Kuru v State of New South Wales [2008] HCA 26 (12 June 2008)

Last Updated: 12 June 2008

HIGH COURT OF AUSTRALIA

GLEESON CJ

GUMMOW, KIRBY, HAYNE AND HEYDON JJ

MURAT KURU APPELLANT

AND

STATE OF NEW SOUTH WALES RESPONDENT

Kuru v State of New South Wales

[2008] HCA 26

12 June 2008

S649/2007

ORDER

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 June 2007 and, in their place, order that the respondent's appeal to that Court on grounds 1, 2, 3 and 4 of the respondent's Notice of Appeal to that Court be dismissed.

3. Remit the matter to the Court of Appeal of the Supreme Court of New South Wales for further consideration and determination of grounds 5, 6, 7 and 8 of the respondent's Notice of Appeal to that Court.

4. Respondent to pay the appellant's costs of the appeal to this Court and of the proceedings in the Court of Appeal of the Supreme Court of New South Wales up to and including the entry of the order of that Court made on 15 June 2007.

5. Costs of the further hearing in the Court of Appeal of the Supreme Court of New South Wales to be in the discretion of that Court.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with M W Sneddon for the appellant (instructed by Carroll & O'Dea)

I D Temby QC with P R Sternberg for the respondent (instructed by Crown Solicitor (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Kuru v State of New South Wales

Torts - Trespass to land - Power of police to enter private premises - Police officers went to suburban flat after receiving report of male and female arguing - Police treated report as "violent domestic" - Occupier invited police to "look around the flat" - Occupier later asked police to leave premises - Police did not leave and remained on premises for longer than it would reasonably have taken them to leave - Whether statutory justification for police to remain on premises - Proper construction of *Crimes Act 1900* (NSW) ss 357F and 357H - Whether express refusal by occupier immediately terminated authority of police "to so enter or remain" on premises, irrespective of fulfilment of purposes for which entry effected.

Torts - Trespass to land - Power of police to enter private premises - Whether common law justification for police to remain on premises - Whether entry could be justified as directed to preventing a breach of the peace.

Words and phrases - "enter or remain", "expressly refused", "breach of the peace".

Crimes Act 1900 (NSW), ss 357F-357I.

1. GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. In the early hours of 16 June 2001, police received a report of a male and female fighting in a flat in suburban Sydney. Police treated the report as a "violent domestic" requiring available officers to attend as quickly as possible. Six police officers went to the flat. Mr Murat Kuru (the appellant) and his then fiancée (now wife) who lived there had had a noisy argument, but, by the time police arrived, the fiancée had left the flat with the appellant's sister. When police arrived, the front door of the flat was open. The police officers went into the flat. Two friends of the appellant, who did not live in the flat, were in the living room and the appellant was taking a shower in the flat's bathroom.

2. When the appellant came out of the bathroom, he found that the police were in the flat. The police asked if they could "look around" and the appellant agreed. After the police had looked in the two bedrooms, they asked to see "the female that was here". The appellant said that she had gone to his sister's house. He asked the police to leave the flat. The police asked for the sister's address and telephone number. The appellant said he did not know the address but at some point he wrote a telephone number (presumably his sister's number) on a piece of paper. The appellant repeated his demand that the police leave. He did this several times, very bluntly and with evident anger. Still the police did not leave.

3. At some point the appellant jumped onto the kitchen bench. He was later to say that he did this to get the attention of everyone in the room. Whether he then jumped off the bench towards the police, or jumped off in the opposite direction, was disputed. That dispute need not be resolved. There is no dispute that having got down from the bench, the appellant moved towards the

police, with his arms outstretched, and made contact with one of the officers. A violent struggle followed. The appellant was punched, sprayed with capsicum spray, and handcuffed. As he was led to a police vehicle, he twice fell down stairs leading from his flat to the ground floor. He was taken to a police station and lodged in a cell wearing nothing but his boxer shorts. He was released from custody some hours later.

4. The appellant brought proceedings against the State of New South Wales in the District Court of New South Wales claiming damages for trespass to land, trespass to the person, and false imprisonment. The appellant alleged in his pleading, and the State admitted in its defence, that the action was brought against the State in accordance with ss 8, 9 and 9B of the *Law Reform (Vicarious Liability) Act 1983* (NSW) and s 5 of the *Crown Proceedings Act 1988* (NSW). The application of those provisions was examined by this Court in *New South Wales v Ibbett*[1] and *New South Wales v Fahy*[2]. No issue was argued in this appeal about the operation of these provisions, or about the liability of the State for any wrongs done by the individual police officers[3], and it is not necessary to say more about them.

5. At first instance the appellant succeeded. Judgment was entered for him for $418,265 with costs to be assessed on a "solicitor and client" basis.

6. The State appealed to the Court of Appeal of New South Wales. It alleged that it was not liable to the appellant and that, in any event, the damages awarded (which had included aggravated and exemplary damages) were excessive.

7. The appeal to the Court of Appeal was conducted on the basis that if the State's appeal against the finding that it was liable for trespass to land failed, its appeal against liability in respect of trespass to the person would also fail, and conversely, that if the appeal against the finding of liability for trespass to land were to succeed, the appeal in respect of liability for trespass to the person would also succeed. The claim for false imprisonment was treated as standing or falling with the claim for trespass to the person. That is, the parties conducted the appeal to the Court of Appeal on the footing that the single determinative issue between them was whether the police officers were trespassing in the appellant's flat when the appellant first made physical contact with one of their number.

