28/10; [2010] VSCA 113

SUPREME COURT OF VICTORIA — COURT OF APPEAL

STATE OF VICTORIA & ORS v RICHARDS

Nettle and Redlich JJA and Hansen AJA

19 April, 12 May 2010 — [2010] Aust Torts Reports 82-058

TORT – NEGLIGENCE – POLICE OFFICER DEPLOYING CAPSICUM SPRAY TO RESTRAIN OFFENDER – WHETHER DUTY OF CARE OWED TO BYSTANDER – *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, *TAME v NEW SOUTH WALES* [2002] HCA 35; (2002) 211 CLR 317; 191 ALR 449; (2002) 76 ALJR 1348 AND *ZALEWSKI v TURCAROLO* [1995] VicRp 76; [1995] 2 VR 562; [1994] Aust Torts Reports 81-280, CONSIDERED – APPEAL AGAINST REFUSAL TO STRIKE OUT CAUSE OF ACTION – APPEAL DISMISSED.

R. was present in a shop when police used capsicum spray during the arrest of an offender in the shop. R. claimed that she suffered injury as a result of the deployment of the spray and that the police officers owed her a duty of care to take reasonable steps to avoid causing her injury whilst carrying out their duties. The police officers unsuccessfully applied to the Supreme Court for the claim to be dismissed as the pleaded duty of care was untenable and that they did not owe R. a duty of care. Upon appeal—

HELD: Appeal dismissed.

1. The submission of the appellant police officers cannot be sustained. It has been recognised that people may be subject to a number of duties, provided they are not 'irreconcilable'. While a duty of care will be denied which is inconsistent with a duty which the law imposes on police in the exercise of their powers it is only where the duty of care 'would give rise to inconsistent obligations' that a duty should be denied. Such inconsistency may not be present when the performance of the one duty does not of necessity require action that would create a substantial risk that the putative duty, if it existed, would be infringed.

***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;**

***Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317; 191 ALR 449; (2002) 76 ALJR 1348; and**

***Zalewski v Turcarolo* [1995] VicRp 76; [1995] 2 VR 562; [1994] Aust Torts Reports 81-280, considered.**

2. If R.'s claim is not arguably covered by any accepted category of liability, a consideration of the facts bearing upon the relationship between R. and the police and an analysis of the salient features, such as legal policy, coherence of the law, conformity with other duties and obligations, foreseeability, degree of harm, and vulnerability do not compel the conclusion that R. must fail in her claim that such a duty exists.

3. The police officers' contention that the proposed duty of care was unarguable cannot be made out. Giving due weight to the imperative to preserve the autonomy of police officers in their operational judgments and decisions, it has not been shown that R.'s cause of action as pleaded involves an inconsistency between the police duty to apprehend, and the proposed duty to take reasonable steps to take care of R. It was open to R. to maintain her claim in negligence as there is no necessary incompatibility between the duty of the police to enforce the law by exercising their power of arrest and a duty to have reasonable regard for the welfare of third parties in doing so.

NETTLE JA:

1. I agree with Redlich JA.

REDLICH JA:

2. The plaintiff, Teresa Richards, commenced proceedings in the County Court seeking damages for injuries caused by the negligent deployment of capsicum spray by police officers during the arrest of an offender in a shop. The plaintiff was present in the shop at the time of the offender's arrest. The appellants, who are the individual police officers and the State of Victoria,[1]

appeal from the decision of the primary judge[2] who refused their application for summary dismissal of the proceeding. The appellants alleged that the proceeding was bound to fail as the pleaded duty of care was untenable. The appellants now seek to have the decision of the primary judge overturned and an order that the proceeding be dismissed.

3. The plaintiff pleaded that the police owed her a duty of care to take reasonable steps to avoid causing her injury whilst carrying out their duties as members of Victoria Police. She alleges that the police acted in breach of this duty by the use of capsicum spray in circumstances where it was 'inappropriate' and or in the alternative 'unnecessary'. Further and in the alternative, the plaintiff pleaded that the duty of care required the police to render assistance and advice to the plaintiff following her exposure to the spray.

