated case note: Alana Richards, 'Duty of care owed by police officers and development of the law of negligence in light of the Smith v Victoria decision.'

In Australia, the courts have traditionally been reluctant to impose a duty of care on police officers to protect an individual from harm by a third party. In what may be a signal of change, in August 2018 the Supreme Court of Victoria in *Smith v Victoria*^[1] (*Smith*) refused to dismiss a claim for negligence against Victorian police officers by four plaintiffs for failing to protect them from family violence from a repeat offender, being the father of the three children and former partner of the mother (the perpetrator).

Important note: as this is a published case note, it includes footnotes. Your assessment instructions may have different requirements.

For a law assessment, you will usually **not** be required to use footnotes for part 1 'the case note' but **must** use footnotes for part 2 the 'research/analytical essay' component.

Summary of claim

In June 2015, the plaintiffs, Smith and her three children, commenced claims of negligence against the defendant being the State of Victoria.

The plaintiffs alleged the defendant owed a duty of care to affected family members named in extant family violence intervention orders to prevent breaches of those intervention orders. The perpetrator of the family violence (who was the subject of the intervention orders) was the biological father of the children, and the former partner of Smith between 2003 and 2012.

The bases of the plaintiffs' claims in negligence are "police tort claims" within the meaning of s 73 of the Victoria Police Act 2013 (Vic).

The defendant sought a summary dismissal of the negligence proceeding pursuant to ss 62 and 63 of the Civil Procedure Act 2010 (Vic). In the alternative, the defendant sought to strike out the allegations of a common law duty of care as pleaded.

Use headings for each section. Refer to the Australian Guide to Legal Citation for heading guidelines.

You may include a short summary. The opening paragraphs of a case note should usually cover the **facts** and **procedural history**. Procedural history is the information about what has been decided by which court (or courts) prior to the case that you are reading.

Background facts

Between 2005 and January 2014, the perpetrator committed multiple repeated acts of family violence against Smith and their daughters.

Between 29 March 2006 and 1 February 2013, the perpetrator was the respondent to four intervention orders, naming one or more of the plaintiffs as the affected family members protected by the terms of the orders.

The facts section should be short in comparison to the rest of the document. The primary focus for part 1 'the case note' should be on discussing the **reasoning of the judges**.

[1] *Smith v Victoria* [2018] VSC 475; BC201807859.

Legend



Good practice




Needs improvement



Comment

Smith only sought to restrain contact between the perpetrator and the children when he was intoxicated, not wanting the intervention orders to operate when he was sober. This created some issues with the police who appeared to prefer a full prohibition from the perpetrator attending the plaintiffs' residence. Pursuant to the intervention orders, the perpetrator was prohibited from assaulting, harassing, molesting, threatening or intimidating the plaintiffs, from approaching, telephoning or contacting them when affected by intoxicating liquor or drugs, from knowingly being at or within 100 metres of their home when affected by intoxicating liquor or drugs or from causing damage to property or causing another person to engage in the prohibited conduct.



A case note assessment at university is usually around 1,000 words, so your fact discussion would be shorter than this published case note. Most of the word count in a case note should be used on discussing the **legal reasoning** of the case.

Victoria Police behaviour

The behaviour of the Victoria Police in relation to a number of the key incidents of family violence is relevant to the plaintiffs' claim in negligence. A notable example is that despite an intervention order stating that the perpetrator could not attend the plaintiffs' house whilst intoxicated, there was an incident in 2006 when the police dropped him there when he was intoxicated.

In another incident, the perpetrator had called Smith telling her he would be attending her premises. The plaintiffs left the premises, however, when they returned, the house had been extensively damaged. Despite the incident being reported, police doubted the perpetrator had committed the crime or if he could be prosecuted for it because he had been invited onto the premises from time to time. No further investigation was taken by the police in respect of the incident.

In January 2014, after the plaintiffs had moved to a different location (and when there was no current intervention order in place), the perpetrator attended the new premises while intoxicated, verbally abused Smith, caused damage to the premises and then took her car.

She called emergency services, claiming she believed he was trying to run her over. She again called 000 after he left her vehicle, with the police attending and negotiating for the perpetrator to return to his home. Police took the perpetrator to the train station but no other action was taken by the police.

On numerous occasions Smith was verbally threatened over the phone (in contravention of the intervention orders) and upon reporting this to the police, she was informed that there was nothing they could do unless the perpetrator attended the premises.