8. Evidence given at the trial may well have permitted framing the issues between the parties differently. There was evidence that might have been understood as permitting, even requiring, examination of whether the appellant's conduct went beyond taking reasonable steps for the removal of trespassers, and whether the conduct of the police went beyond the application of reasonable force to arrest a person impeding them in the execution of their duty. But the parties having chosen to litigate the appeal to the Court of Appeal on the conventional basis that has been identified, neither sought in this Court to submit that any issue about the use of excessive force either by the appellant, if his ejecting the police officers was otherwise lawful, or by the police officers, if their restraining the appellant was otherwise lawful, should now be considered by this Court.

9. The Court of Appeal (Mason P, Santow and Ipp JJA) held[4] that the State's appeal should be allowed. All members of the Court of Appeal concluded that, despite the appellant's withdrawal of permission for police to remain in his flat, the police were not trespassers when the appellant first made physical contact with one of the officers. The judgment entered at trial was set aside and in its place judgment was entered for the State.

10. The principal reasons for the Court of Appeal were given by Santow JA and Ipp JA. Those reasons differed in some respects but it is not necessary to explore those differences.

Immediately, it is sufficient to say that both Santow JA and Ipp JA held that the police had both statutory and common law justification for remaining on the appellant's premises, despite the appellant having withdrawn permission for them to remain in his flat.

11. By special leave the appellant appeals to this Court.

12. The appeal to this Court should be allowed. There was neither statutory nor common law justification for the police remaining on the appellant's premises. The matter must be remitted to the Court of Appeal for consideration of the outstanding issues about damages. That outcome means that this Court cannot make orders disposing finally of the dispute between the parties. This Court has said on a number of occasions[5] that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.

Relevant statutory provisions

13. At the time of the events giving rise to these proceedings s 357F to s 357I of the *Crimes Act 1900* (NSW) made provision for powers of entry in cases of domestic violence[6]. Section 357F was directed to entry by invitation; s 357G concerned entry by warrant; s 357H made more particular provision in relation to the exercise of powers of entry under ss 357F and 357G; and s 357I dealt with entry and search for firearms.

14. It will be necessary to set out the text of s 357F. But because the section is long and its provisions dense, it is convenient to preface that by pointing out particular features of the provisions made by the section that are relevant to the present matter. The powers to enter a dwelling-house that were given by s 357F were predicated upon a member of the police force being invited to enter or remain in the dwelling-house "by a person who apparently resides in the dwelling-house, whether or not the person is an adult"[7]. That is, the provisions of the section were engaged by the invitation of an apparent resident of the premises to enter or remain.

15. Further provision was then made by s 357F(3) and (4) for two different events. First, sub-s (3) provided for what was to happen if an "occupier" of the dwelling-house expressly refused authority to a member of the police force to so enter or remain. That sub-section invites attention to the definition[8] of an "occupier" ("a person immediately entitled to possession of the dwelling-house"). It also invites attention to what is meant by the refusal of an invitation when s 357F(2) dealt separately with an invitation to enter a dwelling-house and an invitation to remain in a dwelling-house.

16. Section 357F(4) qualified the effect of an occupier's refusal of authority. It did that by qualifying the operation of sub-s (3) in a case where a member of the police force enters or remains "by reason of an invitation given as referred to in subsection (2) by the person whom the member of the police force believes to be the person upon whom a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwelling-house". In such a case the member of the police force was entitled to enter or remain in the dwelling-house "notwithstanding that an occupier of the dwelling-house expressly refuses authority to the member of the police force to so enter or remain".

17. At the times relevant to this matter s 357F provided:

"**Entry by invitation**

(1) In this section, ***occupier***, in relation to a dwelling-house, means a person immediately entitled to possession of the dwelling-house.

(2) A member of the police force who believes on reasonable grounds that an offence has recently been or is being committed, or is imminent, or is likely to be committed, in any dwelling-house and that the offence is a domestic violence offence, may, subject to subsection (3):

(a) enter the dwelling-house, and

(b) remain in the dwelling-house,

for the purpose of investigating whether such an offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence, if invited to do so by a person who apparently resides in the dwelling-house, whether or not the person is an adult.

(3) Except as provided in subsection (4), a member of the police force may not enter or remain in a dwelling-house by reason only of an invitation given as referred to in subsection (2) if authority to so enter or remain is expressly refused by an occupier of the dwelling-house and the member of the police force is not otherwise authorised (whether under this or any other Act or at common law) to so enter or remain.

(4) The power of a member of the police force to enter or remain in a dwelling-house by reason of an invitation given as referred to in subsection (2) by the person whom the member of the police force believes to be the person upon whom a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwelling-house may be exercised by the member of the police force notwithstanding that an occupier of the dwelling-house expressly refuses authority to the member of the police force to so enter or remain."

18. Section 357G provided for police obtaining authority by warrant to enter a dwelling-house by force. The section provided for a Magistrate, upon complaint made by a member of the police force, to issue a warrant which would "authorise and require the member of the police force to enter the dwelling-house and to investigate whether a domestic violence offence has been committed or, as the case may be, to take action to prevent the commission or further commission of a domestic violence offence"[9]. A complaint could be made in person or by telephone[10]. The warrant could be granted by the Magistrate stating the terms of the warrant[11]. In executing a warrant granted under s 357G(3) a member of the police force was authorised to use force[12], whether by breaking open doors or otherwise, for the purpose of entering a dwelling-house.