4. The appellants contended that the plaintiff's pleaded cause of action is untenable as the police do not owe her a duty of care. The appellants submit that no duty arose as:

> (a) the imposition of the alleged (or any other) duty was inconsistent with other police duties and responsibilities;
>
> (b) a variety of public policy considerations precluded the imposition of a duty of care; and
>
> (c) a duty of care has been imposed on police officers in a limited number of cases largely restricted to conduct by police officers in relation to people in their custody and to 'exceptional' situations in which the police officer had engaged in positive dangerous behaviour that created a situation of risk; this was not such a case.[3]

5. The trial judge did not consider the plaintiff's action was foredoomed to fail and refused to strike out the plaintiff's statement of claim, finding that it was arguable that a relevant duty of care could arise on the facts as pleaded by the plaintiff.

6. The pleaded facts were as set out in the reasons of the primary judge as follows:

> The Statement of Claim alleges that at the time that the capsicum spray and/or foam was deployed it was 'inappropriate and/or unnecessary' to do so 'in the premises' which are particularised to consist of 'a small shop' it being 'a confined space'. It is also pleaded that at the time of the arrest of the offender that person 'had calmed considerably and was compliant prior to the deployment of capsicum spray' and the offender 'could have been removed from the premises without the need for such action...'.
>
> Further, it is pleaded by the plaintiff that the second to fourth defendants, at the time that the capsicum spray and/or foam was deployed, 'knew or ought to have known that the plaintiff had suffered from the exposure' to the substances and could have suffered injury.
>
> Further, there is a pleading that having exposed the plaintiff to capsicum spray and/or foam the second to fifth named defendants failed to do anything or take proper steps to care for the plaintiff by advising her to immediately wash her eyes and skin and to remove her clothing.

7. It was also pleaded that the police knew that their actions might expose the plaintiff to injury. These pleaded facts are to be assumed correct for the purposes of this appeal. Accordingly the appellants must demonstrate that no duty of care could arise in circumstances where the actions by the police in deploying the spray are to be treated as unreasonable, disproportionate and as exposing the plaintiff to the risk of injury.

8. This was the plainest case for deferring any answer to the question of whether the appellants owed the plaintiff the duty of care which she alleges until after the facts of the matter had been established at trial. As Kirby P said in *Wickstead v Browne*:[4]

> Common experience teaches that it is usually more efficient and just to consider the viability of a cause of action when the facts said to support it are adduced and the suggested action can be judged with a full understanding of all relevant evidence. Testimony gives colour and content to the application and development of legal principle. That is why leave is usually required for an appeal from interlocutory orders. Appellate courts, including this Court, will usually require evidence to be adduced and a trial concluded before considering the application of the law to that evidence. Out of the detail of the evidence ultimately proved, affecting the relationship of the respondent and the appellant, may arise a finding of a duty of care which the common law of negligence would uphold.

9. On the facts as pleaded, the application to strike out the plaintiff's statement of claim as wholly untenable, faces challenging obstacles.

10. The appellants contend that the duty to take reasonable care to avoid causing the plaintiff injury is inconsistent with the general duty of the police to enforce the criminal law, and in particular, to apprehend the suspect offender. Such a conclusion, it is said, is dictated by the High Court decisions in *Sullivan v Moody*[5] and *Tame v New South Wales*.[6] The appellants submit that the imposition of such inconsistent duties would produce 'incoherence' in the law such that we should find that the duty alleged by the plaintiff is wholly unarguable. While the appellants conceded that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his actions or omissions[7] they submit that in the circumstances identified in Sullivan and Tame the law will not recognise the existence of a duty of care. The appellants further contend that no duty should be found to exist because it would be difficult to formulate the scope and content of the duty.

