

39/06; [2006] VSC 480

SUPREME COURT OF VICTORIA

**GANDY & ANOR v STATE OF VICTORIA**

Bongiorno J

1 December 2006

**CIVIL PROCEEDINGS – TORT – CLAIM FOR DAMAGES AGAINST STATE OF VICTORIA IN RESPECT OF THE ACTIVITIES OF POLICE OFFICERS IN EVICTING THE PLAINTIFFS FROM THEIR HOME – CLAIM FOR BUSINESS LOSSES INCLUDING DAMAGES FOR COMPENSATION FOR LOSS OF BREEDING STOCK AND BUSINESS – WHETHER POLICE OFFICERS LIABLE WHEN CARRYING OUT THEIR DUTIES – WHETHER AN ACTIONABLE DUTY OF CARE CO-EXISTS SO AS TO GIVE THE CITIZEN A PRIVATE RIGHT OF ACTION – WHETHER APPROPRIATE TO TERMINATE THE PROCEEDING.**

1. The duties which police officers have are duties owed to the citizenry as a whole to carry out their police functions. Those duties are inconsistent with a co-existing duty of care to any particular citizen which would sound in damages for its breach. The conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care and to the kind of judicial scrutiny involved in an action in tort is inappropriate.

*Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2; and

*Hill v Chief Constable of West Yorkshire* [1986] AC 53, applied.

2. Accordingly, where persons sought damages from the State of Victoria in respect of the actions of certain police officers involved in the eviction of the persons from their premises, no cause of action against the police officers and the State of Victoria could be made out. In those circumstances, it was appropriate to terminate the proceeding finally.

3. The plaintiffs claim is for pure economic loss. No right of action in negligence for pure economic loss can be made out in the circumstances.

*Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180; (1999) 164 ALR 606; (1999) 73 ALJR 1190; [1999] Aust Torts Reports 81-516; (1999) 15 Leg Rep 2, applied.

**BONGIORNO J:**

1. On 20 April 2006 Ashling Gandy and Carlton Gandy filed a writ in this court against the State of Victoria. The writ had endorsed upon it a statement of claim which asserted a claim against the State of Victoria in respect of the activities of a number of police officers in relation to the eviction of the plaintiffs from their home in Stradbroke in Gippsland. The plaintiffs' claim was for \$12.5 million being business losses which were said to have arose as a result of that eviction. Subsequent to the filing of the writ two further statements of claim have been produced by the plaintiffs, the last of which was produced by a document dated 31 November 2006 (sic).

2. That statement of claim, although it does not claim an amount of damages, claims 'general compensation' which I assume means a claim for damages as compensation for loss of breeding stock and business.

3. The claims against the various police officers allege misconduct by them in various ways. The statement of claim itself, said by Mrs Gandy to have been drawn with the assistance of a legal practitioner, has a number of deficiencies of form. However it is not form I am here concerned with. It is substance. When one reads the statement of claim it emerges that the allegations in respect of the police officers are allegations in respect of the way in which they performed their functions in that role. It is said that they were in breach of a duty or duties which they owed to the plaintiffs.

4. The statement of claim also contains a number of allegations against a number of other people, including officers of the Office of Police Integrity, the Ombudsman and a Magistrate. It

refers also to correspondence between the plaintiffs and various government officers including the Minister for Police and the Attorney-General. The thrust of the plaintiffs' claim must be a claim that the police officers mentioned in the document were in breach of some duty which they owed to the plaintiffs. It is at that point that the claim founders.

5. The third and current version of the statement of claim also has an added defendant Sergeant D. McIlwain, although there is no suggestion that Sergeant McIlwain was ever served with any documentation in the case. He is not a defendant although he is described as such in the current version of the statement of claim.

6. Mrs Gandy appeared today to defend the statement of claim against an attack made upon it by the State of Victoria that it did not disclose a cause of action and accordingly ought to be struck out and that as the claim foreshadowed in it was itself unable to be substantiated as a matter of law the proceeding itself should be summarily disposed of.

7. The question of law which arises can be relatively simply dealt with.

8. Sometimes a police officer may owe a duty of care to a citizen such as the occasion referred to by the Full Court in *Zalewski v Turcarolo*<sup>[1]</sup>, where a police officer negligently injured a citizen in circumstances, described by Hansen J, as 'on the spot' operational activities. And of course a police officer may be liable to a citizen in negligence for driving a motor vehicle, or carrying out other activities in the course of his duty as a police officer which would in any event breach a duty of care which he owed to a citizen.