19. Section 357H(1) regulated the powers of entry given by ss 357F and 357G. It provided that:

"**Provisions relating to powers of entry under sections 357F and 357G**

(1) Where a member of the police force enters a dwelling-house in pursuance of an invitation (as referred to in section 357F), or in pursuance of a warrant granted under section 357G, for the purpose, in either case, of investigating whether an offence which the member of the police force suspects or believes to be a domestic violence offence has been committed, or, as the case may be, for the purpose of

> taking action to prevent the commission or further commission of such an offence, the member of the police force:
>
> (a) is to take only such action in the dwelling-house as is reasonably necessary:
>
> (i) to investigate whether such an offence has been committed,
>
> (ii) to render aid to any person who appears to be injured,
>
> (iii) to exercise any lawful power to arrest a person, and
>
> (iv) to prevent the commission or further commission of such an offence, and
>
> (a1) must inquire as to the presence of any firearms in the dwelling-house and, if informed that there is a firearm or firearms, must take all such action as is reasonably practicable to search for and to seize the firearm or firearms, and
>
> (b) is to remain in the dwelling-house only as long as is reasonably necessary to take that action."

20. Section 357H(2) addressed the continued existence of other powers of entry. It provided that:

> "(2) Nothing in subsection (1) or in section 357F or 357G limits any other power which a member of the police force may have under this or any other Act or at common law to enter or remain in or on premises."

Application of ss 357F and 357H

21. The events described at the start of these reasons took several minutes to play out. In the Court of Appeal, Santow JA concluded[13] that "the duration of [the police officers'] further stay after being first told to 'get out of my house' was some five to eight minutes" (a period Santow JA described[14] as "not a very long time"). Inevitably, the evidence given at the trial about the events focused upon what the witnesses remembered of what was said and done. Using those descriptions to construct a comprehensive narrative of the events was not easy. It was not made any easier by the trial judge's finding that the evidence of the police officers was unsatisfactory in some respects. The narrative of events given in the Court of Appeal differed in some respects from that found by the trial judge. Those differences are not important for the resolution of the present appeal. What is important is how the Court of Appeal characterised what the police officers were doing in the appellant's flat when he made physical contact with one of the officers.

22. Central to the reasoning of the Court of Appeal was the conclusion[15] that the police officers had not finished investigating whether a domestic violence offence had been committed when the appellant walked towards the officers with his arms outstretched and came into contact with one of them. It is to be recalled that s 357F(2) provided that, if certain conditions are met, a police officer may enter and may remain in a dwelling-house "for the purpose of investigating whether [a domestic violence] offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence".

23. There is room for a deal of debate in this case about what exactly were the investigations that the police who attended the appellant's flat had not finished, and about whether the prosecution of those investigations required or was even assisted by police remaining in the appellant's flat. So, for example, there was debate in the Court of Appeal about whether the police wanted, or needed, to look in the flat's bathroom before they left the premises. They had looked in every

other room in the flat but once violence broke out, and the appellant was forcibly removed from his flat, there was no evidence that any of the six officers who were at the scene then thought it necessary or desirable to look in the bathroom. This may suggest strongly that such a search formed no part of the investigations that the police were undertaking. There was also some debate about whether the police officers needed to confirm where the appellant's fiancée was, or needed to speak to her, before it could be said that their investigations were at an end. It is not immediately apparent why either of those steps required or was even assisted by the police officers staying in the appellant's flat. But these questions about what further police investigations were under way or were incomplete when violence erupted at the flat need not be pursued. Even if, as the Court of Appeal concluded, further police investigations were still under way, that fact is not relevant to the application of ss 357F and 357H in the present matter.

24. There are only three facts that are critical to the application of ss 357F and 357H in the present matter. Those facts are not disputed. They are:

(a) an "occupier" of the dwelling-house (the appellant) had invited the police to "look around" the flat;

(b) an occupier of the dwelling-house (again, the appellant) had then asked the police to leave; and

(c) the police officers did not leave and remained on the premises for longer than it would reasonably have taken them to leave.

Their remaining upon the premises after the appellant had asked them to go, and a reasonable time for their immediate departure had elapsed, was not authorised by the provisions of ss 357F and 357H.

25. To explain why the three facts identified, and only those, are the critical facts in this matter, it is necessary to deal with some issues about the proper construction of ss 357F and 357H.

Construction of ss 357F and 357H

26. Section 357F treated entering a dwelling-house and remaining in the dwelling-house as distinct steps. In particular, s 357F(2) provided that, in the circumstances described in that provision, a member of the police force may:

> "(a) enter the dwelling-house, and
>
> (b) remain in the dwelling-house".

That distinction between entering and remaining is not marked by a bright line. Any entry upon premises necessarily constitutes remaining upon the premises for at least as long as the act of entering takes. And the marking and maintenance of a distinction between the two ideas is not made easier by the way in which s 357F(3) is framed. That sub-section provided that "a member of the police force may not *enter or remain* ... if authority to so enter or remain is expressly *refused* by an occupier" (emphasis added). The use of the single verbal phrase "is expressly refused" may suggest that "enter or remain" is to be read as a portmanteau expression, and that the only refusal which the provision contemplated was a refusal at the point of initial entry to the premises. If that were so, the phrase "is expressly refused" might be said not to include a subsequent revocation of a permission granted earlier.