11. In *Sullivan v Moody* the court considered that those invested with professional and statutory responsibilities to investigate and report upon allegations of child abuse could not be subjected to a legal duty to take care to protect those who were suspected of such abuse. Such a duty could not be reconciled with those statutory and professional responsibilities or the statutory obligations to treat the interests of the children as paramount. No relationship existed between those suspected as child abusers and those invested with statutory responsibility to investigate and report, which could support a duty of care. The Plaintiff's claim thus failed as it rested only on the proposition that harm to those suspected of abuse was foreseeable. Foreseeability was insufficient to support a duty.

12. In *Tame v New South Wales* no duty of care was found to be owed to a plaintiff who alleged that she had suffered psychiatric injury as a consequence of an error made by a police officer in creating a record of a traffic accident. The officer had incorrectly noted that the plaintiff had been affected by alcohol at the time of the accident. The majority of the court considered the duties of an investigating officer were potentially inconsistent with the existence of a duty to take reasonable care to avoid psychiatric injury to a person whose conduct is under investigation and who claimed her reputation had been harmed.[8] McHugh J observed:

> Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering. To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual. *It would often — perhaps usually — defeat the whole purpose of intelligence recording if the officer were required to check the accuracy of the material recorded*. Often enough, checking the accuracy of the material would require contacting the very person who was the subject of an adverse recording.[9]

13. As in the court was influenced by the need to preserve 'legal coherence,' many of the considerations under defamation law being rendered irrelevant if the law of negligence applied.[10]

14. The parties referred to numerous cases where courts have denied the existence of a duty of care by police officers acting in an operational or investigative capacity. Those cases may be conveniently divided into the following categories:

> (1) Where police are investigating a crime and the offender, then known or unknown harms the plaintiff. *Hill v Chief Constable of West Yorkshire,*[11] *Smith* v *Chief Constable of Sussex Police*.[12]
>
> (2) Where police in the course of investigation injure the person under investigation. *Brooks v Commissioner of the Metropolis,*[13] *Sullivan v Moody,*[14] *Tame v New South Wales,*[15] *Pinfold, Stewart v Ronalds, Rush v Commissioner of Police,*[16] *Cran v State of New South Wales,*[17] *Rickard v State of New South Wales*.[18]
>
> (3) Where police in the course of investigation injure the person under investigation and a family member of the person under investigation suffers indirect injury. *Halech v State of South Australia,*[19] *State of New South Wales v Klein*.[20]
>
> (4) Where no police power has been exercised. *State of New South Wales v Tyszyk*.[21]

15. A duty may not exist where the negligent investigation of a crime by the police is said to have allowed an offender to commit a crime against a third person. The seminal example is *Hill v Chief Constable of West Yorkshire*[22] where it was held that the plaintiff, the mother of the deceased, a victim of a serial killer, was not owed a duty of care by investigating authorities whom, it was submitted, had negligently failed to apprehend the offender before he attacked the deceased. Lord Keith, while confirming the general rule that a police officer may be liable in tort to a person who is injured as a direct result of his acts or omissions, found no duty of care could apply on the basis that the law did not recognise a duty to apprehend an unknown offender. He went further, however, stating that public policy might require an immunity in such a case, where the proposed duty may interfere with the duty to investigate by changing operational priorities or encouraging defensive policing.[23]

16. Similar considerations emerged in *Smith v Chief Constable of Sussex Police*[24] which also involved an alleged duty to prevent harm by a third person. Such circumstances are plainly distinguishable from those with which we are concerned. In addition to the general policy considerations these cases reveal the general reluctance of the law to impose liability upon an individual for loss arising out of the criminal conduct of another. Even in such cases a duty of care may at least be arguable. That was the conclusion reached in *State of New South Wales v Spearpoint*,[25] the Court of Appeal upholding the refusal of the judge at first instance to strike out a claim in negligence against the State as a result of police officers failing to detain an offender who was the subject of an apprehended violence order, after complaints were made that he was continuing to breach the order and who thereafter caused injury and damage to the plaintiffs.

