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ACT Court of Appeal confirms police responsibilities for prevention of crime are critical to determining whether a duty of care is owed

The ACT Court of Appeal unanimously allowed the appeal in *Australian Capital Territory v Crowley and Commonwealth of Australia and Glen Pitkethly* [2012] ACTCA 52, overturning the finding at first instance that the Australian Federal Police (AFP) owed the plaintiff, Jonathan Crowley, a duty of care, and had breached that duty of care. The case discusses the nature and scope of the duty of care that is owed by government officials in the exercise of their responsibilities. In particular, the case addresses the law surrounding when police officers will be found to have a duty of care, along with their general responsibility to enforce the law. The case also considers when a duty of care may require the exercise of a statutory power.

Background

On 11 December 2001, the AFP received reports that the plaintiff was walking the streets in a highly disturbed state and behaving in a threatening manner to a number of people whilst carrying a kendo stick. When 2 AFP officers reached the plaintiff, he refused to comply with their directions and reacted violently, assaulting both officers with the kendo stick. The plaintiff was shot in the neck by one of the AFP officers, shattering the plaintiff's spinal column and leaving him a quadriplegic (it was conceded by the plaintiff that the shooting was reasonable).

The previous day, ACT Mental Health (ACTMH) had been notified of the plaintiff's condition and had made a report regarding his mental health suggesting that he required hospitalisation. A plan was made to follow-up the next morning. On the morning of the day of the shooting, the plaintiff's father informed ACTMH that the plaintiff would be voluntarily admitted to hospital and no follow-up by ACTMH was made, although an official of the ACTMH was made aware of the plaintiff's condition when discharging another responsibility for the plaintiff's brother.

The plaintiff argued the AFP and ACTMH owed a duty of care to him that had been breached. It was further argued by the plaintiff that the Commonwealth and the ACT were vicariously liable for the alleged breaches committed by the AFP and ACTMH.

This was accepted at first instance on the following basis:

- The AFP officers dealing with the plaintiff owed a duty of care because they had him under their control (the Court at [253]). The AFP officers breached their duty by failing to plan adequately before reaching the plaintiff and approaching the plaintiff in an aggressive and threatening manner (the Court at [254]).
- The ACTMH owed a duty of care to the plaintiff akin to that of a doctor and patient (the Court at [375]). ACTMH breached their duty of care by failing to follow up on their earlier

report of the plaintiff's condition and admit him to hospital and by failing to inform the plaintiff's parents of the observations made by a ACTMH official on the day of the shooting (the Court at [258]).

The Court of Appeal's reasons

Nature of the duty of care owed by AFP

The Court of Appeal held that the AFP did not owe a duty of care to the plaintiff. It strongly emphasised in its judgment that, while police officers can be found to owe a duty of care to others, this is tempered by their duty to the general public to enforce the criminal law (the Court at [270]–[286], citing *Hill v Chief Constable of West Yorkshire* [1989] AC 53). The Court also relied on the principle enunciated in *Sullivan v Moody* (2001) 207 CLR 567 that a common law duty could not be imposed on an authority where it conflicted with an existing statutory duty (the Court at [287]).

Applying these principles, the Court of Appeal held that the AFP could not be under an obligation to discharge a duty of care when apprehending someone to prevent apparent or possible criminal behaviour (the Court at [300], [313]). The Court of Appeal further held, that at no time did the AFP have sufficient control of the plaintiff to take reasonable steps to avoid the risk of injury to him (the Court at [310]–[313]).

The Court of Appeal considered whether a breach of duty would have occurred if the AFP had owed a duty of care to the plaintiff. It found that there was no such breach since the steps taken by the AFP were reasonable in the circumstances. Disagreeing strongly with the findings at first instance, the Court of Appeal held that the AFP officers were not in a position to know how the plaintiff would react (the Court at [360]–[372]).

Nature of the duty of care owed by the ACTMH

The Court of Appeal held that a duty of care was owed to the plaintiff by ACTMH but that it had not been breached in the circumstances (the Court at [393]). It disagreed with the finding at first instance as to the scope of the duty owed by ACTMH, holding that the duty was only to follow-up on the plaintiff's condition (the Court at [392]). Significantly, the Court disagreed with the trial judge's conclusion that ACTMH owed a duty of care to exercise the power to apprehend a person and take them to an approved health facility under s 37(2) of the *Mental Health (Treatment and Care) Act 1994* (ACT) (the Court at [392]).

The Court of Appeal held that this duty had not been breached because it was reasonable for the ACTMH official to accept the statement made by the plaintiff's father that the plaintiff would voluntarily admit himself to hospital (the Court at [403]). It further held that there was no breach of duty by the ACTMH official who observed the plaintiff on the day of the shooting, on the basis that the trial judge had made an impermissible use of hindsight in assessing whether or not there was a breach (the Court at [408], [412]).

Implications for Commonwealth agencies

Commonwealth agencies are required to discharge a wide range of different responsibilities. The potential for a duty of care to arise in the discharge of those responsibilities is a very real concern for both officials and the agencies that could be vicariously liable for their actions. This decision reaffirms the importance of considering any competing policy considerations when determining whether a government official owed and/or breached a duty of care, especially in a law enforcement context.

The Court of Appeal's conclusion that any duty of care owed by ACTMH did not include an obligation to exercise the power under s 37(2) of the *Mental Health (Treatment and Care) Act*

1994 (ACT) illustrates that Courts will not readily accept that a duty of care can be imposed on officials to compel the exercise of a statutory power.

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