27. If there is any awkwardness in the operation of the provision that follows from the drafter

treating entering and remaining on premises as distinct steps, those difficulties need not be resolved in this matter. They need not be resolved because it was accepted by both parties, correctly, that the phrase "is expressly refused" in s 357F(3) must be read as including revocation of permission given earlier. Nor is it necessary to consider how the provisions of s 357F applied to the conduct of the police when they first entered the flat through the open door. No one in the flat had asked them to come in, but the lawfulness of that initial entry was not put in issue in this matter. Rather, as noted earlier, attention was directed only to whether the police officers were trespassers when the appellant first came into physical contact with one of them. And the premise for that debate was that because the appellant had agreed that the police officers might "look around" the flat, they then had authority under s 357F to remain on the premises.

28. Once it is observed that s 357F recognises that an invitation to enter or remain in a dwelling-house may be revoked by an occupier of the premises, attention must shift to what it is in the relevant provisions that would permit remaining on the premises after the invitation is revoked. And given that the power to enter and remain that is afforded by s 357F is a power that is predicated upon there being an invitation to enter (issued by someone who appears to be a *resident* of the premises) why should the revocation of permission (by an *occupier*) not take immediate effect by withdrawing the licence to remain that was founded in the combination of the invitation and the provisions of s 357F(2)?

29. The Court of Appeal answered those questions by reference to the purposes of the entry specified in s 357F(2): "for the purpose of investigating whether [a domestic violence] offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence". The permission to enter and to remain that was constituted by the invitation extended by an apparent resident of the premises coupled with s 357F(2) was treated as persisting for so long as a purpose of the entry that was a purpose identified in s 357F(2) remained unfulfilled. The purpose identified by the Court of Appeal as the purpose which remained unfulfilled was investigating whether a domestic violence offence had been committed.

30. Of course it is important to recognise that the statute prescribed the purposes that were to be effected when a member of the police force entered or remained in the dwelling-house. But it is also essential to give proper effect to s 357F(3).

31. Section 357F(3) provided, in part, that:

> "a member of the police force may not enter or remain in a dwelling-house by reason only of an invitation given as referred to in subsection (2) if authority to so enter or remain is expressly refused by an occupier."

These express provisions of s 357F(3) preclude reading other provisions of the section as permitting a police officer to enter and remain for as long as it was necessary to effect the purposes for which the entry was effected. That is, the express provisions of s 357F(3) require the conclusion that, unless sub-s (4) was engaged, and that was not suggested here, an express refusal by an occupier immediately terminated the authority "to so enter or remain".

32. A construction of s 357F which attaches immediate consequences to the express refusal of an occupier is reinforced by consideration of ss 357G and 357H(1). Section 357G is important because that section provided for compulsory entry to a dwelling-house. The express provisions of s 357G reinforce the view that s 357F dealt only with entry to a dwelling-house by invitation, and then for only so long as the relevant invitation remained unrevoked. In all but the case for

which s 357F(4) provided, revocation by an occupier of an invitation to enter or remain sufficed to terminate then and there the permission for a police officer to remain on the premises. Only an invitation to enter or remain issued by the person reasonably believed to be the victim of a domestic violence offence trumped the occupier's revocation of permission.

33. Section 357H(1) further reinforces the view that an occupier's revocation or refusal of permission withdrew the authority given by s 357F for a police officer to remain in a dwelling-house regardless of whether investigation of past or threatened offences was complete. Section 357H(1) identified the content of, and limitations upon, both the exercise of the powers to enter and remain pursuant to invitation conferred by s 357F and the exercise of the powers to enter and remain pursuant to a warrant granted under s 357G.

34. Section 357H(1)(a1) obliged a police officer who entered a dwelling-house to ask about the presence of firearms and, if told that there was a firearm, obliged the officer to search for it and seize it. As explained in *Fahy*[16], s 201 of the *Police Service Act 1990* (NSW) ("the Police Act")[17] made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.

35. In other respects, however, s 357H(1) *confined* what a member of the police force may do if he or she entered a dwelling-house for the purposes there described: the purpose of investigating whether a domestic violence offence has been committed or the purpose of taking action to prevent the commission or further commission of such an offence. Section 357H(1)(a) provided that a member of the police force was "to take *only* such action in the dwelling-house as is reasonably necessary" to do certain things (including "to investigate whether [a domestic violence] offence has been committed"). Paragraph (b) of the same sub-section provided that the member of the police force "is to remain in the dwelling-house *only* as long as is reasonably necessary to take that action".

36. Each of par (a) and par (b) of s 357H(1) limited the exercise of the power to enter or remain on the premises. Neither can be read as granting a power to enter or a power to remain. The powers to enter and to remain were given by the other provisions of the Act: s 357F or s 357G as the case required. And as earlier observed by reference to s 357F(3), the power to enter and remain given by s 357F could be, and in this case was, revoked. That the purposes identified in ss 357F and 357H for the police entering the appellant's premises had not been fulfilled when the appellant revoked their permission to remain neither precluded revocation of the invitation to remain in the flat nor engaged the relevant statutory provisions in a way that authorised the police officers to remain there.

