Halliday v Nevill - [1984] HCA 80

HIGH COURT OF AUSTRALIA

Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.

ADRIAN ROBERT HALLIDAY v. STEWART NEVILL &ANOTHER
(1984) 155 CLR 1
6 December 1984

Criminal Law—Trespass—Magistrates Courts (Vict.)

Criminal Law—Arrest—Police officer pursuing disqualified driver into driveway of private dwelling—Arrest in driveway—Occupier's permission not required—Whether implied licence to enter driveway—Lawfulness of arrest. Trespass—Access to premises—Implied licence to enter path or driveway of private premises for legitimate purpose—Police officer pursuing disqualified driver into driveway—Whether implied licence to enter and make arrest in driveway. Magistrates Courts (Vict.)—Order to review—Error of law—Police officer pursuing disqualified driver into driveway of private dwelling—Arrest in driveway—Occupier's permission not required—Whether implied licence to enter driveway—Whether magistrate's finding of no licence reviewable—Question of law or fact—Magistrates' Courts Act 1971 (Vict.), s. 88.

Decisions

GIBBS C.J., MASON, WILSON and DEANE JJ. This is an appeal by special leave from the decision of Brooking J. of the Supreme Court of Victoria in which his Honour made absolute orders nisi to review five decisions of a Stipendiary Magistrate dismissing five informations laid against the appellant. The informations charged the appellant with one offence of escaping from legal custody, two offences of resisting police in the execution of their duty and two offences of assault. These charges, together with a charge of driving a motor car while disqualified from obtaining a licence and driving a motor car whilst his blood alcohol content exceeded the prescribed maximum on each of which the appellant was convicted, all arose from an incident which occurred in West Heidelberg shortly after five o'clock one afternoon in January 1982. At that time two police officers named Nevill and Brida were on a motorised patrol of the area. As they drove along Liberty Parade they saw the appellant, who was known to Police Constable Brida as a disqualified driver, reversing a motor car out of the driveway of premises at 375 Liberty Parade. Having driven out into the street, the appellant apparently saw the police car approaching and immediately drove back into the driveway from which he had come. The police officers stopped their vehicle across the mouth of the driveway, alighted and entered the premises at 375 Liberty Parade by walking down the open driveway. There they engaged the appellant in conversation. He had been drinking. He was aggressive and denied that he had driven on the roadway. Police Constable Nevill then arrested the appellant for driving whilst disqualified; this happened while the three men were standing on the driveway inside the premises near the rear of the car that the appellant had been driving.

2. Then, while the appellant and Police Constable Nevill were walking back down the driveway towards the police car, the appellant suddenly broke away from Police Constable Nevill's grasp and ran across Liberty Parade and entered his own home at number 370. The police officers pursued him into the house where a scuffle took place before he was finally overcome. The two charges of resisting the police officers and the two charges of assault all relate to the scuffle that occurred in his own home.

3. The Magistrate held that the arrest of the appellant in the driveway of 375 Liberty Parade was unlawful because the arresting officer was a trespasser on those premises at the time of the arrest. He therefore dismissed the five informations to which we have referred.

4. On the return of the orders nisi to review, Brooking J. proceeded on the basis:

> (a) that the Stipendiary Magistrate must be taken to have found that at the time of the arrest Police Constable Nevill was in the driveway without the permission of the occupier of 375 Liberty Parade and that he was not prepared to dispute such a finding, and
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> (b) that the power to arrest without warrant conferred by s.458 of the Crimes Act 1958 (Vict.) as amended did not confer by implication a power to follow the suspect on to private property for the purpose of effecting the arrest.

On that basis, Police Constable Nevill was a trespasser on the premises at 375 Liberty Parade at the time when he purported to arrest the appellant. His Honour came to the conclusion however that, even if that were so, the arrest itself was lawful. It followed, in his Honour's view, that the appellant escaped from lawful custody in breaking away from Police Constable Nevill and that the entry of the police officers into the appellant's home at 370 Liberty Parade in pursuit of him was authorized

by s.459A of the Crimes Act.

5. In the course of his argument, counsel for the appellant has raised issues of fundamental importance touching the liberty of the subject. It is unnecessary however that we embark on a consideration of those issues. It is common ground that the appeal must fail unless Police Constable Nevill was, at the time he arrested the appellant in the driveway of premises at 375 Liberty Parade, a trespasser on that driveway. The evidence on that question is sparse. On that evidence however, we consider that the only conclusion which is open as a matter of law is that Police Constable Nevill had an implied licence from the occupier of the premises to be upon the driveway.

6. While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked (cf. Edwards v. Railway Executive (1952) AC 737, at p 744). The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it (see, generally, Robson v. Hallett (1967) 2 QB 939, at pp 950-952,953- 954 ; Lipman v. Clendinnen (1932) 46 CLR 550, at pp 556-557 ; Lambert v. Roberts (1980) 72 Cr App R 223, at p 230). Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker C.J. in Robson (at p.950), the law is not such an ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away. The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property.

7. The evidence indicates that the premises at 375 Liberty Parade were residential premises with an open driveway to the roadway. There is no suggestion that the driveway was closed off by a locked gate or any other obstruction or that there was any notice or other indication advising either visitors generally or a particular class or type of visitor that intrusion upon the open driveway was forbidden. That being so, a variety of persons with a variety of legitimate purposes had, as a matter of law, an implied licence from the occupier to go upon the driveway. The question which arises is whether, in those circumstances, the proper inference as a matter of law is that a member of the police force had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of

questioning or arresting a person whom he had observed committing an offence on a public street in the immediate vicinity of that driveway. The conclusion which we have reached is that common sense, reinforced by considerations of public policy, requires that that question be answered in the affirmative. That conclusion does not involve any derogation of the right of an occupier of a suburban dwelling to prevent a member of the police force who has no overriding statutory or common law right of entry from coming upon his land. Any such occupier who desires to convert his path or driveway adjoining the public road into a haven for minor miscreants can, by taking appropriate steps, preclude the implication of a licence to a member of the police force to enter upon the path or driveway to effect an arrest with the result that a police officer's rights of entry are restricted to whatever overriding rights he might possess under some express provision or necessary implication of a statute (cf. Crimes Act, s.459A and note generally Morris v. Beardmore (1981) AC 446 and the discussion in the judgment of Kennedy J. in Dobie v. Pinker (1983) WAR 48, at pp 53 ff .) or the common law. All that that conclusion involves is that, in the absence of any indication to the contrary, the implied or tacit licence to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor upon it. It follows that Police Constable Nevill was lawfully upon the driveway of 375 Liberty Parade when he arrested the appellant.

8. It should be mentioned that it was submitted on behalf of the appellant that the Court should not substitute a different conclusion of its own for the finding at first instance that Police Constable Nevill was on the driveway without the permission or licence of the occupier. The matter having come before the Supreme Court by way of order to review, the finding of the magistrate should not, so it was said, be disturbed unless there was no evidence upon which "the magistrate might, as a reasonable man, come to the conclusion to which he did come" (see Spurling v. Development Underwriting (Vic.) Pty. Ltd. (1973) VR 2, at p 11). The answer to that submission is that, there being no real dispute about the underlying objective facts and no suggestion that the occupier of 375 Liberty Parade did anything to negate or rescind any implied licence, the question whether those facts gave rise to an implied licence in favour of Police Constable Nevill was and is a question of law.

9. We would dismiss the appeal.

BRENNAN J. This case is about privacy in the home, the garden and the yard. It is about the lawfulness of police entering on private premises without asking for permission. It is a contest between public authority and the security of private dwellings.

2. The joint judgment sets out the material facts. I need not repeat them. The charges laid against the appellant include escaping from lawful custody, resisting a police officer in the execution of his duty (two charges), assaulting a police officer in the execution of his duty and assault by kicking. The charge of assaulting a police officer in the execution of his duty is an alternative to the charge of assault by kicking. A Stipendiary Magistrate dismissed the five charges mentioned, but Brooking J. in the Supreme Court of Victoria made absolute orders nisi to review the orders of dismissal. His Honour ordered that the appellant be convicted on four of the charges and that the alternative charge be withdrawn.

3. The Stipendiary Magistrate had accepted a submission that the arrest of the appellant on private property - the driveway of 375 Liberty Parade - was unlawful, that the police officers had not been acting in the execution of their duty when they re-arrested the appellant in his mother's home at 370

Liberty Parade and that the appellant had been entitled to use reasonable force in resisting the re-arrest. Brooking J. held that the arrest of the appellant in the driveway of 375 Liberty Parade was lawful. Having reached that conclusion, his Honour held that conviction on four of the charges followed. The premises at 375 Liberty Parade were occupied by a person known to the appellant. The police officers did not seek and were not given permission by that person to enter on the driveway of 375 Liberty Parade. He had no interest in the arrest of the appellant on his driveway.

4. The common law principles relevant to the present case are of ancient origin but of enduring importance. In Entick v. Carrington (1765) 19 St Tr 1029 Lord Camden L.C.J. said, at p 1066 :

> " By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him."

That statement, as Lord Scarman said in Morris v. Beardmore (1981) AC 446, at p 464, is still true. The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law. Thus in Great Central Railway Company v. Bates (1921) 3 KB 578, a police officer who had the powers of a common law constable and who, seeing the door of a warehouse open after dark, entered it in order to see that everything was all right, was held to be a trespasser. Atkin L.J. said, at pp. 581-582 :

> " Now it appears to me that he had no right to enter these premises at all ... It can hardly be suggested that the right exists in respect of a dwelling house. If it did the privacy of an Englishman's dwelling house would be most materially curtailed. In view of the limitations that have been laid down over and over again as to the right of a constable to force a door, and as to the limitations of his powers unless he has a warrant, or in cases of felony, it appears to me quite impossible to suggest, merely because a constable may suspect there is something wrong, that he has a right to enter a dwelling house either by opening a door or by entering an open door or an open window and go into the house. It is true that a reasonable householder would not as a rule object if the matter was done bona fide and no nuisance was caused. But the question is whether the constable has the right to enter. This is a matter of very considerable importance, because the case has been put on the
> analogy of a person having a right as a matter of public duty to enter into premises, and we know that such powers and privileges are occasionally given to persons who are not constables. It appears to be very important that it should be established that nobody has a right to enter premises except strictly in accordance with authority."

5. His Lordship put the question in terms of the constable's right to enter, not in terms of a licence to do so. In Robson v. Hallett (1967) 2 QB 939, at p 954, Diplock L.J. said that a police officer who enters upon private land may fail to be a trespasser in one of two ways: "One is leave and licence of the person entitled to possession ...; the other is in the exercise of an independent right to proceed on

the land". I would add the leave and licence of the person in actual possession as a good authority to enter: see Mount Bischoff Tin Mining Co., Registered v. Mount Bischoff Extended Tin Mining Co., No Liability (1913) 15 CLR 549, at p 562. A licence is revocable, and a police officer who has no right to remain on premises must leave if the licence is revoked. He is not acting in the execution of his duty once he becomes a trespasser: Morris v. Beardmore, at pp 458-459; Davis v. Lisle (1936) 2 KB 434 ; McArdle v. Wallace (1964) 108 SJ 483 ; at all events where the trespass is more than trivial (cf. the cases discussed by Lanham "Arrest, Detention and Compulsion", The Criminal Law Review (1974), 288). A police officer who has grounds for arresting a person on a criminal charge needs to be armed with more than leave and licence if he is not to be frustrated in effecting the arrest. He needs the authority of an independent right, else offenders can find an Alsatia in their homes or in the homes of their friends. But, as Chitty's Criminal Law 2nd ed. (1826), vol.1, p.15 notes:

> " Since the privileges of sanctuary and abjuration were abolished, no place affords protection to offenders against the criminal law. ... even the clergy may, on a criminal charge, be arrested whilst in their churches ..."

The common law power to arrest on a criminal charge can be exercised as of right on private as well as on public property, in the home of a fugitive offender or in the homes of his friends. No leave or licence is necessary to enter if no force be needed, and in some cases force may be used.

6. Although the common law has long protected the privacy of the home, it has never treated that privacy as inviolate against the exercise of a power to arrest. The first proposition laid down in Semayne's Case (1604) 5 Co.Rep.91a (77 E.R.194) that everyone's house "is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose" was qualified by the third proposition in the same case. It was laid down (at p. 916 ; p.195):

> " 3. In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors ...".

Where entry is sought to effect an arrest for a criminal offence, it is a case "when the King is party". The person effecting the arrest is entitled not only to enter as of right but to break down the outer doors of the offender's home after making the customary demand: "Open in the name of the King" (per Lord Denning M.R in Southam v. Smout (1964) 1 QB 308, at p 320). The privilege of keeping the outer doors shut against process was confined to execution at the suit of a private individual. Semayne's Case gives an offender no immunity from arrest on criminal process: Burdett v. Abbot (18 11) 14 East 1 at p 162 (104 ER 501, at p 563); Harvey v. Harvey (1884) 26 ChD 644 ; Southam v. Smout, at p 320. Nor does Semayne's Case give an offender any such immunity if he takes refuge in the home of another for "the house of any one is not a castle or privilege but for himself" and the offender cannot claim the benefit of sanctuary in the other's home (at p.93a (p.198); and see Foster's Crown Law 3rd ed. (1809), p.320, sect.21).

7. Of course, a constable's power to arrest without warrant is limited. At common law, a constable is empowered to arrest without warrant any person whom he suspects on reasonable grounds of having committed a felony, but he is not empowered to arrest a person guilty or suspected of

misdemeanours except where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission (Stephen, A History of the Criminal Law of England (1883), vol.1, p.193; Hale's Pleas of the Crown (1800), vol.2, p.85). And so it was held that a constable could not lawfully arrest an offender who, having assaulted the constable an hour earlier, retires to his house and closes and fastens his door: R v. Marsden (1868) LR 1 C.C.R 131 . At common law, a constable is entitled to enter on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose.

8. In Victoria, the distinction between felonies and misdemeanours has been abolished and, by s.457 of the Crimes Act 1958 (Vic.) ("the Act"), common law powers to arrest without warrant have been abolished. In place of the common law power to arrest without warrant, a statute now confers power to arrest without warrant for various offences. The question arises whether the conferment of the statutory power carries with it a power to enter on private property without a licence (by force, if necessary) or whether there is a territorial restriction on the exercise of the statutory power to arrest.