The issue as to the duty of care

The duty of care owed by Victoria Police as pleaded by the plaintiffs included:

- a duty of care to prevent breaches of the terms of the extant intervention orders
- a duty to prevent breaches of the intervention orders by the perpetrator by reason of the relationship of proximity between the plaintiffs and the police officers, as a result of a number of “salient features”
- a duty of care to prevent family violence by repeat offenders
- a duty to prevent family violence by the perpetrator who was (by no later than 29 March 2006) a repeat family violence offender
- a duty of care to ensure compliance with Victorian family violence policies (including adopting a pro-arrest and pro-charge approach and completing a VP L17 Form for every incident of family violence reported to police)

In arguing the proceedings should be summarily dismissed, the defendant submitted that the duties of care pleaded by the plaintiffs did not exist, for the following reasons:

- There is no common law duty to act where no positive conduct of the defendant has created the risk of injury.
- Police officers do not owe a duty of care to individuals to investigate a complaint of actual or threatened conduct.
- The principles of conflicting duties weigh against imposing a duty on police officers.
- Two exceptions exist, neither of which apply in this situation, those being control and assumption of responsibility.

Common law duty to act

The defendant contended that “the High Court has consistently drawn a distinction between a positive act causing damage and a failure to act”[2] and, save for some exceptional relationships, the common law does not impose a duty on a person to act where no positive conduct of that person created the risk of injury to the victim. The defendant submitted that the relationship between members of the public and police force members was not a relationship that enlivens the exceptions to the general principles.

Identify the legal issues in the case. It can be helpful to also identify the claims of each party in relation to those issues.



Dot points can be used occasionally, i.e. to list elements, such as a party's claims. Be sure to use full paragraphs for most of the case note.



Duty of care owed by police

The defendant submitted that, absent exceptional circumstances, police officers do not owe a duty to an individual to investigate a complaint of actual or threatened conduct. In support of this contention the defendant relied on the decisions of *Slaveski v Victoria*,^[3] *Gesah v Ross*^[4] (*Gesah*) and *Gandy v Victoria*.^[5]

Consideration was given to the case of *Hill v Chief Constable of West Yorkshire*^[6] (*Hill*) where no duty of care was found after the plaintiff sued the police for failing to apprehend a serial killer before he killed her daughter. Australian courts have referred to the *Hill* case with approval.

The court considered the case of *Gesah* in which Beach J found there was no duty of care owed in the context of an investigation of criminal activity. He distinguished the cases of *Zalewski v Turcarolo*^[7] and *Victoria v Richards*^[8] (*Richards*) which both involved the infliction of physical injury by police in one-on-one situations.

Salient features

The plaintiffs submitted that the salient features that applied in this matter to give rise to a duty of care owed by police officers are those of foreseeability, knowledge, responsibility and control. This approach is consistent with the case of *Crimmins v Stevedoring Industry Finance Committee*^[9] (*Crimmins*).

In considering this submission, the court noted that the police officers knew or ought to have known the terms of the extant intervention orders. Beyond the intervention orders, the police obtained specific knowledge of the risk of harm to the plaintiffs by Smith's reports of various incidents and the police's attendance at her premises on a number of occasions.

Please note that the referencing in this published case note is different to the required referencing for most law students. Refer to the Australian Guide to Legal Citation and your assessment instructions.

For each legal issue, identify the case law that was considered. Refer to relevant facts if they assist in explaining the issue and the court's approach.

3. *Slaveski v Victoria* [2010] VSC 441; BC201007298.

4. *Gesah v Ross* [2013] VSC 165; BC201301747.

5. *Gandy v Victoria* [2006] VSC 480; BC200610382.

6. *Hill v Chief Constable of West Yorkshire* [1989] AC 53; [1988] 2 All ER 238.

7. *Zalewski v Turcarolo* [1995] 2 VR 562; (1994) Aust Torts Reports 81-280.

8. *Victoria v Richards* (2010) 27 VR 343; [2010] VSCA 113; BC201002918.

9. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; 167 ALR 1; [1999] HCA 59; BC9907273.

In this regard it was noted that the defendant accepted that the relevant focus of the salient feature of control was control of the risk of harm, not control of the Offender.

Concerning responsibility, the court observed:

As to vulnerability, the plaintiffs identified that both applicable legislation and policies recognise the vulnerability of victims of family violence. On the assumed facts, the plaintiffs were vulnerable to the consequences of any failure by the police to enforce the intervention orders. The vulnerability of the second to fourth plaintiffs was clear as they had no ability to protect themselves, and the responsibility of the police to protect them is commensurably greater.[10]

Court decision

The defendant's application to summarily dismiss the matter was dismissed by Dixon J of the Victorian Supreme Court.

His Honour referred to *Kuhl v Zurich Financial Services Australia Ltd*[11] in which it was emphasised that when determining the existence of a duty of care, those questions are determined by considering reasonable foreseeability and the salient features of the relationship between the plaintiffs and defendant.