17. The plaintiff contended that the other categories of cases relied on by the appellants, in which a duty has been denied are also readily distinguishable. We are not here considering a claim in negligence brought by the very person who is the subject of an investigation and where supervening policy reasons may deny the existence of a duty despite the presence of powerful factors to the contrary. Nor are we here dealing with cases involving an indirect claim by a family member for damages arising out of injury caused by police to another. Different considerations may also apply where indirect harm is pleaded of a particular type, such as nervous shock. So for example in cases such as *State of New South Wales v Klein*,[26] *Sullivan* and *Tame*, indeterminate liability and foreseeability were important considerations militating against the existence of a duty.

18. The present case involves harm to a victim which was a direct and immediate consequence of police action (albeit that the victim was not the subject of the arrest, but was in close physical proximity). On the facts pleaded, it was unreasonable for the police to have used the spray. The police knew or ought to have known of its potential harmful effects on innocent third parties who were present. To make out their contention that the cause of action was not tenable on the facts pleaded, the appellants were driven to the extreme proposition that the police were not by law constrained to exercise their powers in a reasonable manner. The fact that it was foreseeable that potential harm could be caused to innocent members of the public was not a matter, it was said, which the police were obliged to take into account. Moreover they contended that they had no duty to render any assistance to the plaintiff following the use of the spray. These arguments led the plaintiff to draw upon the analogy that it would be a startling conclusion if police officers were entitled to discharge lethal weapons, without any duty to take reasonable care to avoid injury to members of the public in the immediate vicinity or to offer any assistance to them in the event that they were wounded.

19. Contrary to the appellants' contention, the common law is not insensitive to the circumstances of innocent members of the public who may be affected by the actions of law enforcement officers. The duty in the law of negligence is intended to reflect values held within the community.[27] Hence Gleeson CJ in *Tame* referred to reasonableness as the essential concept in the process of defining the ambit of a person's proper concern for others.[28] Those who seek immunity from negligence liability for direct physical injury have to overcome a heavy burden of justification for such dispensation.[29]

20. While latitude must be given to police in the judgments and decisions that must be made in their discharge of their common law and statutory duties to enforce the criminal law,[30] the law does not call for a stark choice between an unfettered discharge of law enforcement responsibilities

and the protection of members of the public from unnecessary harm. Police do not enjoy blanket immunity from suits in negligence.[31] It has been well recognised that an officer may owe a duty of care to prevent injury to the subject of a police operation or to a third person. I should refer to a number of cases that bear some similarity to the present circumstances in which a duty was found to exist. In *Knightley v Johns*[32] a policeman was found to have acted negligently in performing duties regulating traffic flow following an accident; in *Rigby v Chief Constable of Northamptonshire*[33] police were found to have been negligent when, in a siege situation, they shot a canister of gas into a building causing the building to catch fire; and in *Schilling v Lenton*[34] a police officer pursuing a speeding driver was found to owe a duty of care to other motorists (as well as to the subject of the pursuit). *Knightley* and *Rigby* were cited by Lord Keith in *Hill* in support of the proposition that a police office may be liable in negligence for the direct results of his acts or omissions.[35]

21. The appellants sought to characterise these cases as exceptional and submitted that to discharge capsicum in a confined space while third parties were present was not an exceptional circumstance. However one might characterise these cases and the present circumstances, they preclude the conclusion that it is untenable for the plaintiff to maintain that the police in this case may be liable in negligence for the injury resulting from their direct acts. Moreover, the need to demonstrate that the case is exceptional appears to arise only when the proposed duty of care would otherwise be found to be inconsistent with the general duties of the police to enforce the law.[36] There is considerable force in counsel for the plaintiff's submission that it is the appellants, not the plaintiff, who are seeking some extension of principle and authority in contending that no duty can conceivably arise in such circumstances.

22. Another case involving the imposition of a duty of care to avoid injury to others during police operations is the decision of the Appeal Division of this Court in *Zalewski v Turcarolo*.[37] Police were there found to owe a duty of care when, in a siege type situation, they broke into a room with weapons drawn and then discharged those weapons. The reasons for judgment of Hansen J and Brooking J contain references to numerous authorities which show that police officers may be liable for the negligent discharge of their responsibilities in the course of operational duties.