9. Section 458 of the Act confers on any person a power to arrest for any offence in the circumstances therein prescribed and s.459 confers on a police officer additional powers to arrest without warrant if he believes on reasonable grounds that the person arrested has committed an indictable offence. The respondents in the present case rely on the power to arrest conferred by s.458 (1)(a). The relevant provisions of s.458 read as follows:

> " (1) Any person, whether a member of the police force or not, may at any time without warrant apprehend and take before a justice to be dealt with according to law or deliver to a member of the police force to be so taken, any person -
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> (a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely -
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> (i) to ensure the appearance of the offender before a court of competent jurisdiction;
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> (ii) to preserve public order;
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> (iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or
>
> (iv) for the safety or welfare of members of the public or of the offender;
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> (b) when instructed so to do by any member of the police force having power under this Act to apprehend that person; or
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> (c) he believes on reasonable grounds is escaping from legal custody or avoiding apprehension by some person having authority to apprehend that person in the circumstances of the case."

10. When ss.458 and 459 were inserted into the Act in their present form by the Crimes (Powers of Arrest) Act 1972 (Vic.), the Act contained no express power to enter on and search private property for the purpose of arresting an offender or a suspected offender. The Crimes (Classification of Offences) Act 1981 (Vic.) inserted s.459A in the Act, and a limited power of entry and search is conferred by that section:

> " (1) A member of the police force may, for the purpose of arresting under section 458 or 459 or any other enactment a person whom he -
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> (a) believes on reasonable grounds -
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> (i) to have committed in Victoria a serious indictable offence;
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> (ii) to have committed an offence elsewhere which if committed in Victoria would be a serious indictable offence; or
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> (iii)to be escaping from legal custody; or
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> (b) finds committing a serious indictable offence -
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> enter and search any place where the member of the police force on reasonable grounds believes him to be.
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> (2) In order to enter a place pursuant to sub-section (1), a member of the police force may, if it is necessary to do so, use reasonable force.
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> (3) In this section 'serious indictable offence' has the same meaning as it has in section 325."

Section 459A has no application in the present case.

11. The appellant submits that the power to arrest conferred by s.458 is restricted and that an arrest in purported exercise of that power cannot be effected lawfully on private property unless the case falls within s.459A, and this case does not. The appellant's argument rests substantially on the speeches in two cases decided in the House of Lords on the operation of s.8 - the breathalyzer provisions - of the Road Traffic Act 1972 (U.K.).

12. In the first of those cases, Morris v. Beardmore, it was held that a power conferred by s.8(2) on a constable in uniform to require a driver to provide a specimen of his breath does not authorize the constable to trespass on private property and does not enable a constable who is trespassing to make a valid requirement of a person that he provide a specimen of his breath. The case was not concerned with a power to arrest but with a statutory power of a wholly different legal nature, as Lord Diplock pointed out (at pp 454-455). In the second case, Clowser v. Chaplin (1981) 1 WLR 837 , their Lordships dealt with the power to arrest without warrant conferred on a constable by s.8(5) of the Road Traffic Act when a person required to provide a specimen of breath failed to do so. It was held that the power to arrest did not authorize a constable to enter private premises to carry out an arrest. The reasoning in that case owes much to the broad scope of the general arrest provisions and

particularly to the width of the provisions authorizing entry and search which had been enacted in the Criminal Law Act 1967 (U.K.). Lord Keith of Kinkel, in whose speech the other members of the House agreed, said (at pp.841-842):

> " The question accordingly comes to be whether the power to arrest without warrant conferred by section 8(5) carries with it the power lawfully to enter, by force if need be, the dwelling house of the person whom it is intended to arrest, for the purpose of carrying out that intention. It may confidently be stated as a matter of general principle that the mere conferment by
> statute of a power to arrest without warrant in given circumstances does not carry with it any power to enter private premises without the permission of the occupier, forcibly or otherwise. Section 2 of the Criminal Law Act 1967 creates a category of 'arrestable offences' in respect of which the power of arrest without warrant may be exercised. Such offences are extremely serious, being those punishable by five years' imprisonment on first conviction, and attempts thereat. Subsection (6) specifically provides:
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> 'For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be.'
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> Apart from the category of arrestable offences, there are a considerable number of instances where a specific power of arrest without warrant is conferred in relation to particular statutory offences. ... The proper inference, in my opinion, is that where Parliament considers it appropriate that a power of arrest without warrant should be reinforced by a power to enter private premises, it is in the habit of saying so specifically, and that the omission of any such specific power is deliberate."

Lord Scarman's speech contains a passage to the same effect (at p 842). And in Swales v. Cox (1981) 1 QB 849, at p 854, Donaldson L.J. said that Parliament, in enacting the Criminal Law Act 1967

> " was intending to provide a comprehensive code on the rights of a constable to enter a place ... in circumstances in which a constable with reasonable cause suspected that an arrestable offence had been committed or a constable, again with reasonable cause, suspected that an arrestable offence was about to be committed."

The same observations cannot be made with respect to the Crimes (Powers of Arrest) Act 1972 of Victoria. These cases do not answer the question whether the statutory powers to arrest created by ss. 458 and 459 in 1972, being unaccompanied at that time by any express power of entry and search, might be exercised as of right on private property. At that time, it would have been absurd to impute to the Parliament of Victoria an intention so to restrict the statutory power to arrest that they could not be exercised on private property without the permission of the person in possession of that property or entitled to possession of it. In Canada, where the powers to arrest conferred by s. 450 of the Criminal Code were unaccompanied by any express power of entry and search for the purpose of arrest, the Supreme Court held that a fugitive could not obtain sanctuary by residing with a friend: Eccles v. Bourque (1974) 50 DLR (3d) 753. A right to enter for the purpose of arrest was admitted, but the Court insisted on the common law restrictions on the use of force to effect entry. Dickson J.,

with the concurrence of the other members of the Court, said (at pp. 756-757):

> " I would wish to make it clear, however, that there is no question of an unrestricted right to enter in search of a fugitive. Entry can be made against the will of the householder only if (a) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry."

13. In South Australia, Napier C.J. held that a statutory power conferred on a police officer to arrest a person reasonably suspected of having committed an offence gave the police officer authority to follow the person onto private property for the purpose of effecting the arrest: Dinan v. Brereton (1960) SASR 101 . In New South Wales, Taylor C.J. at C.L. held that a similar statutory power gave a right to police officers to arrest suspected persons "wherever they may be": Kennedy v. Pagura (1977) 2 NSWLR 810 . In the Northern Territory, Muirhead J. held a statutory provision which conferred a power to enter "into or upon any premises, vehicle or vessel, by force if necessary" did not restrict a general statutory power to arrest so as to preclude its exercise on private property in cases that did not fall within the terms of the particular provision: McDowell v. Newchurch (1981) 9 NTR 15 .

14. In principle, a statute which creates a general power to arrest in substitution for the common law power to arrest ought not be read down to preclude the exercise of the statutory power on private property. Whether the person seeking to arrest another for a criminal offence is exercising a common law or statutory power, the case is one "when the King is party" and when the public interest in the prosecution of crime prevails over private possessory interests in land. The Crimes (Powers of Arrest) Act 1972 codified the general law governing powers of arrest but the code made no reference to powers of entry and search for the purpose of arrest. It is improbable that in 1972 Parliament intended that the powers conferred by ss.458 and 459 of the Act should not carry with them the same authority to enter and remain on private premises to effect an arrest as were carried by the common law powers to arrest, subject to the common law restrictions on forcible entry. Prior to 1981, the statutory powers, like the powers conferred by s. 450 of the Canadian Criminal Code, must be taken to have authorized entry onto private premises for the purpose of effecting an arrest.

15. The powers conferred by ss.458 and 459 were not novel statutory powers, such as the power to require the provision of a sample of breath. The presumption that a statute creating general powers of arrest intends to confer a power of entry corresponding with the common law is not applied to a statute creating a novel power of a different nature. The common law presumes that when Parliament creates a novel power, it does not intend thereby to authorize the commission of a trespass to facilitate its exercise: Morris v. Beardmore; Colet v. The Queen (1981) 119 DLR (3d) 521 . The general protection which the common law accords to persons in possession of private property is undiminished by the creation of the novel power unless Parliament expressly provides otherwise.

16. In 1981, when s.459A was inserted in the Act, Parliament clearly intended to attach an express statutory right of entry to the general arrest powers conferred by ss.458 and 459; equally clearly, Parliament intended to restrict the right of entry and search for the purpose of effecting an arrest under those sections to cases falling within the terms of s.459A. Section 459A was itself a code of the power of entry and search for the purpose of effecting an arrest under s.458 or s.459. Unlike the provision considered by Muirhead J. in McDowell v. Newchurch, s.459A conferred power to enter

and search "any place", whether the place be "premises" or not. But conditions were imposed. The power of entry and search for the purpose of arresting was conferred only on a member of the police force, and only in respect of persons found committing or believed on reasonable grounds to have committed a "serious indictable offence" (a term defined by s.325(6) of the Act). The common law restriction on forcible entry was altered to authorize the use of necessary and reasonable force to effect an entry. In the light of the legislative intervention in 1981, the general powers to arrest conferred by ss.458 and 459 cannot now be construed as carrying with them any powers of entry and search save those conferred by s.459A. From that conclusion, it follows that police officers have no independent right to enter or remain on private property to effect an arrest under s.458 or s.459 in cases that fall outside s.459A.

17. In cases falling outside s.459A, the statutory powers to arrest - shorn of any power of entry - stand in no different position from those novel statutory powers that cannot be exercised on private property without the leave and licence of the person in possession of the property or the person entitled to possession: see Transport Ministry v. Payn (1977) 2 NZLR 50 ; Allen v. Napier City Council (1978) 1 NZLR 273 . The statutory powers to arrest are no longer effective to diminish the common law rights of persons in possession of land except in the circumstances specified in s.459A. Those powers cannot now be construed as authorizing an arrest which can be effected only by trespassing on private property. If a purported arrest is made in circumstances where the power is not intended to be exercised, the arrest is invalid. The arrest is not struck with invalidity because the person arrested is not liable to arrest under s.458 or s.459 but because the power conferred by those sections can be exercised only if it is otherwise lawful to act in execution of the power. If a police officer could validly arrest by entering a place which he has no power to enter and which he is given no permission to enter, the statutory limitation on the power of entry would be nugatory and the protection of individual privacy which Parliament intended would be denied in practice.

18. In England, after Morris v. Beardmore and before additional powers of entry were conferred by amending legislation (see s.7(6) of the Road Traffic Act inserted by the Transport Act 1981 (U.K.) s. 25(3), Sch.8), the validity of a requirement to provide a sample of breath was upheld in a line of cases by resort to the notion of an implied licence. There is, of course, no general licence implied by law permitting police officers on police business to enter on private property. It is clear from what Atkin L.J said in Great Central Railway Company v. Bates (at p 582) that a police officer has no right to enter merely because most reasonable householders "would not as a rule object if the matter was done bona fide and no nuisance was caused". Is some licence to be inferred in fact, at least in the generality of cases? The circumstances of each case determine whether it is reasonable to infer that the person in possession of the premises has given permission to the police officer to enter and remain. However legitimate or even laudable from the public viewpoint the business of a police officer may be, it cannot be inferred that in general the police officer has an implied licence to enter and remain on private property to transact that business, at least where the business is of no benefit to the person in possession. Permission to enter to transact the business may be sought, but permission cannot be assumed. A police officer, in common with any other person on legitimate business, has an implied licence from the occupier of a dwelling-house "to come through the gate, up the steps, and knock on the door of the house" (per Lord Parker C.J. in Robson v. Hallett, at p 951). That, as Lord Widgery C.J. explained in Brunner v. Williams (1975) 73 LGR 266, at p 272, "means that anyone who has any genuine reason for wishing to enter the house or the garden has implied licence from the occupier to approach the front or nearest door and ask whether he may be given permission for what he wishes to do". Now a licence in the terms thus discussed is fairly to be implied in the generality of cases as an incident of living in society. Unless a notice says "Keep Out" it is, generally speaking, reasonable to imply a licence to come up and ask "May I come in?" In the

line of cases between Morris v. Beardmore and the insertion of s.7(6) into the Road Traffic Act, however, the implied licence to enter on the curtilage of a dwelling to get permission to do something on the premises was treated as a licence to the police to perform their functions under s.8 of that Act on any part of the premises between the entrance to the curtilage and the front door without seeking the permission of the person in possession. It then became a question of deciding whether the implied licence to perform those functions - on a path or driveway - had been revoked before the requirement to provide a sample of breath for the breathalyzer had been made. Perhaps the most extreme examples of these cases were Snook v. Mannion (1982) RTR 321 and Gilham v. Breidenbach (1982) RTR 328 where vulgar and vigorous injunctions to depart were construed as mere abuse falling short of an express withdrawal of a licence to be on the premises. With great respect, I am unable to adopt the reasoning in these cases. To imply that a police officer who is pursuing a fugitive onto his home ground has the fugitive's permission to enter and remain there until the police officer's work is done is, in my opinion, contrary to the inference ordinarily to be drawn from those facts. To hold that a licence impliedly given by the person in possession (who might or might not have been the fugitive) endures until it is revoked in unmistakeable terms reverses the onus which Entick v. Carrington places upon the person entering. Such an implied licence could be distinguished from a legal right of entry only by its revocability.

19. In the present case, if the police had an implied licence to enter on the driveway of 375 Liberty Parade, by whom was that licence revocable? Presumably not by the appellant, for he was not the person in possession of 375 Liberty Parade. For what purposes did the police have that person's implied licence to enter? Once it is admitted that the police officers have an implied licence to enter to arrest, might a licence for other police purposes be implied? To install a traffic radar device on the driveway? Or carry out surveillance of neighbouring premises from there? The presence of the police officers on the driveway of 375 Liberty Parade was not for any purpose with which the person in possession was concerned. I am unable to see in the facts of the case any ground for inferring that the police had a licence from that person to come onto his driveway without his permission for the purpose of arresting a suspected offender.