37. To the extent that, in the end, there was any ambiguity about the meaning and ambit of the authority provided to police by ss 357F and 357H to remain in the appellant's flat after he had made it clear that he was requiring them to leave, such ambiguity must be resolved in favour of the foregoing construction. This is because of the strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence. That principle has been recognised and upheld by this Court on numerous occasions[18]. It derives from the principles of the common law of England. Indeed, it appears to be a principle against which the provisions of ss 357F and 357H of the Act were written. It defends an important civil right in our society. If Parliament were to deprive persons of such a right, or to diminish that right, conventional canons of statutory construction require that it must do so clearly[19].

38. We are mindful of the difficulties of police in responding to apparent complaints about domestic violence. Such difficulties obviously lay behind the conferral of police powers in terms of ss 357F, 357G and 357H. Properly, those difficulties, and the importance of effective police

intervention in response to suspected cases of domestic violence, were referred to by the Court of Appeal[20]. However, the powers there granted were not unlimited. They were granted, relevantly, subject to the provisions of the Act. Those provisions reserved the right to the occupier to withdraw an invitation to police to enter and remain on the premises. If, in the present case, the police considered that it was necessary to re-enter the premises, the remedy was in their hands. They could seek a warrant from a magistrate, and this could be sought and provided by telephone[21].

39. It follows that the police officers who entered the appellant's flat had no statutory justification for remaining on the premises after he asked them to leave. Was there common law justification?

Common law justification?

40. The common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property[22]. The actions of fire-fighters, police and ambulance officers will often invoke application of that principle. There being no evidence of danger to life or property, it was not suggested that this was such a case.

41. The defence delivered by the State in answer to the appellant's claim in the District Court did not distinctly allege that the police officers remaining in the appellant's flat, after he had asked them to leave, was in exercise of any common law right to remain on the land. The defence was cast in terms that were apposite to invoke only a statutory right founded in s 357F of the *Crimes Act*. Yet at all stages of the proceeding, this litigation has been conducted on the footing that it was open to the State to rely not only on s 357F, but also on a common law justification for what otherwise would have been the police officers' trespass to land. As Mason P rightly pointed out[23] in the Court of Appeal, the State's failure to plead all of the defences on which it relied was and is unsatisfactory. It is unsatisfactory because there is no sufficient definition of what was said to be the justification, and there is no sufficient definition of what were the facts that were said to engage that justification.

42. In its written submissions in this Court the State submitted that where police "apprehend on reasonable grounds that a breach of the peace has occurred and unless they involve themselves may recur, or alternatively that a breach of the peace is imminent, they may enter private dwelling premises for preventative and investigative purposes, acting only in a manner consistent with those purposes and remaining only for so long as is necessary for those purposes". It is convenient to treat this submission as identifying the asserted common law justification. It should also be said at once, however, that the submission was cast at a level of abstraction that did not identify the facts of this case that were said to engage the justification.

43. As was pointed out in this Court's decision in *Plenty v Dillon*[24], 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[25]. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land[26]. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.

44. In the case of a police officer's entry upon land, this is not necessarily a great burden. As has already been pointed out[27], the police officer may then (or earlier) seek a warrant which may

be granted in large terms[28]. Such a warrant may be sought by telephone[29]. It is granted by a Magistrate. Although the grant of a warrant is an administrative act, it is performed by an office-holder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual to the quiet enjoyment of residential premises. Where a case for entry can be made out to a Magistrate, the occupier's refusal or withdrawal of permission to enter or remain may be overridden. However, this is done by an officer who is not immediately involved in the circumstances of the case and who may thus be able to approach those circumstances with appropriate dispassion and attention to the competing principles at stake[30].

45. In *Halliday v Nevill*[31], this 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 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".

46. Argument in this Court about an asserted common law justification for the police officers remaining in the appellant's flat necessarily referred to general statements made in decided cases, about "preventing" a breach of the peace, especially some statements on that subject made in the decision of a Divisional Court of the King's Bench Division in *Thomas v Sawkins*[33]. Particular emphasis was given to two statements in that case. First, Avory J said[34] that "[t]o prevent ... a breach of the peace the police were entitled to enter and to remain on the premises". Secondly, Lord Hewart CJ said[35] that "a police officer has ex virtute officii full right [to enter and remain on private premises] when he has reasonable ground for believing that an offence is imminent or is likely to be committed".

47. It is to be noted that neither of these statements countenances an entry or remaining on premises for *investigating* whether a breach of the peace has occurred or determining whether one is threatened or imminent. Nothing else that was said in *Thomas v Sawkins* would support such a power and no reference was made to any decision that would cast the power so widely. Rather, the focus of what was said in *Thomas v Sawkins* was upon prevention of a breach of the peace, not upon any power of investigation.

48. As has been cogently argued in academic commentary[36] on *Thomas v Sawkins*, the statements made by Avory J and Lord Hewart CJ that have been set out earlier were cast in "unnecessarily wide terms"[37]. The immediate context for the decision in *Thomas v Sawkins* was the attendance of police at a public meeting held to consider, among other things, a call for the dismissal of the chief constable of the county. For at least Avory J, and perhaps the third member of the Court, Lawrence J, much turned on the fact that the meeting was a public meeting to which all members of the public were invited. What was decided in *Thomas v Sawkins* must be approached with the facts of the case well in mind, and of course, the facts of the present case are very different.