In finding the court was required to consider the salient features approach articulated in *Crimmins*, Dixon J noted that this approach was adopted in *Gesah* and *Richards* in relation to the issue of police liability in negligence.

In distinguishing this matter from *Hill* in which it was found the police did not owe a duty of care in relation to the investigation of criminal activity, his Honour noted the salient features of proximity, knowledge and control were absent in *Hill*. He considered in the case before him the proximity between the plaintiffs and the police officers to be much closer. The plaintiffs were known to the police officers, the perpetrator was known to police and the police were aware that intervention orders had been made to protect the plaintiffs from harm.

Provide a clear summary of the decision. ✓
This section should then provide a detailed analysis of the decision in your own words.

While it's important to refer to the case law cited by the judges in their reasoning, remember that in **part 1/the case note** in a law assessment, you are usually **not** required to use footnotes. Use footnotes for your research assignment ('part 2' of the assessment).

Explain the legal reasoning. Identify the case law or legislation used by the judge/s, and how they applied it to the current case and relevant facts. ✓

10. Above n 1, at [138].

11. *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; 276 ALR 375; [2011] HCA 11; BC201102644.

The court considered that a summary dismissal of the matter would be an “extreme measure”[12] which would forever shut out the plaintiffs from seeking to prove their claim at trial. It was further noted that Australian common law has not affirmatively recognised that a police officer can never owe a duty of care. Accordingly, the court found that whether a duty of care could be owed on the basis identified in the plaintiffs’ claims needed to be determined on a close analysis of the facts.

← The case under discussion here has only a single judge. For cases with multiple judgments, make sure you discuss the legal reasoning of all dissenting and concurring judgments.



Dixon J noted that in the earlier authorities in which it was determined the police did not owe a duty of care to the plaintiffs, there had not been the requisite degree of proximity between the officer and the plaintiffs. In this case, there was a real issue as to whether there was the requisite degree of proximity which the plaintiffs should have the opportunity to ventilate at the trial (as well as having regard to the policy and legislative frameworks regarding domestic violence at the relevant time).

← In explaining the judge’s reasoning, note if they distinguish from previous cases, and why. ✓



Noting that the matter was “fact rich” and “fact intensive”, [13] Dixon J was not persuaded by the defendant that no duty of care could arise on the assumed facts and considered “a duty of care may at least be arguable”. [14] His Honour noted that there was no authoritative decision of any Australian court that denies the existence of a duty of care of the kind alleged in the “assumed factual matrix”, and accordingly found the court ought not to summarily dismiss the proceedings.

Further developments in New South Wales

Since the *Smith* decision, on 20 August 2018 the New South Wales Court of Appeal also considered a case regarding the duty of care owed by police officers to civilians in the case of *Fuller-Wilson v New South Wales*. [15] Mr Keith Wilson was killed in a motor vehicle accident and 6 months after his death, members of Mr Wilson’s family (the plaintiffs) attended the scene of the accident. Upon visiting the scene, they discovered parts of Mr Wilson’s foot and ankle as well as remnants of his clothing containing his remains, as a result of which they claimed to have suffered psychological injury.

← For a law assessment at university, this information would be used in **part 2** or the ‘**research assignment**’, as it discusses further developments in this area of law.



12. Above n 1, at [169].

13. Above n 1, at [171].

14. Above n 1, at [172].

15. *Fuller-Wilson v New South Wales* [2018] NSWCA 218; BC201809100.


The plaintiffs commenced proceedings against the State of New South Wales, alleging that officers were negligent in failing to remove Mr Wilson's remains from the accident site and by failing to warn the plaintiffs that his remains may be present at the scene.

The matter was summarily dismissed by the New South Wales Supreme Court on the basis that the officers did not owe a duty of care of the type that had been pleaded by the plaintiffs. The plaintiffs appealed the decision to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the orders of the first judge. The court noted in their decision that:

Although the weight of authority at the intermediate court level is against the duty for which the appellants contend, there is a point of possible uncertainty in High Court authority which would warrant permitting them to run their case at a trial.[16]

Implications

The above decisions demonstrate that the issue of whether police officers owe a duty of care to civilians will be the subject of further judicial consideration in the near future. The courts have recognised that it is not settled law that police officers can never owe a duty of care. The outcome of these two cases will be awaited with much interest.



The **implications** of a case and its **legal significance** should then be researched, analysed and discussed in detail in **part 2** or the '**research assignment**' related to your case.

Please note that each law unit may have different assessment instructions regarding case notes and case research assignments. **Read the assessment instructions carefully** to ensure you are using the correct format.

16. Above n 15, at [80].