20. There is, of course, a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement. The contest is not to be resolved by too ready an implication of a licence to police officers to enter on private property. The legislature has carefully defined the rights of the police to enter; it is not for the courts to alter the balance between individual privacy and the power of public officials. It is not incumbent on a person in possession to protect his privacy by a notice of revocation of a licence that he has not given; it is for those who infringe his privacy to justify their presence on his property. There may well be a case for enlarging police powers of entry and search, but that is a matter for the legislature.

21. I would allow the appeal, set aside the order of Brooking J. and the convictions of the appellant, and in lieu thereof order that the orders nisi to review be discharged.

22. Appeal dismissed with costs.

Orders

Cited by:

Criminal Charge Book [2023] JCV Criminal_Charges_Book -
Page v Long [2025] VCC 868 -
Page v Long [2025] VCC 868 -
R v Nunan [2025] NSWDC 293 (20 June 2025) (Haesler SC DCJ)

73. Common law principles, exemplified in the decision in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 and ss 21, 99 and Part 5 *LEPR Act*, provide some protection against intrusion by State agencies into a person's home. The common law rules are strictly applied: see cases summarised by Kirby J in *NSW v Corbett* [2007] HCA 32 at [16] to [22] . In *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1 at [20] Brennan J observed:

> "There is ... a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement."

Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
The Returned & Services League of Australia WA Branch Incorporated v Vietnam Veterans and Veterans Motorcycle Club WA Chapter (Inc) [2025] WASC 64 -
The Returned & Services League of Australia WA Branch Incorporated v Vietnam Veterans and Veterans Motorcycle Club WA Chapter (Inc) [2025] WASC 64 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
McIntosh v Peterson [No 2] [2024] WASC 428 -
The State of Western Australia v Pettit [2024] WADC 73 (04 September 2024) (Lonsdale DCJ)

84. The State referred to the case of ***Talbot v Lane*** (1994) 14 WAR 120 in which Malcolm CJ made some obiter comments suggesting that a driveway or crossover which provides access from a road surface across the road reservation or verge onto private property was a place to which the public would have access. His Honour compared the case of ***Halliday v Nevill*** (1984) 155 CLR 1 in support of the proposition that the part of a path or driveway inside the boundary of a suburban house which is not unobstructed implies a licence for people with a legitimate business to go there. But it seems to me that ***Halliday v Nevill*** deals with an entirely different area of law: namely, the common law right relating to the right of persons to enter on private property for legitimate business as well as, in that case, the right of a police officer to attend on a person's premises to affect an arrest.

The State of Western Australia v Pettit [2024] WADC 73 -
The State of Western Australia v Pettit [2024] WADC 73 -
Cosenza v State of South Australia [2024] SASC 97 (07 August 2024) (McDonald J)

541. It is well understood that the law of trespass requires that for a person to lawfully enter a private residence there must be an invitation or permission from the occupier. It is for the person who entered the property to establish that they had some form of permission. In *Halliday v Neville* , [417] the High Court held that if the path or driveway leading to the entrance of a suburban dwelling-house is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is forbidden, the law will imply a licence in favour of any member of the public to go on that

path or that driveway for any legitimate purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier or the occupier's guests. [418]

Cosenza v State of South Australia [2024] SASC 97 (07 August 2024) (McDonald J)

628. In support of that proposition the appellants purported to rely on *Halliday v Nevill* [525] and *Plenty v Dillon* . [526] In considering that submission and those authorities Basten JA (with whom Allsop P concurred) made the observation that: [527]

> while the passages relied upon all support the principle that an implied permission can be withdrawn by notice, none stated that the mere publication of a notice, unbeknownst to the visitor was sufficient to render the person a trespasser.

Cosenza v State of South Australia [2024] SASC 97 -
Cosenza v State of South Australia [2024] SASC 97 -
Cosenza v State of South Australia [2024] SASC 97 -
Cosenza v State of South Australia [2024] SASC 97 -
Rainbow v The King [2024] NSWDC 632 -
Rainbow v The King [2024] NSWDC 632 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 (21 June 2024) (M Hanna M)

67. In the High Court case of *Halliday v Nevill* , [14] Brennan J said:

> *The principle applies alike to officers of government and to private persons. A police officer who enters* ***or remains on private property*** *without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.* (emphasis added)

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 (21 June 2024) (M Hanna M)
Halliday v Nevill [1984] HCA 80
Huskisson v Roper

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Cosenza v Denisoff, @Realty Pty Ltd [2024] SADC 42 -
Young v The King [2024] SASCA 47 -
Young v The King [2024] SASCA 47 -
Splinter v Dunne [2024] NTSC 24 -
Splinter v Dunne [2024] NTSC 24 -
Splinter v Dunne [2024] NTSC 24 -
Care A2 Plus Pty Ltd v GI 305 Pty Ltd [2023] VSC 394 -
Sohtra v Peddi [2023] VSC 262 -
Westacott v Noosa Shire Council [2023] QCAT 124 -
Westacott v Noosa Shire Council [2023] QCAT 124 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 (24 March 2023) (Williams J)

28. I reject that submission as fundamentally inconsistent with the fact that loss is not an element of the tort of trespass to land. As the Court of Appeal explained in *SLHD v Macquarie* at [73]-[75]:

> "[73] The tort of trespass is an unusual one which exists 'though the damage be nothing': see *Entick v Carrington* (1765) 19 St Tr 1029 at 1066 per Lord Camden LCJ,

cited by Brennan J in *Halliday v Nevill* (1984) 155 CLR 1 at 10 ; [1984] HCA 80 . Trespas s to land is actionable *per se* (see *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 353; (2004) 135 LGERA 98 at [190] (*Tellamist*)) and 'so nominal damages are awarded as a recognition of the infraction of the plaintiff's possessory right': see *May fair Ltd v Pears* [1987] 1 NZLR 459 at 465.

[74] That is not to say, however, that substantial damages may not be awarded for the tort. They may fall into different categories, as Santow JA explained in *Tellamist* at [193]-[200] , being (a) cases where there is a benefit to the defendant without actual loss to the plaintiff; (b) where the benefit to the defendant correlates to the actual loss to the plaintiff; and (c) where the trespass involves loss to the plaintiff and no correlative gain by the defendant. To these three categories may arguably be added a fourth, namely where there is no benefit to the defendant and no actual loss to the plaintiff. In such a case, only nominal damages would lie. As will be seen, this may be the position where a trespasser has made no actual use of the land whilst in unauthorised possession of it.

[75] There is no doubt that damages awarded for the tort of trespass may be awarded in a conventional manner consistent with the cardinal compensatory nature of damages in tort. Thus, it is open to a plaintiff upon whose land a defendant has trespassed to seek damages which would put that plaintiff in the same position it would have been had the tort not been committed or, to use the language of Hoffmann LJ (as his Lordship then was), to recover the 'loss which he has suffered in consequence of the defendant's trespass': see *Ministry of Defence v Ashman* (1993) 25 HLR 513 at 519."

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 (24 March 2023) (Williams J)

21. The question whether an occupier of land has expressly or impliedly granted permission to an alleged trespasser is essentially a question of fact: *Halliday v Nevill* (1984) 155 CLR 1; (1984) 59 ALJR 124; (1984) 57 ALR 331; 13 A Crim R 250; [1984] HCA 80, at 155 CLR 6 (Gibbs CJ, Mason, Wilson and Deane JJ). There are some circumstances in which the law will imply a licence to enter land for certain lawful purposes, unless there is something additional in the objective facts negating the implied licence or indicating that it was revoked: *Halliday v Nevill* , at 155 CL R 7 (Gibbs CJ, Mason, Wilson and Deane JJ); *Roy v O'Neill* , (2020) 272 CLR 291; (2020) 95 ALJR 64; (2020) 385 ALR 187; (2020) 285 A Crim R 120; [2020] HCA 45 (***Roy v O'Neill***) at [11]-[13] (Kiefel CJ) and [66]-[67] (Keane and Edelman JJ).

Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Supreme Court Of the Australian Capital Territory; Case Title:; McKay v Findex Group Limited; Findex Group Limited v; McKay; Citation: [2023] ACTSC 58 (23 March 2023) (McCallum CJ)

30. Mr Karam also relied on the decision of Mullins J of the Queensland Supreme Court in *Fanigun Pty Ltd v Woolworths Ltd* [2006] QSC 28; 2 Qd r 366 at [90]; 383-4 as follows:

A trespass is constituted by an unjustified entry directly by a person on land in the possession of another which is carried out either intentionally or negligently: *Halliday v Nevill* (1984) 155 CLR 1, 10. A tortfeasor may be liable for trespass on the basis of having authorised or instigated others to commit the trespass for the tortfeasor: *Doolan v Hill* (1879) 5 VLR 290, 291. As it is the method by which Woolworths has conducted its business of a service station on Lot 1 that has caused or contributed significantly to the queuing of customers' motor vehicles on a repetitive basis on the subject land, Woolworths has authorised its customers from time to time to commit a trespass to the subject land and therefore can be held liable for the actions of its customers. This situation can be distinguished from that in *Stoneman v Lyons* (1975) 133 CLR 550 where the trespass was committed by the independent contractors of the builder engaged by the adjoining owner and no issue of authorisation of the trespass by the adjoining owner arose.

39. In *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15, Mason CJ, Brennan, Gaudron and McHugh JJ held, at 435-6 :

> "Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right [*Entick v. Carrington* (1765) 2 Wils KB 275 at 291 (95 ER 807 at 817); *Halliday v. Nevill* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v. Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ See also *Colet v. The Queen* (1981) 119 DLR (3d) 521 at 526.]. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law [*Halliday v. Nevill* (1984) 155 CLR at 10 per Brennan J ; *Pl enty v. Dillon* (1991) 171 CLR at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ]."

Romani v State of New South Wales [2023] NSWSC 49 -
Romani v State of New South Wales [2023] NSWSC 49 -
Romani v State of New South Wales [2023] NSWSC 49 -
Romani v State of New South Wales [2023] NSWSC 49 -
AD v State of New South Wales [2022] NSWDC 546 -
Anthony James Sheridan (& Anor According to the Schedule) v Australian Pacific Airports (Melbourne) Pty Ltd (ACN 076 999 114) [2022] VSCA 222 -
Anthony James Sheridan (& Anor According to the Schedule) v Australian Pacific Airports (Melbourne) Pty Ltd (ACN 076 999 114) [2022] VSCA 222 -
McKay v Findex Group Limited [2021] ACTSC 191 (27 July 2022) (McWilliam AsJ)

94. It is appreciated that the reference in [21] of the claim to intentional or negligent conduct is language deliberately chosen by reference to the expression of the principle in *Halliday v Nevill* (1984) 155 CLR 1 (***Halliday***) at 10 that an action in trespass requires no finding of damage or harm to the plaintiff. In separately addressing pleading deficiencies raised by the defendants, the plaintiff drew the Court's attention to *Faniqun Pty Ltd v Woolworths Ltd & Anor; Woolworths Ltd v Faniqun Pty Ltd & Anor* [2006] QSC 28; 2 Qd R 366 per Mullins J (as her Honour then was) at [90] , which commences:

> A trespass is constituted by an unjustified entry directly by a person on land in the possession of another which is carried out either intentionally or negligently: *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1, 10. A tortfeasor may be liable for trespass on the basis of having authorised or instigated others to commit the trespass for the tortfeasor: *Doolan v Hill* (1879) 5 VLR 290, 291.

McKay v Findex Group Limited [2022] ACTSC 191 -
McKay v Findex Group Limited [2021] ACTSC 191 -
McKay v Findex Group Limited [2022] ACTSC 191 -
McKay v Findex Group Limited [2022] ACTSC 191 -
McKay v Findex Group Limited [2021] ACTSC 191 -
McKay v Findex Group Limited [2021] ACTSC 191 -
McKay v Findex Group Limited [2022] ACTSC 191 -
Norkin v University of New England [2022] NSWSC 819 (24 June 2022) (Davies J)

57. It is apparent that the fundamental right under consideration was "the right of a person in possession or entitled to possession of premises to exclude others from those premises". There can be no doubt that such a right is a fundamental one: *Halliday v Nevill (1984)* 155 CLR 1 at 10 ; *Plenty v Dillon* (1991) 171 CLR 635 at 639. The right gave rise to the tort of trespass very early in the history of the common law.

Aust-One Investment Pty Ltd v New World Investments Pty Ltd [2022] NSWSC 137 -
Sheridan v Australian Pacific Airports (Melbourne) Pty Ltd [2021] VSC 440 (28 July 2021) (Gorton J)

35. On the other hand, if the concept of 'licence' as used in the regulations extended to a licence to a person only to enter the land, then the regulations would be unworkable. Given that APAM had the legal right to possession of its land, any entrant onto its land, to avoid being a trespasser, had to enter pursuant to a licence. [21] Typically, that would be an implied license, but, nonetheless a license. If the word 'licence' as used in the regulations extended to a licence to enter, then, potentially, each entrant onto the APAM land would have to apply to the Secretary under reg 2.13, and then wait up to 30 days for the Secretary to declare 'by instrument' that that person's licence to enter was not prohibited. Also, the requirement that the Secretary take into account the size of the area to be subject to the licence reflects an assumption that the license under consideration is a licence to occupy or use an area of land in some way. These matters show that the approval process set out in reg 2.13 was not intended to cover a licence giving an individual person only a right to enter the airport land.

via

[21] See, eg, *Halliday v Nevill* (1984) 155 CLR 1 .

Sheridan v Australian Pacific Airports (Melbourne) Pty Ltd [2021] VSC 440 -
Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 (20 July 2021) (TOTTLE J)

Halliday v Nevill [1984] HCA 80 ; (1984) 155 CLR 1

Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 -
Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 -
Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 -
Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 -
Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231 -
R v Trandafilov [2021] SADC 85 (15 July 2021) (Honour Fuller J)

179. In *Roy v O'Neill* , Kiefel CJ said that the factors referred to by the court in *Halliday v Nevill* prov ide the limits of the licence to enter which the law will imply.