49. These considerations apart, when it is said that a police officer may enter premises to "prevent" a breach of the peace, it is necessary to examine what is meant by "prevent" and what exactly is the power of entry that is contemplated. Is the power to enter one which permits forcible entry? Does preventing a breach of the peace extend beyond moral suasion to include arrest? Is the

preventing of a breach of the peace that is contemplated directed ultimately to prevention by arrest?

50. Some of these questions have since been considered in English decisions[38]. Those later decisions proceed from the premise stated[39] by Lord Diplock in *Albert v Lavin* that:

> "[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

As is evident, not only from the passage just cited but also from some of the later English decisions, working out the application of a premise so broadly stated is not free from difficulty[40], not least in deciding what constitutes an actual or threatened breach of the peace[41] and what steps, short of arrest, may be taken in response[42].

51. And for the same reasons, the State's submission, set out earlier in these reasons, to the effect that police may enter premises if they apprehended on reasonable grounds that a breach of the peace has occurred and may recur, or that a breach of the peace is imminent, suffers the same difficulties. Further, the State's submission that police may enter for "preventative *and* investigative purposes" would, by its reference to "investigative purposes", extend the power much further than any description of common law power given in the English cases. There is no basis for making that extension. Whatever may be the ambit of the power of police (or of a member of the public) to enter premises to *prevent* a breach of the peace, that power of entry does not extend to entry for the purposes of investigating whether there has been a breach of the peace or determining whether one is threatened.

52. Both parties in the present case accepted that police officers in New South Wales are duty bound to "keep the peace". A statutory source of that duty was not identified in argument but it may be that it is to be found in the then provisions of regs 8 and 9 of the Police Regulation 2000 (NSW), coupled with ss 6 and 201 of the Police Act. Regulation 8 prescribed a form of oath or affirmation to be taken by a police officer under s 13 of the Police Act. The prescribed form of oath or affirmation contained a promise to "cause Her Majesty's peace to be kept and preserved", and a promise by the declarant to "prevent to the best of my power all offences against that peace". Regulation 9(1) provided that police officers were "to comply strictly with the Act and this Regulation and promptly comply with all lawful orders from those in authority over them". Section 6 of the Police Act stated the mission and functions of the Police Service. Those functions included providing police services for New South Wales and "police services" was defined in s 6(3) as including "services by way of prevention and detection of crime" and "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way". And as noted earlier, s 201 of the Police Act made it an offence to neglect or refuse to carry out any lawful duty as a police officer.

53. It is not necessary to decide whether it is these provisions that obliged police officers in New South Wales to keep the peace. It is sufficient for present purposes to accept, without deciding, that at the time of the events giving rise to this litigation New South Wales police officers were bound to "keep the peace". But in the present matter, by the time police went to the appellant's flat, there was no continuing breach of the peace and nothing in the evidence of what happened thereafter suggested that, but for the police officers not leaving the flat when asked to do so, any further breach of the peace was threatened or expected, let alone imminent. However broadly understood may be the notion of a duty or right to take reasonable steps to make a person who is

breaching or threatening to breach the peace refrain from doing so, that duty or right was not engaged in this case. It was not engaged because, by the time police arrived at the appellant's flat there was no continuing or threatened breach of the peace. And no breach of the peace was later committed or threatened before the eruption of the violent struggle that culminated in the appellant's arrest.

54. It follows that the continued presence of police officers in the appellant's flat, after he had asked them to go and a reasonable time for them to leave had elapsed, could not be justified as directed to preventing a breach of the peace. No other form of common law justification for remaining in the appellant's flat was suggested.

Conclusion and Orders

55. For these reasons, the question treated by the parties as dispositive of liability (were the police officers trespassers when the appellant first came into physical contact with one of them) should be resolved in the appellant's favour. It follows that the appeal to this Court should be allowed. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 June 2007 should be set aside. In their place there should be orders that the State's appeal to that Court on grounds 1, 2, 3 and 4 be dismissed and that the appeal be remitted to that Court for further consideration of grounds 5, 6, 7 and 8 of the State's Notice of Appeal. The State should pay the appellant's costs of the appeal to this Court and of the proceedings in the Court of Appeal up to and including the entry of the order of the Court of Appeal made on 15 June 2007. The costs of the further hearing in the Court of Appeal should be in the discretion of the Court of Appeal.

56. HEYDON J. This appeal presents a difficult problem of statutory construction. The problem arises from a tension between s 357F(3)[43] and s 357H(1)[44] of the *Crimes Act 1900* (NSW). The former provision was relied on by the plaintiff to support the submission that at the instant the police officers failed to comply with the plaintiff's first request to leave the premises, they became trespassers. The latter provision was relied on by the defendant to support the submission that once police officers have lawfully entered premises, or remain lawfully on them by reason of a s 357F(2) invitation, they are entitled to stay on those premises for as long as is reasonably necessary to take, and complete, the actions described in s 357H(1)(a) and (a1). The defendant's construction is to be preferred for the following reasons.

The construction of the legislation

57. The plaintiff's construction has the result that if police officers who had lawfully entered, or were lawfully remaining in, a dwelling-house because of a s 357F(2) invitation, on observing that a person present appeared to be badly injured, would have no statutory right to remain merely because an occupier of the dwelling-house expressly refused consent to remain. A construction of the legislation which would deprive police officers who, pursuant to s 357H(1)(a)(ii), were trying to control severe haemorrhaging, or were trying to restore an injured person's heart beat, or were trying to prevent an injured person from choking to death, of any statutory right to remain and continue their endeavours once consent to remain was refused, must be rejected.

