***Smith v State of Victoria* [2018] VSC 475 (27 August 2018) – Victorian Supreme Court**

'Aboriginal and torres strait islander people' – 'Children' – 'Duty of care owed by police' – 'Family violence' – 'Negligence' – 'Women'

Charges: Negligence claims.

Case type: Application for summary dismissal.

Facts: The plaintiffs, a woman and her three children (who identify as Aboriginal), were the victims of family violence by the children's father. They alleged that police officers and senior officers owed duties of care to them as victims of family violence, and that they suffered psychological harm as a result of breaches of those duties. The plaintiffs also asserted that the officers acted in breach of the plaintiffs' human rights and obligations as public authorities under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ([40]). The defendant submitted that the alleged duties cannot arise at law and that the proceedings should be summarily dismissed ([41]). Alternatively, the defendant sought a strike out of the allegations of a common law duty of care pleaded in certain paragraphs of the plaintiffs' amended statement of claim on the basis that no cause of action had been disclosed ([3]). The plaintiffs contended that the current law in Australia regarding the application of duties of care to police officers is 'in a state of development' and that, as a result, the court ought not summarily dismiss the proceedings ([87]).

Issue: The State of Victoria sought either a summary dismissal of the case or that the Court strike out the claims alleging that a common law duty of care was owed.

Held: Dixon J dismissed the application, stating that the defendant's contention that the proposed duties of care have no real prospect of succeeding had not been established ([174]). Dixon J held that a summary dismissal is an 'extreme measure' and would 'forever shut out' the plaintiffs from seeking to prove their claim at trial ([169]). Although the case was 'fact rich and fact intensive', the defendant did not persuade his Honour that no duty of care could arise ([171]).

Duty of care

Dixon J stated at [170]:

'Australian common law has not affirmatively recognised that a police officer can never owe a duty of care… In no case has a court determined that no duty of care was owed in circumstances that demonstrate the degree of proximity between the plaintiffs and the police that is likely to be demonstrated on the evidence in this case at trial and in the legislative and policy framework that prevail in respect of domestic violence at the relevant time.'

As outlined in *Kuhl v Zurich Finance Services Australia Ltd* [2010] HCA 11, the existence of a duty of care is determined by considering reasonable foreseeability and the salient features of the relationship between the plaintiffs and the defendant ([168]). The plaintiffs argued that the police officers owed them a duty of care to prevent breaches of several Intervention Orders (IVOs) by the father due to the existence of a relationship of proximity between the police officers and the plaintiffs, arising from various salient features, including that:

- It was reasonably foreseeable that the plaintiffs required protection from breaches of the extant IVOs by the father;
- The police officers had actual or constructive knowledge of the terms of the extant IVOs;
- The police officers exercised control with respect to the compliance by the father with the terms of the extant IVOs;
- The Victorian police represented, through the terms of its family violence policies, that police officers would protect women and children from family violence. As a result of these representations, the plaintiffs relied on the police officers to enforce compliance by the father with the extant IVOs; and
- There were no countervailing policy reasons that negated the imposition of a duty of care on the police officers to prevent breaches of IVOs ([49]).

The defendant argued that some of the pleadings in the plaintiffs' amended statement of claim were too broad. The submission was that these duties were that, 'every' police officer owed a duty to 'every' affected family member named in any and 'every' extant IVO ([53]). In response, the plaintiffs argued that the duties were 'owed by police officers at stations local to the plaintiffs' homes, by reason of their status as family violence victims' or, alternatively, as 'victims of a recidivist family violence offender known to police' ([58]). Dixon J accepted the plaintiffs' submission that the duty was not pleaded in unnecessarily broad terms ([59]).

Salient Features

Dixon J noted that as the existence of a novel duty of care was alleged, the court must apply the salient features approach in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 ([90]). A determination of the existence of a duty of care requires '[a] close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by reference to the salient features or facts affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury' ([91]).

The plaintiffs submitted that the salient features of foreseeability, knowledge, control and responsibility applied ([129]). They challenged the defendant's reliance on *Hill's Case* [1989]AC 53, emphasising that the salient features of proximity, knowledge and control were absent in *Hill's Case*. Dixon J held that *Hill's Case* was distinguishable, even if it was good law in Australia ([94]-[95]). The plaintiffs also emphasised the dissenting judgment in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, which viewed proximity as the determinative factor ([102]). The plaintiffs submitted that *NSW v Spearpoint* [2009] NSWCA 233 was analogous, and that it was persuasive authority for their submission that the proceedings could not be summarily dismissed ([114]-[115]).

In relation to the factor of control, Dixon J accepted that the relevant focus was on control of the risk not the offender, and that the issue of control is 'fact sensitive and a matter for evidence' ([135]). The plaintiffs suggested that the police officers exercised control by having the father in a police vehicle and dropping him within the zone identified in one of the IVOs ([137]).