> They are consonant with the law of trespass, to which the implied licence effects a qualification. An approach which requires that the purpose be both legitimate and involve no interference with possession or injury to those present is comprehensible and workable. It requires no fine distinctions to be drawn, unguided, as to what are permissible or impermissible purposes; rather one looks to the effects of those purposes carried out upon the occupier's rights and its impact on those present. [206]

R v Trandafilov [2021] SADC 85 (15 July 2021) (Honour Fuller J)

220. The law is clear. The common law will not imply a licence to enter private property for the purpose only of searching the premises. To enter lawfully, the police must have a valid warrant issued under a statute which provides that authorisation in order to justify what would otherwise be a trespass. [212] Alternatively, the police may, pursuant to the implied licence to enter the property to speak with the occupier, request the permission of the occupier to search any part of the premises and if such permission is granted, conduct a search in accordance with the grant of permission.

via

[212] *Roy v O'Neill* at [17] citing *Halliday v Nevill* [supra] and *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
R v Trandafilov [2021] SADC 85 -
Ward v Richardson [2021] ACTSC 130 (02 July 2021) (Burns ACJ)

37. It is also appropriate to observe that a right to enter upon property will only be implied where the lawful purpose of entry involves no "interference with the occupier's possession, no injury to the occupier, his or her guests or his, her or their property": *Halliday v Nevill* at 8. As Kiefel CJ pointed out in *Roy v O'Neill,* the word "injury" when used in this context has a broader meaning that in other areas of tort: [16]. The purpose of the appellant's entry to TR's property, or at least the backyard, being the removal of one of her guests, K, in circumstances likely to involve confrontation and a breach of TR's peaceful occupation of the property, was one involving interference with TR's rights of occupation and injury, in the relevant sense, to TR and her guests.

Ward v Richardson [2021] ACTSC 130 -
Ward v Richardson [2021] ACTSC 130 -
Ward v Richardson [2021] ACTSC 130 -
Ward v Richardson [2021] ACTSC 130 -
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Ward v Richardson [2021] ACTSC 130 -
Mark Eldridge v Agent 47 Pty Ltd trading as Harcourts West Ryde [2021] NSWDC 230 -
Mark Eldridge v Agent 47 Pty Ltd trading as Harcourts West Ryde [2021] NSWDC 230 -
Mark Eldridge v Agent 47 Pty Ltd trading as Harcourts West Ryde [2021] NSWDC 230 -
Mark Eldridge v Agent 47 Pty Ltd trading as Harcourts West Ryde [2021] NSWDC 230 -
Lawrence v Arambasic [2020] NSWSC 1864 -
Lawrence v Arambasic [2020] NSWSC 1864 -
Lawrence v Arambasic [2020] NSWSC 1864 -
Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

81. An example of an implied licence possessed by police officers which ordinary members of the public do not possess is the licence recognised in *Halliday* to enter the curtilage of a property to question or arrest a person who is not an occupier of the property and whom the officer had observed committing an offence [84] . However, that circumstance, described as "hedge-hopping", was said by Lord Diplock to involve "very different considerations" from those where the person to be subject to coercive process is the occupier [85] . The recognition of a common law implied licence to enter private land to assert any coercive power against the occupier or the occupier's guests would disturb the proper balance between public

authority and the security of private dwellings. It would cut across the common law regime of special cases, described above, which license the entry onto land for the purpose of exercising only particular coercive powers and only in particular circumstances. It would also be inconsistent with the foundation of the implied licence in the habits and reasonable expectations of social life if the common law were to extend the licence in *Halliday* to permit a police officer to enter the curtilage of a property for the sole purpose of asserting any coercive power over the occupier or the occupier's guests.

via

[84] *Halliday v Nevill* (1984) 155 CLR 1 at 8.

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

32. Nobody, and especially no officer of the state, can enter my home, or even walk up my path or stand at my doorstep or knock on my door, without my permission unless positively authorised by statute or the common law to take that action [20] . But, of course, the very fact that I have a path and a doorstep, and a door, implies that I am granting permission for anyone who means me no harm to walk up the path, to stand at the doorstep and to knock on the door so as to talk to me if I am home and if I choose to answer the knock [21] .

via

[21] *Lipman v Clendinnen* (1932) 46 CLR 550 at 557 ; *Halliday v Nevill* (1984) 155 CLR 1 at 7-8 .

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

17. Clearly it would be an interference with an occupier's possession if police entered for the purpose only of searching the premises [15] . Consistently with what was said in *Halliday v Nevill* , the common law will not imply a licence to enter for that purpose. To enter lawfully, police must have a valid warrant issued under a statute which provides that authorisation in order to justify what would otherwise be a trespass [16] . Likewise, if a police officer was to enter premises for the sole purpose of exercising coercive powers, such as requiring a person to submit to a breath test, a statutory power such as s 126(2A) of the *Police Administration Act* w ould be necessary and the police officer must have the required belief as to contravention.

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

14. The circumstances in *Halliday v Nevill* [7] provide an example. The purpose of the police in entering upon the driveway of the dwelling in question was not to communicate with the occupier or other persons lawfully there present. The police had no business with such persons. Their purpose was to arrest without warrant a person known to be a disqualified driver who took refuge in the driveway. Clearly the entry of the police to effect that purpose involved no interference with the occupier's possession or injury to the occupier or others on the property. The conclusion reached by the majority, that the police officer was not a trespasser, was said to be based on common sense, reinforced by considerations of public policy [8] .

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

70. The circumstances in which a licence to enter land will be implied in law are not limited to the common instances of lawful communications with, or deliveries to, the occupants of a premises. As the joint judgment in *Halliday* explained, the path or driveway is "held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no

interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property" [57] . Other examples of a licence implied in law include entry upon a driveway for the purposes of recovering an item of property or an errant child [58] . In *Halliday* it was also held that a member of the police force, acting in the ordinary course of his duties, had an implied licence to enter an open driveway for the purpose of questioning or arresting a person who was not the occupier of the property but whom the officer had observed committing an offence on a public street in the immediate vicinity of that driveway [59] .

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

67. The implication upon which Ms Roy relies on this appeal is an implication in law, not an implication in fact. The two are closely related. An implication in law is based upon background facts and conventions rather than reasons of desired public policy. It is akin to a presumption and it is based upon "an incident of living in society" [47] , "the reasonable requirements of society" [48] , "the habits of the country" [49] , or "background social norms" [50] . A licence will only be implied as a matter of law if there is nothing "in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated" [51] . And this implied licence can be revoked at any time [52] , which will require the invitee to leave the land as soon as is reasonably practicable [53] .

via

[47] *Halliday v Nevill* (1984) 155 CLR 1 at 19.

Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

68. In *Halliday v Nevill* [54] the joint judgment of Gibbs CJ, Mason, Wilson and Deane JJ described the core, or most common, instance of a licence implied by law to enter land as follows:

> "The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house."

Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
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Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Middlin-Hannah v The Queen [2020] SASCFC 112 -
Phillips v Police [2020] SASC 212 (03 November 2020) (Stanley J)

16. In *Halliday v Nevill* [5] the High Court considered the rights of a police officer to enter or remain on private property. In that case two officers were on patrol in a police car when they saw the appellant reversing a car out of the driveway. One of the officers knew the appellant to be disqualified from driving. The evidence suggested the appellant saw the approaching police car and decided to drive back into the driveway that he had been exiting. The police stopped their vehicle across the driveway and alighted from their car. They walked down the driveway entering the property. They spoke to the appellant. The appellant had been drinking. He denied that he had driven on the roadway. He was arrested. As the officers and the appellant walked down the driveway towards the police car the appellant broke away and ran across the street and into his own home. The police followed him. There was a struggle with the police finally subduing the appellant and taking him into custody. He was charged with driving while disqualified, escaping custody, hindering police, assault and driving a motor vehicle whilst his blood alcohol content exceeded the prescribed maximum. At trial a magistrate excluded the evidence of what had occurred after the police had arrested the appellant on the basis that the officers were trespassing. The charges were consequently dismissed.

Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 -
Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

Going back to *Halliday v Nevill* , where the Court did consider the manner in which the inference is to be drawn in determining the scope – I have lost track of the majority judgment's consideration of that. If necessary, I will come back to it. We say, though, in an ordinary case lawful communication with the occupier is a legitimate purpose, but lawful communication does not mean any communication. Lawful communication is the communication that is necessary to make the occupier aware of the business on which the entrant comes and to seek the permission which is sought.

Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

Your Honours, the third proposition we would draw from page 7 of *Halliday* is the first statement by the Court about the scope of the licence – which is that where the conditions for it are met:

Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

Secondly, in that case it was simply not argued or necessary to consider whether there was any greater scope to the licence than that which was identified at page 7 of the judgment. The thrust of the appellant's argument in *Halliday* was essentially that the implied licence was limited to the case where the entrant's business is with the occupier of the house and the facts of the decision were being attacked on the basis that the business was with a third person, not the occupier. And that is clear from Mr Merkel's argument, which is summarised on pages 3 and 4 of the report, down the bottom of page 3, up to the top of page 4 where it was argued that:

Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

There never was a case where the police simply intended to knock on the door and to communicate, there was something more directed and purposive about the reason for being in the premises that day. So we submit that the statement that is relied upon by my learned friends as being the real essence of why the police were not trespassing is not dispositive in principle nor in the facts of this case. The majority in *Halliday v Nevill* were simply identifying what is lawful communication and delivery as to legitimate purposes, but neither lawful communication nor delivery arose on the facts of that case and neither does this case hang on that concept.

Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

I can also take your Honours to *Halliday v Nevill* again in Justice Brennan's judgment at page 19 , wh ere his Honour referred to Lord Chief Justice Widgery's explanation in *Brunner v Williams* that lawful communication in this instance:

Roy v O'Neill [2020] HCATrans 135 (08 September 2020) (Kiefel CJ; Bell, Gageler, Keane and Edelman JJ)

In a similar way, the idea of what is customary, has been picked up here in this Court's consideration of the way in which you imply the scope of the licence. As we have said in our written submissions, paragraph 23, Justice Brennan in *Halliday* used the term that the scope:

Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
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Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Roy v O'Neill [2020] HCATrans 135 -
Rossiter v Adelaide City Council [2020] SASC 61 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Annan v Harris [2019] WADC 157 (22 November 2019) (Quail DCJ)

Halliday v Nevill [1984] HCA 80 ; (1984) 155 CLR 1

R v Salotti [2019] SADC 171 (22 November 2019) (Reasons For Ruling Of Tilmouth J)

36. Nothing said in *Halliday v Nevill* renders anything done by Lloyd unlawful or unfair. In all respects, all he did as a member of the police force was going 'upon the driveway in the ordinary course of his duty' of reasonably searching for items of evidence that might be disposed of. Nothing of consequence therefore comes of this point.

Annan v Harris [2019] WADC 157 -
R v Salotti [2019] SADC 171 -
R v Salotti [2019] SADC 171 -
R v Salotti [2019] SADC 171 -
R v Salotti [2019] SADC 171 -
R v W, N P [2019] SADC 143 -
O'Neill v Roy [2019] NTCA 8 (04 September 2019) (Southwood and Kelly JJ and Riley AJ)

37. This is not a case where the implied license was for a specific purpose of the kind found in *Barker v The Queen* . [33] This is a case similar to *Halliday v Nevill* [34] as it involves an implied license from the occupier of the premises for visitors to be on the footpath and approach the door of the unit. There was nothing in the facts to suggest that the occupier did anything to negate or rescind any implied license. The dual purpose of the visit by the police was to determine whether the terms of a DVO were being honoured and to check on the well-being of the protected person under the Order. The police officer gave evidence that, for reasons which he outlined, "I felt that there may have been an issue and I started making further enquiries as to the nature of their relationship and what was going on at the address for his own welfare." That is not an unlawful purpose. In the words of the High Court the approach was for the purpose of lawful communication [35] which is a legitimate purpose. [36] The police officers did not seek to go beyond the threshold of the premises or to enter the premises. Their actions did not involve interference with the occupier's possession, or injury to the person or property of either occupier. It was open to one or other occupier to revoke or negate the implied license by telling the police to leave. They did not do so.

via

[35] *Halliday v Nevill* (1984) 155 CLR 1 .

O'Neill v Roy [2019] NTCA 8 (04 September 2019) (Southwood and Kelly JJ and Riley AJ)

13. In the present case, the appellant relied heavily upon the High Court decision in *Halliday v Nevill and Another* [6] which involved police officers observing the appellant, who was known to them as a disqualified driver, reversing a car out of a driveway. When the appellant saw the police car he drove back into the driveway. The officers walked down the driveway and arrested him. Whilst being escorted back along the driveway to the police car he broke free and ran across the road into his own house. Police eventually arrested him at that house. The majority (Gibbs CJ, Mason, Wilson and Deane JJ) made the following observations: [7]

> While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked. The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other direction that entry by visitors generally or particularly designated visitors is forbidden or unauthorised, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done or said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it.
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> ....
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> The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property.
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> ....
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> [I]n the absence of any indication to the contrary, the implied or tacit license to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor upon it.

via

[6] (1984) 155 CLR 1 .

O'Neill v Roy [2019] NTCA 8 (04 September 2019) (Southwood and Kelly JJ and Riley AJ)

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via

[7] (1984) 155 CLR 1 at 6-7 .

O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
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O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
R v Clough [2019] SADC 125 -
R v Clough [2019] SADC 125 -
R v Clough [2019] SADC 125 -

R v Armistead [2019] SASCFC 85 (16 July 2019) (Kelly, Stanley and Hinton JJ)

73. In the High Court Gibbs CJ, Mason, Wilson and Deane JJ considered that the only conclusion open on the evidence was that the arresting officer had an implied licence from the occupier of the premises to be upon the driveway where the arrest first took place. [4] They said: [5]

> While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked: cf. *Edwards v. Railway Executive*. The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it: see, generally, *Robson v. Hallett*; *Lipman v. Clendinnen*; *Lambert v. Roberts*.
>
> [footnotes omitted]

via

[4] *Halliday v Nevill* (1984) 155 CLR 1 at 6.