58. It is necessary also to reject a construction of the legislation which would deprive police officers, on the point of lawfully arresting someone pursuant to s 357H(1)(a)(iii), of any statutory right to remain in order to do so the instant consent was refused.

59. It is necessary, further, to reject a construction of the legislation which would deprive police officers who are seeking to prevent the commission or further commission of a domestic

violence offence within the meaning of s 357H(1)(a)(i) of any statutory right to remain in order to continue their endeavours once consent to remain was refused in circumstances not falling within s 357F(4).

60. And it is necessary to reject a construction of the legislation which would deprive police officers who were about to inquire into the presence of firearms, search for them and seize them, or were in the process of conducting that inquiry, search and seizure as contemplated by s 357H(1)(a1), of any statutory right to remain in order to continue that course of conduct once consent to remain was refused.

61. It is no answer to the difficulties posed by these four instances to say that the police officers, once they have left the premises, are at liberty speedily to obtain a telephone warrant to enter the premises for a second time. The plaintiff contended that that process would take very little time. But the process is not supposed to be a formality, and it could often take some time. By the time the police officers had departed and obtained a telephone warrant to re-enter, the injured person might have died or suffered irreparable physical injury; the person to be arrested might have fled and absconded for good; a domestic violence offence, or a further domestic offence, might have been committed, causing grave injury or death; and firearms might have been removed from the premises or used to commit a crime.

62. In each of the four instances just discussed, a correct construction of the legislation gives police officers who are lawfully present before consent to remain is withdrawn a statutory right to remain in order to commence or continue, and then to complete the actions described in s 357H(1)(a)(ii), (iii) and (iv) and (a1), despite that withdrawal of consent. There is no reason not to adopt the same construction in relation to the action described in s 357H(1)(a)(i) - investigating whether a domestic violence offence has been committed. As the defendant submitted, it follows from the fact that under s 357H(1)(b) the police officers are to remain "only as long as is reasonably necessary", that they may remain as long as is reasonably necessary.

63. Is there an absurdity or anomaly in the defendant's position arising from its contemplation that under the legislation consent to enter can be refused in the first place, and any entry therefore rendered unlawful, even if the police officer suspected a serious crime causing grave personal injury had just taken place, but withdrawal of consent to remain cannot render the continued presence of police already on the premises unlawful until the s 357H(1) actions are complete? In similar vein, the plaintiff submitted: "The notion that Parliament would have prevented you from saying, 'I know I let you in but I really do not like the way you are carrying on, I want you to go now', the notion that Parliament has abolished that common law possibility is ... unthinkable." That submission reveals a certain obliviousness to practical circumstances. Police officers who have lawfully entered pursuant to consent, or who remain lawfully after entry pursuant to consent, are likely in practice to know much more about what has happened or is likely to happen than police officers who were not given any consent to enter or remain and did not enter or remain. The compromise struck by the legislation is that police officers who have been refused consent to enter at all must obtain a warrant. Those who have entered or remained pursuant to consent which is then withdrawn may remain until the s 357H(1) processes, in the course of which they may well have learned information which makes the completion of questioning those persons desirable, are complete. To be balanced against the supposedly unthinkable consequences of the defendant's construction to which the plaintiff's submission referred is the fact that the consequences of the plaintiff's construction are, if not unthinkable, at least highly impractical and in particular circumstances undesirable. It would mean that the householder could forestall the lawful activities of police officers just as they were beginning to bear fruit.

64. The plaintiff's construction would read s 357F(3) as prevailing over s 357H(1). On the defendant's construction, the two must be read together, and s 357H(1) prevails because police officers acting within that sub-section are not remaining, to use the language of s 357F(3), "by reason only" of a s 357F(2) invitation: they are "otherwise authorised" by s 357H(1).

The facts

65. The police officers entered the premises lawfully because a person who apparently resided on the premises invited them to do so. Even if that were not so, the police officers remained lawfully once the plaintiff encountered the police officers and said that they could look around. The state of affairs in which the police officers found themselves just before the plaintiff came into physical contact with them - just before the moment when the legality of their presence must be tested - was as follows. The police officers had heard a broadcast on their radios of a message preceded by two beeps. That signified a serious state of affairs like an armed robbery or a violent domestic incident. One message broadcast included the words: "Male and female fighting. Female heard screaming". A later message broadcast included the words: "The female had been screaming. Now it's all gone quiet." These signals and messages indicated a serious problem to be dealt with urgently by travelling as quickly as possible to the premises using lights and sirens. Three police vehicles, each containing two officers, responded. After speaking to two friends of the plaintiff, the police officers waited until the plaintiff came out of the shower. The evidence called for the plaintiff reveals that the following events then took place. The police officers informed the plaintiff that they were investigating a domestic violence complaint made by a neighbour. He told them that no female was present and that his "Mrs" had left. They sought and obtained his permission to look around. Two of the officers looked in the two bedrooms in the plaintiff's unit. They asked him where the female who had been there was, and he said that she was at his sister's house around the corner. He could not give the precise address of the sister's house, but described what it looked like and how to get there. He then began to ask them to leave, and did so on a number of occasions (estimates varying from between two to three to at least six occasions) in a foul-mouthed way, accompanying what he said with violent acts like slamming down a piece of paper with his sister's telephone number on it. These were excessive and disproportionate reactions which were not calculated to allay the alarm which had brought the police officers to the premises. They were not obliged to accept his answers immediately, and their experience probably instructed them that it was prudent not to do so. The police officers continued to ask where the female was and where the house of the plaintiff's sister was. The plaintiff then climbed onto a bench between the kitchen and the living room and jumped off in the direction of the police. He came into physical contact with them, and they used force to subdue him and arrest him. They experienced difficulty in getting him down the stairs. After the plaintiff was put in a police car, one of the police officers asked Mr Guler, a friend of the plaintiff, who had been present when the police officers entered the unit, whether he knew where the plaintiff's sister lived. Mr Guler responded that he did not know the address but could show the police where the sister's house was. Mr Guler went in a police car to the sister's house where he then observed the police talking to the plaintiff's fiancée. At that time, at least the urgent stage of the police investigation into whether a domestic violence offence had been committed came to an end.