23. In *Zalewski*, the police sought to invoke an immunity of the kind described in the advice of Lord Keith in *Hill*. The factors so influential in *Hill* were examined by Hansen J who referred to the consideration that 'in some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind'[38] and that such a duty might interfere with the ability of the police to make decisions of 'policy and discretion' about matters such as the 'deployment of resources'.[39]

24. *Zalewski* was concerned with whether an 'immunity' from a duty of care ought arise, rather than the existence of a duty. Hansen J, with whom Brooking and Phillips JJ agreed, considered the circumstances distinguishable from those in *Hill* where the police sought a blanket immunity whenever police officers investigate a complaint and make decisions which they consider appropriate. The appellants in the present case, in effect, advance the same contention. Hansen J noted that that which was initially 'an attempt to state the immunity in abstract terms is in reality an immunity to be judged on the facts of the particular case'.[40] His Honour concluded that he would not be prepared to recognise an immunity where injuries arise from 'specifically identified antecedent negligence ... by a particular police officer'. Hansen J observed that on the facts the police officer 'did not act in accordance with his training and instructions' and was therefore beyond the immunity sought.

25. The plaintiff contends that the reasoning in *Zalewski* is apposite to the present circumstances. Here the statement of claim similarly alleges injuries resulting from specifically identified antecedent, and subsequent, negligence by the police. Additionally, on the facts as pleaded the police acted unreasonably and may not have acted in accordance with their operational training in the circumstances.

26. The decisions of the High Court in *Tame* and *Sullivan* are said by the appellants to demonstrate the need for a narrower approach to the question of duty of care than that undertaken by the Appeal Division in *Zalewski*. As no duty of care should be found to exist where that duty would be inconsistent with some other duty imposed by law, reconsideration of *Zalewski* should lead to the conclusion that no duty of care exists towards third parties by police performing

operational duties save in all but the most exceptional cases. The appellants submit that *Zalewski* should be overruled. They received some support for that contention in certain obiter remarks of Young CJ in Equity in *Klein* who said:

> One would not say that *Zalewski* was wrongly decided on the facts, but it would seem to me that in the light of subsequent decisions of high authority both in this country and in England, it is of very limited precedent value in this 21st century.

27. The appellants' submission cannot be sustained. It was recognised in *Sullivan v Moody* that people may be subject to a number of duties, provided they are not 'irreconcilable'.[41] While a duty of care will be denied which is inconsistent with a duty which the law imposes on police in the exercise of their powers[42] the duty of care in contemplation in *Zalewski* was not such a duty. It is only where the duty of care 'would give rise to inconsistent obligations' that a duty should be denied. Such inconsistency may not be present when the performance of the one duty does not of necessity require action that would create a substantial risk that the putative duty, if it existed, would be infringed.

28. The passages from *Sullivan* upon which the appellants must rely do not in my opinion preclude the existence of the duty pleaded by the plaintiff. The passages from the joint judgment are in these terms:

> Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations[43].....
>
> The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to the latter, *the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable.*[44]

29. *Sullivan v Moody* does not lay down a new approach to the assessment of conflicting duties. The High Court in *Sullivan* referred to *Hill* as an example of circumstance were the proposed duty of care might be in conflict with the broader duty of the officers in the circumstances.[45] In *Zalewski* Hansen J applied *Hill* as part of a broader assessment of whether a duty of care ought be recognised in the circumstances. Hansen J referred to policy concerns about the use of resources and the risk that police might carry out their duties 'defensively' to avoid liability- factors specifically considered by Lord Keith in *Hill*.[46] These considerations underpin the 'inconsistent duties' analysis undertaken in Sullivan and by those members of the High Court who adopted an 'inconsistency' analysis in *Tame*. The reasons in *Zalewski* are in conformity with that analysis. The obiter comment by Young CJ in Equity in *Klein* which suggests the contrary is not justified. No sound reason has been advanced why *Zalewski* should be overruled.