R v Armistead [2019] SASCFC 85 (16 July 2019) (Kelly, Stanley and Hinton JJ)

77. It is difficult to distinguish the objective facts relevant to the existence and content of an implied licence in the present case from those in *Halliday v Nevill.* In the present case, as in *Halliday v Nevill* , there was an open driveway to a public road which led to a residential premises. There was no gate or obstruction intended to prevent or impede access to the property. There was no sign or any form of notice advising people to keep out or, more particularly, police officers to keep out. The legitimate purpose that Constable Nevill had was to arrest Mr Halliday pursuant to the power to arrest without warrant contained in s 458 of the *Crimes Act 1958* (Vic) . Importantly, whilst that power authorised a police officer to take a person into custody, it did not authorise the officer to trespass upon private property to do so.

R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
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R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Armistead [2019] SASCFC 85 -
R v Daka [2019] SASCFC 80 (03 July 2019) (Kourakis CJ; Stanley and Parker JJ)

75. The High Court held that the police had not trespassed and the arrest was lawful. Gibbs CJ, Mason, Wilson and Deane JJ held: [14]

> While the question whether an occupier of land has granted the licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or revoked. The most common instance of such an implied licence relates to the means of access, where the path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors by generally or particularly designated visitors is forbidden or unauthorised, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it.
>
> (Citations omitted)

via

[14] Ibid at 6-7 (Gibbs CJ, Mason, Wilson and Deane JJ) .

R v Daka [2019] SASCFC 80 (03 July 2019) (Kourakis CJ; Stanley and Parker JJ)

49. The Judge also held that if he was wrong about any aspect of the formation by Detective Sergeant Santucci of a reasonable cause to suspect, he was satisfied that, upon the front door of the house being opened, the overwhelming smell of cannabis provided a reasonable cause to suspect for the purposes of s 67 . That did not involve a retrospective justification for the search. The police had an implied licence to approach the front door where the detection of a very strong smell of cannabis did not involve any retrospective justification. His Honour distinguished the facts in *R v Rockford* . [2] His Honour also had regard to the decision in the High Court in *Halliday v Nevill* . [3]

R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Tipping [2019] SASCFC 41 (29 April 2019) (Vanstone, Peek and Blue JJ)

129. There are various ways in which an officer may transgress and later be found not to have been acting in the course of duty quite apart from the matter of an unlawful arrest. [28] However, the particular (and only) type of transgression under present consideration is unlawful arrest; it is well established that an officer who unlawfully arrests a person is not acting in the execution of his or her duty. With respect, one of the most comprehensive modern expositions of this matter is that of McHugh J in *Coleman v Power* . His Honour there stated: [29]

> [117] ... It is not part of an officer's duty to engage in unlawful conduct. If the officer acts outside his or her duty, an element of the offence is missing. In *Re K* , [30] after reviewing the authorities on the scope of an officer's duty, the Full Court of the Federal Court said:
>
> > "The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as

> a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein."

[118] An officer who unlawfully arrests a person is not acting in the execution of his or her duty. In *Nguyen v Elliott*,[31] the Supreme Court of Victoria set aside convictions for assaulting and resisting an officer in the execution of his duty when the arrest was unlawful and therefore not made in the execution of the officer's duty. The accused was approached by two constables who believed that he might have been involved in drug dealing. The accused attempted to walk away but was detained by the first officer who wished to search him. The accused became aggressive and kicked the first officer. The second officer crossed the street to assist the first officer to control the accused. The accused was forced into the police vehicle and continued to protest. He was then taken out and handcuffed during which the accused bit the second officer on the hand. Before the magistrate, the first officer acknowledged that he did not reasonably suspect that the accused was in possession of drugs but was merely curious about whether the accused possessed drugs. The charges relating to the first officer were dismissed. The prosecution claimed the second officer's position was different because he had good reason to believe he was lawfully assisting his partner to effect an arrest for what the second officer assumed was an assault on the first officer. Hedigan J held that the conviction for resisting arrest could not stand. His Honour said:

> "... it cannot be said that a police officer is acting in the execution of his duty to facilitate an unlawful search and arrest. The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases."

[119] In setting aside the conviction, Hedigan J applied the decision of the Full Court of the Supreme Court of Victoria in *McLiney v Minster* where Madden CJ said: [32]

> "... it is an important principle of law that no man has the right to deprive another of his liberty except according to law, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and get out of his custody."

[120] Hedigan J held that, although the second officer acted in good faith, his conduct was also unlawful and he was not acting in the execution of his duty when assisting the first officer to effect an unlawful arrest.

via

[28] Another prominent transgression is that of trespassing. As Brennan J said in *Halliday v Nevill* (1984) 155 CLR 1, 10 (a passage later approved by the High Court in *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ): "The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law."

R v Tipping [2019] SASCFC 41 -
Community Association DP270447 v ATB Morton Pty Ltd [2019] NSWCA 83 -
O'Neill v Roy [2019] NTSC 23 (12 April 2019) (Mildren AJ)

[9] Written submissions were prepared by counsel for the defendant. Counsel also spoke to them briefly. In short, the defendant's case was that the police had no legal authority to go to Ms Roy's door and submit her to a breath test. It was put that the *Domestic and Family Violence Act* contained no such power, and the powers under the *Police Administration Act* arose only if the Police had reasonable grounds to believe that there was a contravention of the order. As to the latter, this did not authorise them to knock on the defendant's door because up until then, they had no such reasonable belief. As to the possibility of an implied licence, it was put that where the legislature had carefully defined the rights of the police to enter private property, it was not for the courts to alter the balance between individual privacy and the power of public officials, citing Brennan J in *Halliday v Nevill.* *[1]* The written submissions then addressed the reasons why the Court should exclude the evidence under s 138 of the *Evidence (National Uniform Legislation) Act* . It is not necessary to refer to them in detail, save to say that a strong argument was put for excluding the evidence.

via

[1] [1984] HCA 80 ; 57 ALR 331 at 343.

O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
State of New South Wales v Dargin [2019] NSWCA 47 -
State of New South Wales v Dargin [2019] NSWCA 47 -
Luben Petkovski v Kai Yin Huang [2018] NSWSC 1667 -
Luben Petkovski v Kai Yin Huang [2018] NSWSC 1667 -
Woodley v Woodley [2018] WASC 333 (02 November 2018) (Tottle J)

Halliday v Nevill [1984] HCA 80 ; (1984) 155 CLR 1

Woodley v Woodley [2018] WASC 333 (02 November 2018) (Tottle J)

71. Amongst other circumstances, a trespass to land occurs when a person intentionally or negligently enters into or remains on land which is in the possession of another. [46] Unless a person who enters the property of another can justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises, that person commits an act of trespass. [47] Every unauthorised entry upon private property is a trespass. [48]

via

[48] See ***Coco v The Queen*** [1994] HCA 15; (1994) 179 CLR 427 Mason CJ, Brennan, Gaudron and McHugh JJ); ***Halliday v Nevill*** [1984] HCA 80; (1984) 155 CLR 1, 10 (Brennan J) .

Robinson v State of New South Wales [2018] NSWCA 231 -

Heather Healey v Royal Society for the Prevention of Cruelty to Animals Victoria [2018] VSCA 245 (26 September 2018) (Kyrou, Niall and Hargrave JJA)

65. The applicant contended that this contrast was particularly relevant in the light of the COO's supervisory role in applications for warrants, and the serious nature of the issue of warrants due to their interference with privacy and property rights. She relied on *Halliday v Nevill* , [46] *Tran Nominees Pty Ltd v Scheffler* ,[47] *Coco v The Queen* ,[48] *R v McNamara* [49] and *New South Wales v Corbett* ,[50] for the following proposition: Where legislation seeks by way of a search warrant to render lawful an entry and seizure that would otherwise be a trespass and an invasion of privacy, a court will construe the legislation strictly, resolve any ambiguity in favour of the citizen and insist on strict compliance with the legislation and the conditions on which the warrant is authorised.

Heather Healey v Royal Society for the Prevention of Cruelty to Animals Victoria [2018] VSCA 245 -
Heather Healey v Royal Society for the Prevention of Cruelty to Animals Victoria [2018] VSCA 245 -
R v Daka [2018] SADC 110 -
R v Daka [2018] SADC 110 -
R v Daka [2018] SADC 110 -
Waverley Council v Bobolas [2018] NSWLEC 116 -
Waverley Council v Bobolas [2018] NSWLEC 116 -
Holder v State of South Australia [2018] SADC 83 -
Holder v State of South Australia [2018] SADC 83 -
Holder v State of South Australia [2018] SADC 83 -
R v King [2019] SADC 107 -
R v King [2019] SADC 107 -
R v King [2019] SADC 107 -
R v C, CJ [2018] SADC 76 -
Caratti v Commissioner of the Australian Federal Police [2018] FCA 907 -
Caratti v Commissioner of the Australian Federal Police [2018] FCA 907 -
Caratti v Commissioner of the Australian Federal Police [2018] FCA 907 -
Caratti v Commissioner of the Australian Federal Police [2018] FCA 907 -
R v Muja [2018] SADC 58 -
R v Muja [2018] SADC 58 -
R v Muja [2018] SADC 58 -
Minerva (Aust) Pty Ltd v Suburban Land Agency [2018] ACTSC 103 -
Minerva (Aust) Pty Ltd v Suburban Land Agency [2018] ACTSC 103 -
Roxburgh v Pyrenees Shire Council (Review [2018] VCAT 512 -
Brown v Tasmania [2017] HCA 43 -
Cosenza v Origin Energy Ltd [2017] SASC 145 (12 October 2017) (Blue J)

45 In *Halliday v Nevill* , [17] the High Court (Brennan J dissenting) held that a police officer had an implied licence to enter residential land in pursuit of a disqualified driver fleeing from the police officer. Gibbs CJ, Mason, Wilson and Deane JJ said:

via

[17] (1984) 155 CLR 1 .

Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
State of New South Wales v Bouffler [2017] NSWCA 185 (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)

Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales [2014] NSWCA 116; *State of New South Wales v McCarthy* (2015) 251 A Crim R 445; [2015] NSWCA 153; *Bulsey v Queensland* [2015] QCA 187; *Halliday v Nevill* (1984) 155 CLR 1 ; *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26

State of New South Wales v Bouffler [2017] NSWCA 185 (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)

Adams v Kennedy (2000) 49 NSWLR 78 ; [2000] NSWCA 152 Alderson v Booth [1969] 2 QB 216 Attorney-General for New South Wales v Perpetual Trustee Company (Ltd) (1952) 85 CLR 237 ; [1952] HCA 2 Australian Federation of Islamic Councils Inc v Farrell [2016] NSWCA 256 Bhattacharya v State of New South Wales [2003] NSWSC 261 Bouffler v State of New South Wales (District Court (NSW), C O'Connor QC ADCJ, 23 May 2016, unrep) Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1 Bulsey v State of Queensland [2015] QCA 187 Bushby v Dixon Holmes du Pont Pty Ltd [2012] NSWCA 90 Carolan v AMF Bowling Pty Ltd t/as Bennetts Green Bowl [1995] NSWCA 69 Christie v Leachinsky [1947] AC 573 Collier v Lancer (No 2) [2013] NSWCA 186 Enever v The King (1906) 3 CLR 969 ; [1906] HCA 3 Entrance Plaza Pty Ltd, The v Davids [2016] NSWCA 362 George v Rockett (1990) 170 CLR 104 ; [1990] HCA 26 Halliday v Nevill (1984) 155 CLR 1 ; [1984] HCA 80 Hanningfield v Chief Constable of Essex Police [2013] 1 WLR 3632; [2013] EWHC 243 (QB) Hayes v Chief Constable of Merseyside Police [2012] 1 WLR 517 ; [2011] EWCA Civ 911 Holloway v McFeeters (1956) 94 CLR 470 ; [1956] HCA 25 HP Mercantile Pty Ltd v Clements [2015] NSWCA 212 Hyder v Commonwealth of Australia (2012) 217 A Crim R 571 ; [2012] NSWCA 336 Kuru v State of New South Wales (2008) 236 CLR 1 ; [2008] HCA 26 Lee v New South Wales Crime Commission (2012) 224 A Crim R 94 ; [2012] NSWCA 262 Li v Chief of Army (2013) 210 FCR 299 ; [2013] FCAFC 20 Li v Chief of Army (2013) 250 CLR 328 ; [2013] HCA 49 Luxton v Vines (1952) 85 CLR 352 ; [1952] HCA 19 Nilsson v McDonald (2009) 19 Tas R 173 ; [2009] TASSC 66 O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286 Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales (2014) 242 IR 338 ; [2014] NSWCA 116 R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Generating Board [1982] QB 458 R v Howell [1982] QB 416 R v Van Bao Nguyen (2002) 139 NTR 15 ; [2002] NTSC 38 R (Laporte) v Chief Constable of Gloucestershire Constabulary [2007] 2 AC 105 ; [2006] UKHL 55 Rickard v State of New South Wales [2010] NSWSC 151 Rodi v Gelonesi [2012] NSWCA 424 State of New South Wales v Ibbett (2006) 229 CLR 638 ; [2006] HCA 37 State of New South Wales v Landini [2010] NSWCA 157 State of New South Wales v McCarthy (2015) 251 A Crim R 445 ; [2015] NSWCA 153 State of New South Wales v McMaster (2015) 91 NSWLR 666 ; [2015] NSWCA 228 State of New South Wales v Robinson (2016) 93 NSWLR 280 ; [2016] NSWCA 334 State of New South Wales v Tyszyk [2008] NSWCA 107 Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 ; [1950] HCA 35 Tomarchio v Pocock [2002] WASCA 156 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 ; [1966] HCA 40 XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; [1985] HCA 12

State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia [2017] FCA 803 -
Bright Horizons Australia Childcare P/L v Childcare Providers P/L [2017] QSC 51 -
Bright Horizons Australia Childcare P/L v Childcare Providers P/L [2017] QSC 51 -
Strano v Yates [2016] ACTSC 363 (14 December 2016) (Burns J)

22. The appellant's reference to the decision of the High Court in *Halliday v Nevill* is also misguided. That case concerned the right of police to enter upon private property without warrant in order to effect the arrest of a criminal. The issue in *Halliday v Nevill* only arose because of the absence in Victoria at that time of a statutory power of entry onto private property such as that found in s 220 of the Crimes Act . Similarly, the issue in *Plenty v Dillon* w as whether a police officer had committed a trespass by entering onto private property in

order to serve a summons in circumstances where there was no statutory right of entry given to him. All of these cases are clearly distinguishable.