9. The problem in this case is that the duty of care the statement of claim seeks to set up is not that type of duty of care. It is a duty of care with respect to the carrying out of the police officer's obligations *qua* police officer.

10. In *Sullivan v Moody*<sup>[2]</sup>, a case which did not involve a police officer but involved officers of a department charged with the welfare of children, the High Court considered the question of whether a duty of care existed and concluded that, having regard to the public duties which are imposed upon a person in the position of the defendants in that case no such duty of care should be recognised. The public duty precluded the co-existence of a private duty owed to a citizen.

11. In reaching that conclusion the Court, which consisted of Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ, posed the question: "How may a duty of the kind for which the appellants contend rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty?" Their Honours referred to a similar problem having arisen in other cases where public law duties existed. The Court relied particularly on a House of Lords decision, *Hill v The Chief Constable of West Yorkshire*<sup>[3]</sup>, where the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure in that case to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care and to the kind of judicial scrutiny involved in an action in tort was inappropriate.

12. Their Honours also referred to *Yuen Kun Yeu v Attorney-General (Hong Kong)*<sup>[4]</sup>, a case involving the responsibilities and discretions of a stockbrokers' registration authority, and *X v Bedfordshire County Council*<sup>[5]</sup> which involved a childcare situation.

13. The problem of imposing a duty of care in circumstances such as those alleged by the Gandys is that inevitably the police officer, and the social worker in *Sullivan v Moody*, will owe conflicting duties of care to various citizens. Thus an actionable duty of care cannot co-exist so as to give the citizen a private right of action. Having regard to the allegations which are made in this case it seems clear that the allegation of breach of duty alleged by the plaintiffs runs into the same problem. The duties which it is said the police have are duties owed to the citizenry as a whole to carry out their police functions. Those duties are inconsistent with a co-existing duty of care to any particular citizen which would sound in damages for its breach. Accordingly, in these circumstances no cause of action against police officers, and hence against the State of Victoria pursuant to s123 of the *Police Regulation Act* can be made out.

14. But there is another reason why the plaintiffs' claims are untenable. The claim made by the plaintiffs is for what the law refers to as pure economic loss: *Perre v Apand Pty Ltd*<sup>[6]</sup>. No right of action in negligence for pure economic loss could be made out in the circumstances pleaded.

15. No cause of action is disclosed by the statement of claim and it must be struck out on that ground. The question then arises as to whether there is any basis for permitting this proceeding to continue. Having regard to the general facts surrounding the case which have been referred to by Mrs Gandy, and are deposed to in the affidavit of Andrew Alexander Douglas Suddick of 5 October 2006, the versions of the statement of claim which have already been sought to be filed, and the affidavit of William Westray Burrell handed up in court by Mrs Gandy (which appears to be of little relevance to the plaintiffs' now case) it is clear that no claim could be formulated which would have any possibility of success. No statement of claim could be drawn which would allege facts which would give rise to the duty of care relied upon by the plaintiffs.

16. Accordingly it is appropriate that in this case the principle expounded in *Dey v Victorian Railways Commissioners*<sup>[7]</sup> be applied to terminate this proceeding finally. Accordingly, the proceeding should be summarily terminated by judgment for the defendant with costs.

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<sup>[1]</sup> [1995] VicRp 76; [1995] 2 VR 562; [1994] Aust Torts Reports 81-280.

<sup>[2]</sup> [2001] HCA 59; (2001) 207 CLR 562; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2.

<sup>[3]</sup> [1986] AC 53.

<sup>[4]</sup> [1988] AC 175; [1987] 2 All ER 705; [1987] 3 WLR 776.

<sup>[5]</sup> [1995] UKHL 9; [1995] 2 AC 633; [1994] 4 All ER 640; [1994] 3 WLR 853; [1994] 4 All ER 640; [1995] Fam Law 537; 94 LGR 313.

<sup>[6]</sup> [1999] HCA 36; (1999) 198 CLR 180 particularly at 192 per Gleeson CJ; 214 per McHugh J; 172 per Gummow J and 328 per Hayne J; (1999) 164 ALR 606; (1999) 73 ALJR 1190; [1999] Aust Torts Reports 81-516; (1999) 15 Leg Rep 2.

<sup>[7]</sup> [1949] HCA 1; (1949) 78 CLR 62; [1949] ALR 333; 23 ALJR 48.

**APPEARANCES:** For the plaintiffs: In person. For the defendant State of Victoria: Mr S Wotherspoon, counsel. Victorian Government Solicitor.

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