30. If contrary to my opinion, the plaintiff's claim is not arguably covered by any accepted category of liability, a consideration of the facts bearing upon the relationship between the plaintiff and the police and an analysis of the salient features,[47] such as legal policy, coherence of the law, conformity with other duties and obligations, foreseeability, degree of harm, and vulnerability do not compel the conclusion that the plaintiff must fail in her claim that such a duty exists.

31. The appellants' contention that the proposed duty of care is unarguable cannot be made out. Giving due weight to the imperative to preserve the autonomy of police officers in their operational judgments and decisions, it has not been shown that the plaintiff's cause of action as pleaded involves an inconsistency between the police duty to apprehend, and the proposed duty to take reasonable steps to take care of the plaintiff. I consider it to be open to the plaintiff to maintain her claim in negligence as there is no necessary incompatibility between the duty of the police to enforce the law by exercising their power of arrest and a duty to have reasonable regard for the welfare of third parties in doing so.

32. The appeal should therefore be dismissed.

HANSEN AJA:

33. I agree with Redlich JA.

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[1] It is unnecessary for present purposes to consider the basis upon which the State of Victoria is sued.
[2] As the decision of the primary judge was interlocutory leave to appeal is required. The plaintiff consented to the grant of leave and so the hearing proceeded as an appeal.
[3] Taken from Agreed Summary dated 10 March 2010.
[4] [1992] NSWCA 272; (1992) 30 NSWLR 1, 5–6.
[5] [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.
[6] [2002] HCA 35; (2002) 211 CLR 317; 191 ALR 449; (2002) 76 ALJR 1348.
[7] *Hill v Chief Constable of West Yorkshire* [1987] UKHL 12; [1988] 2 All ER 238; [1988] 2 WLR 1049; [1989] AC 53, 59 (Lord Keith).
[8] The duties were also described as 'incongruous', 'incompatible' and in 'conflict'. See *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317, [58]; 191 ALR 449; (2002) 76 ALJR 1348 (Gaudron J), [298] (Hayne J).
[9] Ibid [125] (McHugh J), emphasis added.
[10] Ibid [28] (Gleeson CJ).
[11] [1987] UKHL 12; [1988] 2 All ER 238; [1988] 2 WLR 1049; [1989] 1 AC 53.
[12] [2008] UKHL 50; [2008] 3 WLR 593; [2009] 1 Cr App R 12; [2008] HRLR 44.
[13] [2004] EWCA Civ 1332; [2005] 1 All ER 207; [2004] All ER (D) 189; [2005] PIQR Q4; [2005] Lloyds Rep Med 50; [2005] 2 Costs LR 200; [2005] 1 WLR 2015; (2005) 83 BMLR 47.
[14] [2001] HCA 59; (2001) 207 CLR 562; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [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.
[15] [2002] HCA 35; (2002) 211 CLR 317; 191 ALR 449; (2002) 76 ALJR 1348.
[16] [2006] FCA 12; (2006) 150 FCR 165; 229 ALR 383; 160 A Crim R 342; [2006] Aust Torts Reports 81-829.
[17] [2004] NSWCA 92; (2004) 62 NSWLR 95; [2004] Aust Torts Reports 81-737.
[18] [2010] NSWSC 151.
[19] [2006] SASC 29; (2006) 93 SASR 427; [2006] Aust Torts Reports 81-827; (2006) 45 MVR 41.
[20] [2006] NSWCA 295; (2006) Aust Tort Reports 81-862.
[21] [2008] NSWCA 107.
[22] [1987] UKHL 12; [1988] 2 All ER 238; [1988] 2 WLR 1049; [1989] AC 53.
[23] Ibid 62–63.