Strano v Yates [2016] ACTSC 363 (14 December 2016) (Burns J)

16. It is convenient to consider these grounds together. The Magistrate, the appellant submitted, made an error of law in finding that the shutting of the wooden door constituted obstruction of Senior Constable Yates after correctly determining that the appellant had no obligation to open the closed screen door when called upon to do so by police. The appellant submitted that he was entitled to bar the door to the police, citing *Semayne's Case* (1604) 5 Co Rep 91 a; 77 ER 194 (*Semayne's Case*), *Halliday v Nevill* [1984] HCA 80; 155 CLR 1 (*Halliday v Nevill*) and *Plenty v Dillon* [1991] HCA 5; 171 CLR 635 (*Plenty v Dillon)*.

Strano v Yates [2016] ACTSC 363 -
Strano v Yates [2016] ACTSC 363 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Siddique v Martin [2016] VSCA 274 -
Cleret v Sunshine Coast Regional Council [2016] QSC 208 -
Cleret v Sunshine Coast Regional Council [2016] QSC 208 -
Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 (01 September 2016) (Hall J)
Halliday v Nevill (1984) 155 CLR 1 ; HCA 80

Director of Public Prosecutions (NSW) v Roberts [2016] NSWSC 1224 -
Bennett v Police [2016] SASC 139 (25 August 2016) (Doyle J)

34. At common law, a licence or consent to enter and remain on private property for a particular purpose may be inferred. If the entrance is not locked or obstructed, and there is no other indication (for example, by notice) that entry by visitors is forbidden, then a licence will be implied to enter the property for any legitimate purpose that does not interfere with the occupier's possession of the property. [4] Such an implied licence may be precluded or revoked at any time by an express or implied refusal or withdrawal of the licence. [5]

via

[4] *Halliday v Nevill* (1984) 155 CLR 1 at 6-8 ; *Plenty v Dillon* (1991) 171 CLR 635 at 647 ; *Kuru v New South Wales* (2008) 236 CLR 1 at [45] ; *Wheare v Police* (2008) 180 A Crim R 396 at [22] .

Bennett v Police [2016] SASC 139 (25 August 2016) (Doyle J)

48. In *Halliday v Nevill* , [15] Brennan J summarised the common law position in these terms: [16]

> The common law power to arrest on a criminal charge can be exercised as of right on private as well as on public property, in the home of a fugitive offender or in the homes of his friends. No leave or licence is necessary to enter if no force be needed, and in some cases force may be used.
>
> ...
>
> Of course, a constable's power to arrest without warrant is limited. At common law, a constable is empowered to arrest without warrant any person whom he suspects on reasonable grounds of having committed a felony, but he is not empowered to arrest a person guilty or suspected of misdemeanours except where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission: Stephen, *History of the Criminal Law of England* (1883), vol. 1, p. 193; *Hale's Pleas of the Crown* (1800), vol. 2, p. 85. And so it was held that a constable could not lawfully arrest an

offender who, having assaulted the constable an hour earlier, retires to his house and closes and fastens his door: *Reg. v. Marsden*. At common law, a constable is entitled to enter on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose.

Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Coles Group Property Developments Limited v Milovan (aka Michael) Stankovic [2016] NSWSC 852 -
Wilkinson v Neumann (Civil Claims) [2016] VCAT 813 -
Marigliano v Queensland Police Service [2016] QCAT 110 -
Marigliano v Queensland Police Service [2016] QCAT 110 -
R v Hammond and Loosemore [2016] QSC 98 -
R v Hammond and Loosemore [2016] QSC 98 -
Lord v McMahon [2015] NSWSC 1619 -
R v Gallagher [2015] NSWCCA 228 -
R v Gallagher [2015] NSWCCA 228 -
R v Gallagher [2015] NSWCCA 228 -
R v Gallagher [2015] NSWCCA 228 -
Gazebo Penthouse PL v Owners SP 73943 [2015] NSWCATCD 93 -
State of New South Wales v McCarthy [2015] NSWCA 153 -
Shannon v State of New South Wales [2015] NSWDC 69 -
Shannon v State of New South Wales [2015] NSWDC 69 -
R v Varga [2015] QDC 82 (17 April 2015) (Durward SC DCJ)

Bunning v Cross (1978) 141 CLR 54; *R v Munck* [2010] QSC 416; *R v Christensen* [2005] QSC 279; *R v Peirson* [2014] QSC 134; *R v LR* [2008] 1 Qd R 435 ; *Darwen v Smith* [2007] QDC 030; *The Queen v Ireland* (1970) 126 CLR 321; *R v Bossley* [2012] QSC 292; *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *Halliday v Nevill & Anor* (1984) 155 CLR 1 ; *Coco v R* (1994) 179 CLR 427.

R v N [2015] QSC 91 -
R v Varga [2015] QDC 82 -
R v Pelly [2015] SASCFC 25 -
R v Pelly [2015] SASCFC 25 -
R v Jacilla Nerrah Yatta [2015] QDC 58 (18 March 2015) (Bowskill QC DCJ)

93. Similarly, it seems to me that the activities of the police, in entering the residential unit complex and carrying out the search and subsequent activities that they did, went far beyond what might reasonably be contemplated by any implied licence to enter the driveway or path, leading to the entrance to a dwelling, such as is discussed by the High Court in *Halliday v Nevill* (1984) 155 CLR 1 at 7.

R v Jacilla Nerrah Yatta [2015] QDC 58 -
Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)

324. The violated rights of property and privacy of members of the public were most important. In *Kuru v State Of New South Wales*, the plurality stated: [125]

> [43] As was pointed out in this Court's decision in *Plenty v Dillon* ,[126] it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. [127] Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. [128] ... as Brennan J pointed out [129] in his dissenting opinion in *Halliday* , there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

via

[127] *Halliday v Nevill* (1984) 155 CLR 1, 10 ; [1984] HCA 80 ; *Entick v Carrington* (1765) 2 Wils KB 275, 291 [95 ER 807, 817]; *Great Central Railway Co v Bates* [1921] 3 KB 578, 581582 ; *Southam v Smout* [1964] 1 QB 308, 320 ; *Morris v Beardmore* [1981] AC 446, 464 ; *Eccles v Bourque* [1975] 2 SCR 739, 742743 .

Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)

> 283. It may be said that so much is trite, but it is well to spell it out, for it provides an unspoken background to a number of judicial pronouncements which, if taken apart from that necessary context, might possibly be misunderstood. [90]

via

[90] Thus in *Halliday v Nevill* (1984) 155 CLR 1 Brennan J stated: "The common law power to arrest on a criminal charge can be exercised as of right on private as well as on public property, in the home of a fugitive offender or in the homes of his friends. No leave or license is necessary to enter if no force be needed, and in some cases force may be used." Of course, the entry there being referred to was an entry *for the purpose of arresting a particular person*; the whole underlying theme of both the minority and majority judgments in *Halliday* is that police officers cannot enter willy-nilly for the purpose of making inquiries or to search for a person or persons. So too, in cases where the facts are that such an entry was clearly justified on the basis of following the particular person to be arrested onto premises, the matters in issue in the present case will not call for analysis. For example, see *Wheare v Police* [2008] SASC 13 and the cases referred to therein.

Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)

> 324. The violated rights of property and privacy of members of the public were most important. In *Kuru v State Of New South Wales*, the plurality stated: [125]
>
> > [43] As was pointed out in this Court's decision in *Plenty v Dillon* ,[126] it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. [127] Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. [128] ... as Brennan J pointed out [129] in his dissenting opinion in *Halliday* , there are cases in which it is necessary to

recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

via

[128] *Halliday v Nevill* (1984) 155 CLR 1, 10.

Police v Williams [2014] SASC 177 -
R v Rockford [2014] SADC 199 -
R v Rockford [2014] SADC 199 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
R v Rockford [2014] SADC 199 -
Police v Williams [2014] SASC 177 -
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R v Rockford [2014] SADC 199 -
Police v Williams [2014] SASC 177 -
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Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
Sherman v Condon [2014] QDC 189 -
Gallagher v McClintock [2014] QCA 224 -
Gallagher v McClintock [2014] QCA 224 -
New South Wales v Hunt [2014] NSWCA 47 -
Chen v State of New South Wales [2014] NSWCA 41 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Pourzand v Telstra Corporation Ltd [2014] WASCA 14 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Fazio v The City of Melville [No 2] [2013] WADC 147 -
Bilic and Bilic v Nicholls [2013] QDC 110 -
Sibraa v Brown [2012] NSWCA 328 (12 October 2012) (Campbell and Hoeben JJA, Tobias AJA)

66. A factor relevant to the probability of harm resulting from the presence of the mesh is that it was located on private property, and was not on the ordinary means of access from the front gate to the front door. People unfamiliar with the Appellant's habit of locking the security door and who visited the premises would, in the ordinary course, proceed from the front gate to the front door, a path which would not involve them encountering the mesh: cf ***Halliday v Neville*** (1984) 155 CLR 1 at 7. This would be the usual path adopted by such visitors, both by day and by night. Even if a visitor knew of the Appellant's habit of locking the security door,

it would only be visitors who had an express or implied permission from the Appellant to go to the back door who would not be trespassers in going there. It is foreseeable that private property might be trespassed upon. However, an occupier of land, considering what reasonable care requires of himself or herself, is entitled to take into account that trespassers are the exception rather than the rule. The particular sequence of events that led to the Respondent's injury - of entering the premises at night, barefooted, going first to the front door, being directed to the back door, having the light turned out, being distracted to some extent by a passing car, momentarily forgetting the presence of the mesh that she already knew about, and getting her toes entangled in the mesh - is most unusual.

R v Bossley [2012] QSC 292 -
R v Bossley [2012] QSC 292 -
R v Bossley [2012] QSC 292 -
Pourzand v Telstra Corporation Ltd [2012] WASC 210 (19 June 2012) (: Edelman J)

asserted for a particular purpose. It has been described as a matter which is 'often a critical question in cases of civil trespass'. [221] For instance, landowners will commonly grant an implied licence to the public to enter upon land for a particular purpose. [222] The question whether or not a particular action falls within an implied licence is 'essentially a question of fact'. [223]

via

[223] ***Halliday v Nevill*** (1984) 155 CLR 1, 6 (Gibbs CJ, Mason, Wilson & Deane JJ); ***Wilson v McDonald*** [2009]

Pourzand v Telstra Corporation Ltd [2012] WASC 210 (19 June 2012) (: Edelman J)
Halliday v Nevill (1984) 155 CLR 1

Johnson v Buchanan [2012] VSC 195 (11 May 2012) (Bell J)

59. These principles were confirmed by Brennan J in *Halliday v Nevill* , [30] whose dissenting judgment was approved and applied by the High Court in *Plenty v Dillon*. [31]

Johnson v Buchanan [2012] VSC 195 (11 May 2012) (Bell J)

61. The discussion of trespass in *Plenty* is extensive. Mason CJ, Brennan and Toohey JJ also approved [35] the statement in *Entick* that even a minute unauthorised invasion of private property was a trespass. Their Honours referred to the various forms of legal authority which might justify such an intrusion, including statutory permission and implied licence. [36] Gaudron and McHugh JJ also approved [37] *Semayne's Case* and *Entick* . Citing these and other authorities, their Honours said the 'policy of the law is to protect the possession of property and the privacy and security of its occupier'. [38] This draws attention to the point made by Lord Scarman in *Morris v Beardmore* [39] that the law of trespass has a human rights dimension. It protects the right to privacy of the home which is specified in art 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[40] In this State, that right is protected by s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) . [41] Reflecting the same policy, in *Coco v The Queen* [42] the High Court acknowledged the right of a person to exclude others from their property was a fundamental right or freedom which, therefore, could only be abrogated by legislation clearly and unmistakably evincing that intention. [43] In *New South Wales v Ibbett* ,[44] Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ approved the judgments of Mason CJ, Brennan and Toohey JJ and of Gaudron and McHugh JJ in *Plenty* , as well as the judgment of Lord Scarman in *Morris* , and joined in 'emphasising the fundamental importance attached by the common law to the privacy of the home'. [45]

via

[39] [1981] AC 446, 464 ('*Morris*') (Lord Scarman's judgment was cited with approval by Brennan J in *Halliday* ((1984) 155 CLR 1 , 10) and Gaudron and McHugh JJ in *Plenty* ((1991) 171 CLR 635, 647).

Johnson v Buchanan [2012] VSC 195 (11 May 2012) (Bell J)

59. These principles were confirmed by Brennan J in *Halliday v Nevill* , [30] whose dissenting judgment was approved and applied by the High Court in *Plenty v Dillon*. [31]

via

[30] (1984) 155 CLR 1 (' *Halliday*').

Johnson v Buchanan [2012] VSC 195 (11 May 2012) (Bell J)

60. In *Halliday* , Brennan J adopted [32] the principle stated by Lord Camden LCJ in *Entick* that 'every invasion of private property, be it ever so minute, is a trespass'. [33] Brennan J also approved [34] the proposition laid down in *Semayne's Case*, to which I have referred, that everyone's house was their 'castle and fortress'.

via

[32] *Halliday* (1984) 155 CLR 1 , 10.

Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Johnson v Buchanan [2012] VSC 195 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
R v Whyms [2012] ACTSC 7 -
R v Whyms [2012] ACTSC 7 -
Anne Penfold v John Betteridge and Carol Betteridge [2011] NSWDC 146 -
Maynes v Casey [2011] NSWCA 156 -
Maynes v Casey [2011] NSWCA 156 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 (11 May 2011) (Macaulay J)

26. In *Plenty v Dillon* [16] the High Court approved what had been said by Brennan J in *Halliday v Nevill* [17] in respect of the principle that every invasion of private property is a trespass, namely:

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorised or excused by law. [18]

via

[18] *Halliday v Nevill* (1984) 155 CLR 1, 10.

Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Brown v Spectacular Views Pty Ltd [2011] VSC 197 -
Fazio (Executor) v Passmore [2011] FCA 273 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 (22 December 2010) (Pritchard J)

223. Entry onto another person's land without the permission of the occupier, or otherwise with lawful authority, will constitute a trespass: ***Kuru v The State of New South Wales*** (2008) 236 CLR 1 [43] (Gleeson CJ, Gummow, Kirby & Hayne JJ); ***Plenty v Dillon*** (1991) 171 CLR 635, 639 (M ason CJ, Brennan & Toohey JJ), 647 (Gaudron & McHugh JJ); ***Coco v The Queen*** (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron & McHugh JJ). Whether an occupier has granted a licence to another person to enter on the land is a question of fact: ***Halliday v Nevill*** (1984) 155 CLR 1, 6 7 (Gibbs CJ, Mason, Wilson & Deane JJ).

Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 (22 December 2010) (Pritchard J)

230. A common example of the implication of a licence to enter relates to private homes, where a licence will ordinarily be implied in favour of any member of the public to go upon the path or driveway to the entrance of the home for the purpose of lawful communication with, or delivery to, any person in the house. The path or driveway will be viewed as having been held out by the occupier of the house as the link from the street to his or her home upon which members of the public may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ). However, a licence will not be implied in such a case if the path or driveway leading to the entrance of the house is obstructed or the gate locked: ***Halliday v Nevill*** (7 8) (Gibbs CJ, Mason, Wilson & Deane JJ).

Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Wilson v State of New South Wales [2010] NSWCA 333 -
Wilson v State of New South Wales [2010] NSWCA 333 -
Wilson v State of New South Wales [2010] NSWCA 333 -
Hinkley v Star City Pty Ltd [2010] NSWSC 1389 (02 December 2010) (Ward J)
Halliday v Nevill [1984] HCA 80; (1984) 155 CLR 1
Heatley v Tasmanian Racing and Gaming Commission

Hinkley v Star City Pty Ltd [2010] NSWSC 1389 -
R v Gary Shane Austin (No 2) [2010] ACTSC 136 (05 November 2010) (Refshauge J)

55. See also *Director of Public Prosecutions (NSW) v Nassif* (2002) 135 A Crim R 391 (at [14]). Indeed, the statement of the law in Canada set out in *Eccles v Bourque* (1974) 50 DLR (3d) 753, which was accepted in *Lippl v Haines* , and in which Dickson J (on behalf of the court) enunciated in *R v Cornell* (at 133-4) the exigent circumstances exception (as set out at [51] above), has been accepted as good law in this country in *Halliday v Nevill* (1984) 155 CLR 1 per Brennan J (at 16).

R v Gary Shane Austin (No 2) [2010] ACTSC 136 -
Slaveski v State of Victoria [2010] VSC 441 (01 October 2010) (Kyrou J)

281. This statement of the law remains true today. [243] It was echoed by Lord Denning MR in *Southam v Smout* ,[244] in the following passage that has been cited with approval by the High Court: [245]

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.' So be it – unless he has justification by law. [246]

via

[243] *Plenty v Dillon* (1991) 171 CLR 635, 639 ('*Plenty*'); *Halliday v Nevill* (1984) 155 CLR 1, 10.

Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
AJH Lawyers Pty Ltd v Hamo [2010] VSCA 222 -
Johnstone v State of New South Wales [2010] NSWCA 70 -
Johnstone v State of New South Wales [2010] NSWCA 70 -
Johnstone v State of New South Wales [2010] NSWCA 70 -
Bennett v Boyd [2009] TASSC 104 -
Bennett v Boyd [2009] TASSC 104 -
Bennett v Boyd [2009] TASSC 104 -
Wilson v McDonald [2009] WASCA 39 -
Wilson v McDonald [2009] WASCA 39 -
Wilson v McDonald [2009] WASCA 39 -
Wilson v McDonald [2009] WASCA 39 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
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Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Metso Minerals (Australia) Ltd v Kalra (No 3) [2008] FCA 1201 -
Metso Minerals (Australia) Ltd v Kalra (No 3) [2008] FCA 1201 -
Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ)

45. In *Halliday v Nevill* [31] , this Court held that if the path or driveway leading to the entrance of a suburban dwellinghouse is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is

forbidden, the law will imply a licence in favour of *any* member of the public to go on that path or driveway for any *legitimate* purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests. But as Brennan J pointed out [32] in his dissenting opinion in *Halliday* , there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

via

[32] (1984) 155 CLR 1 at 9.

Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ)

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via

[31] (1984) 155 CLR 1 .

Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCA 26 -
Kuru v State of New South Wales [2008] HCA 26 -
Wheare v Police [2008] SASC 13 (01 February 2008) (Gray J)

38. In *Halliday* , [37] Brennan J considered the relevant authorities in the following terms:

> In South Australia, Napier C.J. held that a statutory power conferred on a police officer to arrest a person reasonably suspected of having committed an offence gave the police officer authority to follow the person on to private property for the purpose of effecting the arrest: *Dinan v. Brereton*. In New South Wales, Taylor C.J. at C.L. held that a similar statutory power gave a right

> to police officers to arrest suspected persons "wherever they may be": *Kennedy v. Pagura*. In the Northern Territory, Muirhead J. held a statutory provision which conferred a power to enter "into or upon any premises, vehicle or vessel, by force if necessary" did not restrict a general statutory power to arrest so as to preclude its exercise on private property in cases that did not fall within the terms of the particular provision: *McDowell v. Newchurch*.
>
> In principle, a statute which creates a general power to arrest in substitution for the common law power to arrest ought not to be read down to preclude the exercise of the statutory power on private property. Whether the person seeking to arrest another for a criminal offence is exercising a common law or statutory power, the case is one "when the King is party" and when the public interest in the prosecution of crime prevails over private possessory interests in land.

Wheare v Police [2008] SASC 13 (01 February 2008) (Gray J)

20. At common law, police officers have power to arrest and detain a citizen where they have reasonable grounds for suspecting that an offence has been committed and that he or she is the person who committed it. The scope of the power of arrest was discussed by Brennan J in *Halliday* : [18]

> The common law power to arrest on a criminal charge can be exercised as of right on private as well as on public property, in the home of a fugitive offender or in the homes of his friends. No leave or license is necessary to enter if no force be needed, and in some cases force may be used.
>
> ...
>
> Of course, a constable's power to arrest without warrant is limited. At common law, a constable is empowered to arrest without warrant any person whom he suspects on reasonable grounds of having committed a felony, but he is not empowered to arrest a person guilty or suspected of misdemeanours except where an actual breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission: Stephen, *History of the Criminal Law of England* (1883), vol. 1, p. 193; *Hale's Pleas of the Crown* (1800), vol. 2, p. 85. And so it was held that a constable could not lawfully arrest an offender who, having assaulted the constable an hour earlier, retires to his house and closes and fastens his door: *Reg. v. Marsden*. At common law, a constable is entitled to enter on private property to effect an arrest within the limits of his common law power to arrest without warrant, although he would be a trespasser if he entered or remained on the property for any other purpose.

via

[18] *Halliday v Nevill* (1984) 155 CLR 1 at 12 (footnotes omitted).

Wheare v Police [2008] SASC 13 (01 February 2008) (Gray J)

Entick v Carrington (1765) 19 St Tr 1029; *Semayne's Case* (1604) 77 ER 194 ; *Halliday v Neville* (1984) 155 CLR 1 ; *Plenty v Dillon* (1991) 171 CLR 635; *Coco v The Queen* (1993-1994) 179 CLR 427; *Colet v The Queen* [1981] 1 SCR 2; *Morris v Beardmore* [1981] AC 446; *Wheeler v Leicester City Council* [1985] AC 1054; *Marcel v Commissioner of Police* [1992] Ch. 225; *Raymond v Honey* [1983] 1 AC 1; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *R v Conley* (1982) 30 SASR 226; *Dinan v Brereton* [1960] SASR 101; *Eccles v Bourque* [1975] 2 SCR 739; *Kennedy v Pagura* [1977] 2 NSWLR 810; *McDowell v Newchurch* (1981) 9 NTR 15; *Letts v King* (1988) WAR 76; *Lippl v Haines* (1989) 18 NSWLR 620; *R v Long and McDonnell* (2002) 224 LSJS 193; *Owen v South Australia* (1996) 66 SASR 251; *Police v Trzesniowski* (2005) 93 SASR 136; *Feldman v Buck* (1966) SASR 236; *Questions of Law Reserved* (No 3 of 1998) (1998) 71 SASR 223 ; *Drymalik v Feldman* (1966) SASR 227; *Zaravinos v State of NSW* (2004) 62 NSWLR 58; *Re K* (1993) 46 FCR 336; *Rowe v Manevski* (1994) 62 SASR 468; *Taikato v The Queen* (1996) 186 CLR 454; *Pascoe v The Nominal Defendant (Queensland) (No 2)* (1964) Qd R 373; *Conners v Craigie* (1994) 76 A Crim R 502, considered.

Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -

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Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Wheare v Police [2008] SASC 13 -
Sims v Thomas [2007] TASSC 106 (14 December 2007) (Evans J)

10. With reference to the difficulty, at the time of the incident in question, of establishing the rights of a police officer to enter premises in the execution of the officer's duty, I mention the following. Except where provided for by the common law or by statute, police officers have no special rights to enter private land; *Halliday v Nevill* (1984) 155 CLR 1 at 10 and *Plenty v Dillon* (1991) 171 CLR 635 at 647. Police officers, like other members of the public, have a revocable implied licence to enter private land for a legitimate purpose. In the case of a police officer, this licence has been held to extend to entering private land in order to effect an arrest on a driveway leading to a residence, *Halliday v Nevill* (supra) at 8. At common law, a police officer is empowered to enter private property to effect an arrest without warrant. This right of arrest is a right to arrest without warrant any person the officer suspects on reasonable grounds of having committed a crime. The right does not extend to the arrest of a person who is guilty of, or suspected of being guilty of, a non-indictable offence, except where an actual breach of the peace involving violence has just been, or is, occurring, *Hallida y v Nevill* (supra) at 12. A police officer's common law powers of arrest are largely reflected in the *Criminal Code* , s 27 , which does not however expressly authorise a police officer to enter private property to effect an arrest. Nevertheless, in *Dowling v Higgins* [1944] Tas SR 32 Morris CJ held that concomitant with a police officer's right and obligation pursuant to the Code, s 27 (6) and (9), to arrest without warrant any person seen committing a breach of the peace, or who is believed on reasonable grounds to be about to commit or renew a breach of the peace, that there is a non-expressed entitlement to enter private property to effect the arrest. Whilst this authority clarified the law for the purposes of the Code, s 27 , that section is far from being the sole source of a police officer's powers of arrest.

Sims v Thomas [2007] TASSC 106 -
Sims v Thomas [2007] TASSC 106 -
Sims v Thomas [2007] TASSC 106 -
Sims v Thomas [2007] TASSC 106 -
Drage v Pitts [2007] WASC 203 -
Drage v Pitts [2007] WASC 203 -
Drage v Pitts [2007] WASC 203 -
Drage v Pitts [2007] WASC 203 -
State of New South Wales v Corbett [2007] HCA 32 (01 August 2007) (Gleeson CJ Gummow, Kirby, Callinan and Crennan JJ)

17. In intermediate courts, opinions are sometimes expressed reflecting a perceived need to moderate the rule of strictness. This has followed the inconvenience that the application of the rule can sometimes occasion and a sympathy for those who seek and execute search warrants (generally police officers) who are accountable in law for defaults when the rule of strictness is rigorously applied. Instances of such opinions may be seen, for example, in the dissenting reasons in two important cases in the New South Wales Court of Appeal [8] . The dissents concern, and respond to, the tension to which Brennan J referred in *Halliday* .

State of New South Wales v Corbett [2007] HCA 32 -
State of New South Wales v Corbett [2007] HCA 32 -
State of New South Wales v Corbett [2007] HCA 32 -
State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -

State of New South Wales v Kuru [2007] NSWCA 141 -
State of New South Wales v Kuru [2007] NSWCA 141 -
Pitt v Baxter [2007] WASCA 104 (18 May 2007) (Wheeler JA)

22 In this case it was not disputed that there was an implied licence for the police to enter onto the premises in order to conduct enquiries. If the officers had been on the appellant's private property, including his private driveway, the appellant could have expressly excluded them. However, as they were on common property, I would agree with Hasluck J's conclusion that:

> "I am of the view, having regard to the reasoning in *Halliday v Nevill* (supra) that the accused could not revoke the implied licence granted by all tenants in common by his unilateral conduct. If the appellant was able to revoke an implied licence granted by all tenants in common, such a power would be inconsistent with the rights of use or enjoyment of the common property of those other tenants in common. Further, such a power would be inconsistent with the nature of a tenant in common's interest in respect of the common property." (at [44])

Pitt v Baxter [2007] WASCA 104 -
Pitt v Baxter [2007] WASCA 104 -
Pitt v Baxter [2007] WASCA 104 -
Pitt v Baxter [2007] WASCA 104 -
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Pitt v Baxter [2007] WASCA 104 -
Samir Tarjali Diab v The State of NSW [2006] NSWDC 66 -
Pringle v Everingham [2006] NSWCA 195 (27 September 2006) (Mason P at [1]; Santow JA at [2]; Hunt AJA at [3])

81. In my opinion, based on the findings of fact the judge made, the only conclusion open to him as a matter of law was that, notwithstanding the plaintiff's order to leave, the three police officer defendants remained lawfully in the car park whilst completing the breath test of the driver of the vehicle they had seen drive in: *Halliday v Nevill* at 6. They were not trespassers as alleged by the plaintiff, and the plaintiff's claim in trespass was correctly dismissed. It follows that the argument put by the plaintiff that, because the police officers were trespassers, he would necessarily be entitled to succeed in relation to his claims for assault and false imprisonment (see par [69] *supra*) is rejected, and the cross-appeal must be dismissed.

Pringle v Everingham [2006] NSWCA 195 (27 September 2006) (Mason P at [1]; Santow JA at [2]; Hunt AJA at [3])

71. It is accepted by all parties that, in the absence of notice of any express reservation or limitation, the occupier of a hotel car park grants an implied licence to persons to enter that car park to carry out any lawful activity in association with the premises: *Barker v The Queen* (1983) 153 CLR 338 at 364-365, 347 ; *Halliday v Nevill* (1984) 155 CLR 1 at 6-7 ; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [29], [31] . Such an implied licence may, however, be withdrawn by the occupier at any time. The plaintiff relies on the statement quoted in the last paragraph as constituting such a withdrawal. The judge found that, rather than demand that the police officers leave the car park, the plaintiff was challenging them to fight. Such a finding was perhaps open to the judge on the evidence, although the effect of what was said appears to me to be an express withdrawal of the implied licence to the police officers to remain in the car park. Be that as it may, the issue has turned not on the effect of what was

said, but rather on whether the police officers were, as the judge went on to hold, entitled by the *Road Transport (Safety and Traffic Management) Act* to remain in the car park in order to complete the breath test being administered there.