[24] [2008] UKHL 50; [2008] 3 WLR 593; [2009] 1 Cr App R 12; [2008] HRLR 44.
[25] [2009] NSWCA 233.
[26] [2006] NSWCA 295; (2006) Aust Tort Reports 81-862.
[27] *Harriton v Stephens: Waller v James: Waller v Hoolahan* [2004] NSWCA 93; (2004) 59 NSWLR 694, 700 (Spigelman CJ); D Derrington, (The Hon) (2004), 'Theory of negligence advanced in the High Court of Australia', 78(9) ALJ 595, 611.
[28] *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317, [13]; 191 ALR 449; (2002) 76 ALJR 1348 (Gleeson CJ).
[29] *Hunter Area Health Service v Presland* [2005] NSWCA 33; (2005) 63 NSWLR 22, [345] (Santow JA).
[30] *Rush v Commissioner of Police* [2006] FCA 12; (2006) 150 FCR 165, [91]; 229 ALR 383; 160 A Crim R 342; [2006] Aust Torts Reports 81-829 (Finn J) referring to *Hinchcliffe v Commissioner of Australian Federal Police* [2001] FCA 1747; (2001) 118 FCR 308, [33]–[35] (Kenny J).
[31] *Hill v Chief Constable of West Yorkshire* [1987] UKHL 12; [1988] 2 All ER 238; [1988] 2 WLR 1049; [1989] AC 53, 59; *State of NSW v Tyszyk* [2008] NSWCA 107, [128] (Campbell JA); *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2009] 1 AC 225; [2009] 1 Cr App R 12; [2008] HRLR 44 (Lord Bingham); *Rickards v State of NSW* [2010] NSWSC 151, [30] (Hulme J).
[32] [1981] EWCA Civ 6; [1982] 1 All ER 851; [1982] 1 WLR 349.
[33] [1985] 2 All ER 985; [1985] 1 WLR 1242.
[34] (1988) 47 SASR 88; (1988) 7 MVR 3.
[35] *Hill v Chief Constable of West Yorkshire* [1987] UKHL 12; [1988] 2 All ER 238; [1988] 2 WLR 1049; [1989] AC 53, [59].
[36] *State of NSW v Klein* [2006] NSWCA 295; (2006) Aust Torts Reports 81-862, [23] (Young CJ in EQ).
[37] [1995] VicRp 76; [1995] 2 VR 562; [1994] Aust Torts Reports 81-280.
[38] *Zalewski v Turcarolo* [1995] VicRp 76; [1995] 2 VR 562, 576; [1994] Aust Torts Reports 81-280 (Hansen J).
[39] Both quotations are from the advice of Lord Keith at 62 extracted in the judgment of Hansen J in *Zalewski v Turcarolo* [1995] VicRp 76; [1995] 2 VR 562, 576; [1994] Aust Torts Reports 81-280.
[40] Ibid 578.
[41] *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562, [60]; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2.
[42] This seems to have been recognised by Finn J in the context of the exercise of policy powers in *Rush v Commissioner of Police* [2006] FCA 12; (2006) 150 FCR 165, [92]; 229 ALR 383; 160 A Crim R 342; [2006] Aust Torts Reports 81-829.

[43] *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562, [60]; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2.
[44] Ibid [62], emphasis added.
[45] Ibid [57].
[46] *Zalewski v Turcarolo* [1995] VicRp 76; [1995] 2 VR 562, 576; [1994] Aust Torts Reports 81-280.
[47] Ibid [50]–[51], *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, [27] (Gleeson CJ), [198], [201] (Gummow J), [333] (Hayne J), [406] (Callinan J); (1999) 164 ALR 606; (1999) 73 ALJR 1190; [1999] Aust Torts Reports 81-516; (1999) 15 Leg Rep 2; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540, [149]; 194 ALR 337; 77 ALJR 183; (2002) 23 Leg Rep 2; [2003] Aust Torts Reports 81-681; (2002) 125 LGERA 1 (Gummow and Hayne JJ), [236]–[237] (Kirby J).

APPEARANCES: For the appellants State of Victoria & Ors: Mr J Kennan SC with Ms R Orr, counsel. For the respondent Richards: Mr JP Gorton, counsel. Birch Ross and Barlow Lawyers.