Patrick John Walker as Commissioner for Fair Trading v Rugs a Million Pty Ltd [2006] WASC 127 (30 June 2006) (Simmonds J)

Halliday v Nevill (1984) 155 CLR 1

Jabuna Pty Ltd v Hartley, unreported; FCt of Aust (Beazley J); Library No 177; 18 April 1984

Patrick John Walker as Commissioner for Fair Trading v Rugs a Million Pty Ltd [2006] WASC 127 -
R v Ratko Josifovski, Goran Josifovski and Joseph Shafik [2006] ACTSC 30 -
Fanigun Pty Ltd v Woolworths Ltd [2006] QSC 28 -
Pitt v Baxter [2006] WASC 4 (11 January 2006) (Hasluck J)

Halliday v Nevill (1984) 155 CLR 1

Pitt v Baxter [2006] WASC 4 -
Pitt v Baxter [2006] WASC 4 -
Pitt v Baxter [2006] WASC 4 -
Pitt v Baxter [2006] WASC 4 -
Pitt v Baxter [2006] WASC 4 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

254 A third concern relates to the relevance of a number of the cases to which his Honour referred, including *Lippl v Haines* (1989) 18 NSWLR 620 and *R v O'Neil* (2001) 122 A Crim R 510. Both related to forcible entry to land. As stated by Gleeson CJ in *Lippl* (at 622D):

> "The above principles are stated in terms of forcible entry, because that is the problem which arises in the present case. Non-forcible entry may give rise to additional questions such as questions of implied licence, which are not presently relevant: c.f. *Halliday v Nevill* (1984) 155 CLR 1 ."

Halliday v Nevill involved charges of driving a motor car whilst disqualified, driving with a blood alcohol content exceeding the prescribed limit and consequential offences of resisting police, assault and escape from lawful custody. The short facts were that the appellant had done no more than reverse a motor vehicle onto the street when he apparently saw the police approaching and drove back into the driveway whence he had come. They spoke to him at the rear of his car in the driveway, with the police car parked across the entrance. He was arrested. The story continued (at p 6):

> "Then, while the appellant and Police Constable Nevill were walking back down the driveway towards the police car, the appellant suddenly broke away from Police Constable Nevill's grasp and ran across Liberty Parade and entered his own home at No. 370. The police officers pursued him into the house where a scuffle took place before he was finally overcome. The two charges of resisting the police officers and the two charges of assault all relate to the scuffle that occurred in his own home."

State of New South Wales v Ibbett [2005] NSWCA 445 -
Tasmania v Lee [2005] TASSC 117 (23 November 2005) (Crawford J)

18. I determine the point upon the basis of two cases in particular, *Garwood v Schultz* [1982] Tas R 120 and *Halliday v Nevill* (1984) 155 CLR 1 . In the former case, Cox J considered circumstances where a police officer pursued into a house a person he required to undertake a breath analysis. The officer was expressly ordered by the father of that person to get out, but the officer disregarded that and continued with his attempt to take the son into custody. The father obstructed the officer. It was held that no offence was committed by the father

because the police officer had no power to enter the house to effect an arrest or to take the son into custody. A slight difference between the circumstances of that case and those of this case is that in that case the occupier of the house expressly told the police officer that he was not to enter, making the officer a trespasser when he refused to comply, whereas here Constable Knights was not ordered out. That raises the question whether Constable Knights had authority to enter to take Terry Lee into custody unless he was expressly required not to enter.

Tasmania v Lee [2005] TASSC 117 -
Tasmania v Lee [2005] TASSC 117 -
Candy v Thompson [2005] QCA 382 (14 October 2005) (Jerrard and Keane JJA and Jones J,)

28. As to the first of these conclusions, his Honour was plainly correct as a matter of law. There is no trespass involved in entering upon land to visit a house on the land. The law recognizes an implied consent to such entry by reason of the existence of means of access leading to the entrance of the ordinary suburban dwelling house. That this is so was reaffirmed by the decision of the High Court in *Halliday v Nevill* . [7] In that case, Gibbs CJ, Mason, Wilson and Deane JJ said: [8]

> "While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked: cf *Edwards v Railway Executive* ([1952] AC 737 at p 744). The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it: see, generally, *Robson v Hallett* ([1967] 2 QB 939 at pp 950 - 952, 953 - 954); *Lipman v Clendinnen* ((1932) 46 CLR 550 at pp 556 - 557); *Lambert v Roberts* ((1980) 72 Cr App R 223 at p 230). Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker CJ in *Robson* ([1967] 2 QB at p 950), the law is not such an ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away. The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-

by may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property."

via

[7] (1984) 155 CLR 1 ; cf *Plenty v Dillon* (1991) 171 CLR 635.

Candy v Thompson [2005] QCA 382 -
Candy v Thompson [2005] QCA 382 -
Candy v Thompson [2005] QCA 382 -
R v Tracey (No 3) [2005] SASC 357 (22 September 2005) (Reasons For Ruling Of Nyland J)

25 It is unnecessary, however, to examine each of the cases referred to by Mr Peek in detail as I consider those principles are well established and no issue was taken by the Crown as to them. *Tran Nominees*, and many of the cases cited, however, are concerned with warrants to search property, or other issues of privacy, as opposed to listening device warrants: *George v Rockett & Anor* [6] ; *Halliday v Nevill & Anor* [7] ; *Garwood v Schultz* [8] ; *Carroll & Ors v Mijovich & Ors* [9] ; *Cassaniti v Croucher & Ors* [10] ; *Ozzie Discount Software (Aust) Pty Ltd v Muling & Ors* [11] ; *Question of Law Reserved on Acquittal (No 5 of 1999)* [12] . Whilst I acknowledge the need for a strict approach to any action taken which infringes upon a citizen's right to privacy, I believe that it is necessary to take some care when considering statements of principle extracted from the above cases which deal with search warrants as opposed to listening devices. This was a matter commented upon by the High Court in *Ousley v The Queen* [13] . Toohey J said (at 82):

> In particular, while both search warrants and listening devices involve an invasion of privacy, any analogy between the two cannot be pressed too far . A search warrant will ordinarily be produced to the person whose premises are to be searched, whereas the authority for a listening device will necessarily not be known to the person whose communication are to be recorded. It follows that in the case of a listening device no opportunity is provided for an assessment of its lawfulness at the time of its installation. (emphasis added)

via

[7] (1984) 155 CLR 1

R v Tracey (No 3) [2005] SASC 357 -
R v Tracey (No 3) [2005] SASC 357 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
New South Wales v Koumdjiev [2005] NSWCA 247 -
Pine v Doyle [2005] FCA 977 -
Pine v Doyle [2005] FCA 977 -
Thompson v Vincent [2005] NSWCA 219 (30 June 2005)

100 Alternatively, the arrest was said to contravene the common law requirement that arrest without warrant of a person suspected of a misdemeanour was only permitted where an actual

breach of the peace by an affray or by personal violence occurs and the offender is arrested while committing the misdemeanour or immediately after its commission. ***R v Marsden*** (1868) LR 1 CCR 131 and ***Halliday v Nevill*** (1984) 155 CLR 1 at 12 were cited.

Thompson v Vincent [2005] NSWCA 219 (30 June 2005)

130 The notion of contemporaneity that the appellants invoke at various places is part of the common law principles restricting forced entry into a dwelling house (***R v Marsden*** (1868) LR 1 CCR 131, ***Halliday*** at 12). It is part of s 352(1)(a) , but not part of some unexpressed qualification of the other positive rights conferred by s 352 . Mr Thompson's initial arrest took place on his premises, but outside his home. When he broke away and rushed off into the house, the police were entitled to follow in hot pursuit and to recapture him. The trial focussed on the lawfulness of the first arrest. If anything, this was a concession in the appellants' favour.

Thompson v Vincent [2005] NSWCA 219 -
Thompson v Vincent [2005] NSWCA 219 -
R v Conway [2005] QCA 194 (10 June 2005) (McMurdo P, Atkinson and Mullins JJ,)
(1984) 155 CLR 1 , considered

R v Conway [2005] QCA 194 -
R v Conway [2005] QCA 194 -
Candy v Thompson [2005] QSC 111 -
Candy v Thompson [2005] QSC 111 -
Fletcher v Harris [2005] ACTSC 27 -
Tasmania v Crane [2004] TASSC 80 -
Arnold v Police No. Scciv-04-118 [2004] SASC 74 (25 March 2004)

10. However it was further put that in advising the appellant that it was an offence to use offensive language, Constable Broad acted unlawfully and that such unlawfulness triggered the revocation of the implied licence that she and the other officers had. It followed, so the argument ran, that from that point the police were trespassers and that their further actions were necessarily other than in the execution of their duty. In support of that contention counsel referred to *Halliday v Nevill* and *R v Barker* (1983) 153 CLR 338, the latter case being concerned with express permission to enter premises.

Arnold v Police No. Scciv-04-118 [2004] SASC 74 -
Arnold v Police No. Scciv-04-118 [2004] SASC 74 -
Arnold v Police No. Scciv-04-118 [2004] SASC 74 -
Capebay Holdings Pty Ltd v Sands [2002] WASC 287 -
Director of Public Prosecutions (NSW) v Nassif [2002] NSWSC 1065 -
Director of Public Prosecutions (NSW) v Nassif [2002] NSWSC 1065 -
Laurens v Willers [2002] WASCA 183 -
Laurens v Willers [2002] WASCA 183 -
Laurens v Willers [2002] WASCA 183 -
Laurens v Willers [2002] WASCA 183 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
Fisher v Ellerton [2001] WASCA 315 (16 October 2001) (Wallwork J, Templeman J, Einfeld AJ)

Halliday v Nevill (1984) 155 CLR 1
Munnings v Barrett

Fisher v Ellerton [2001] WASCA 315 -
Fisher v Ellerton [2001] WASCA 315 -
Fisher v Ellerton [2001] WASCA 315 -
Fisher v Ellerton [2001] WASCA 315 -
R v O'Neill [2001] NSWCCA 193 -
Irvine v The State of Western Australia [2001] WASCA 147 -
Irvine v The State of Western Australia [2001] WASCA 147 -
Irvine v The State of Western Australia [2000] WASC 289 -
Irvine v The State of Western Australia [2000] WASC 289 -
Fisher v Ellerton [2000] WASCA 264 -
Fisher v Ellerton [2000] WASCA 264 -
R v Nicholas [2000] VSCA 49 -
Smith v Business Enterprise Centre - Mersey Inc [1999] TASSC 59 (31 May 1999) (Wright J)
Halliday v Nevill (1984) 155 CLR 1 , applied.

Smith v Business Enterprise Centre - Mersey Inc [1999] TASSC 59 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
Donnelly v Amalgamated Television Services Pty Ltd 45 NSWLR 570 -
McDonald v Malayta; ex parte [1996] QCA 196 (21 June 1996)

in Halliday v. Nevill (1984) 155 CLR 1 at p. 10 ; Coco at p. 435; and R. v. Reading Justices

Mathews, F.G.H v Maddigan, J.K. & Ors [1995] FCA 348 (18 May 1995)
Halliday v Nevill (1984) 155 CLR 1 Referred to

Mathews, F.G.H v Maddigan, J.K. & Ors [1995] FCA 348 -
Coco v the Queen [1994] HCA 15 -
Coco v the Queen [1994] HCA 15 -
Coco v the Queen [1994] HCA 15 -
Coco v The Queen [1993] HCATrans 351 (17 November 1993)

In Halliday v Nevill, 155 CLR 1 , there is a

Coco v The Queen [1993] HCATrans 351 -
Coco v The Queen [1993] HCATrans 351 -
Coco v The Queen [1993] HCATrans 351 -
MacIntosh v Lobel 30 NSWLR 441 -
Carroll v Mijovich 25 NSWLR 441 -
Carroll v Mijovich 25 NSWLR 441 -
Carroll v Mijovich 25 NSWLR 441 -
Plenty v Dillon [1991] HCA 5 -
Plenty v Dillon [1991] HCA 5 -
Plenty v Dillon [1990] HCATrans 176 (20 August 1990)

majority in *Halliday v Nevill.*

Plenty v Dillon [1990] HCATrans 176 (20 August 1990)
Nevill.

Plenty v Dillon [1990] HCATrans 176 -
Plenty v Dillon [1990] HCATrans 176 -
Plenty v Dillon [1990] HCATrans 176 -
Plenty v Dillon [1990] HCATrans 176 -
Plenty v Dillon [1990] HCATrans 176 -
Plenty v Dillon [1990] HCATrans 176 -
Turner v Maher [1990] TASSC 87 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Nicholson v Avon [1991] 1 VR 212 -
Nicholson v Avon [1991] 1 VR 212 -
M v J [1989] TASSC 55 -
Plenty v Dillon [1989] HCATrans 192 -
Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 (13 February 1986) (Young J)

> Halliday v Nevill (1984) 155 CLR 1 at 7-8 Barker v The Queen (1983) 153 CLR 338 at 349 Halliday v Nevill (1984) 155 CLR 1 at 7-8 Barker v The Queen (1983) 153 CLR 338 at 349

Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 -
Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 -
Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 -
Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 -
Lincoln Hunt Australia Pty Ltd v Willesee 4 NSWLR 457 -
Bethune v Heffernan Heelan v Heyward [1986] VR 417 (15 November 1985) (Nathan J)

> There is a plenitude of authority for the proposition, and it is trite to say, that a policeman has such lawful powers as are necessary for him to maintain the peace or prevent breaches of it, eg Mackay v Abrahams [1916] VLR 681 (constable's implied licence to enter shop premises to investigate an alleged offence), Halliday v Neville (1984) 59 ALJR 124 . It must follow from this that he must have the same authority as any occupier of premises to withdraw the licence of any person to remain on those premises.