66. The view of the evidence just expressed corresponds with Ipp JA's approach in the Court of Appeal. Ipp JA did not accept that after the plaintiff had told the police to leave there was nothing to investigate. The mere fact that no person had been found in the unit did not put an end to the investigation of whether a domestic violence offence had been committed. The questions the police asked of the plaintiff in Mr Guler's presence as to the whereabouts of the female who had been heard screaming had not been answered to their satisfaction and were part of the police investigations. Although the plaintiff had given the police a telephone number for

his sister, they had not had an opportunity to verify it. The police wanted to know what had happened to the female, they wanted to know where she was, and they were not going to leave until they got answers to those questions. In the few minutes between when the plaintiff first asked the police to leave and the time when he was arrested, they had not obtained an answer from anyone present giving the address of the plaintiff's sister and had not had an opportunity of calling the telephone number which the plaintiff had told them was the telephone number of his sister. The conduct of the police in those minutes was reasonably necessary in order to investigate whether a domestic violence offence had been committed. Santow JA gave a concurring summary, and Mason P agreed with both judgments. The approach of the Court of Appeal to the finding of facts is to be preferred to that of the trial judge, whose judgment is characterised by errors of fact (as the Court of Appeal demonstrated) and by facetiousness, exaggeration and excessive metaphor. The conclusion of the Court of Appeal that the investigation by the police officers of whether a domestic violence offence had been committed was not complete when the plaintiff came into physical contact with them was correct. The view that it was complete once the plaintiff had said the female had gone to his sister's house and could be contacted on a certain telephone number lacks all practical merit.

67. Hence at the time when the plaintiff came into physical contact with the police officers they had a statutory right to be present, and it is not necessary to consider the common law position.

Orders

68. The appeal should be dismissed with costs.

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[1] (2006) 229 CLR 638; [2006] HCA 57.

[2] (2007) 81 ALJR 1021; 236 ALR 406; [2007] HCA 20.

[3] Cf *Enever v The King* (1906) 3 CLR 969; [1906] HCA 3.

[4] *State of New South Wales v Kuru* [2007] NSWCA 141; [2007] Aust Torts Reports 81-893.

[5] *Cornwell v The Queen* [2007] HCA 12; (2007) 81 ALJR 840 at 865 [105]; [2007] HCA 12; 234 ALR 51 at 85; [2007] HCA 12; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* [2004] HCA 58; (2004) 217 CLR 274 at 312 [105]; [2004] HCA 58; *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* [2001] HCA 8; (2001) 207 CLR 1 at 19-20 [34]- [35]; [2001] HCA 8.

[6] These provisions of the *Crimes Act 1900* (NSW) were repealed by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The latter Act made other provisions by ss 81-87 for search, entry and seizure powers relating to domestic violence.

[7] s 357F(2).

[8] s 357F(1).

[9] s 357G(3).

[10] s 357G(4).

[11] s 357G(6).

[12] s 357G(9).

[13] [2007] NSWCA 141; [2007] Aust Torts Reports 81-893 at 69,703 [79].

[14] [2007] NSWCA 141; [2007] Aust Torts Reports 81-893 at 69,703 [79].

[15] [2007] NSWCA 141; [2007] Aust Torts Reports 81-893 at 69,704 [87] per Santow JA, 69,713 [161] per Ipp JA.

[16] [2007] HCA 20; (2007) 81 ALJR 1021 at 1028 [21], 1029 [27]; [2007] HCA 20; 236 ALR 406 at 412, 413.

[17] The short title of this Act was later amended by the *Police Service Amendment (NSW Police) Act 2002* (NSW) to the *Police Act 1990* .

[18] *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 110-111; [1990] HCA 26; *New South Wales v Corbett* [2007] HCA 32; (2007) 81 ALJR 1368 at 1372-1373 [18]- [22], 1382 [87] and cases there cited; [2007] HCA 32; 237 ALR 39 at 43-44, 57; [2007] HCA 32.

[19] *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304; [1908] HCA 63; *Ex parte Walsh and Johnson; In re Yates* [1925] HCA 53; (1925) 37 CLR 36 at 93; [1925] HCA 53; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at 558-559 [28], 562-563 [43], 577 [90]; [2002] HCA 49.

[20] [2007] NSWCA 141; [2007] Aust Torts Reports 81-893 at 69-705 [93] per Santow JA, 69-710 [138]-[139] per Ipp JA referring to the Second Reading Speech in support of the Crimes (Domestic Violence) Amendment Bill 1982 (NSW).

[21] Above at [18].

[22] *Maleverer v Spinke* (1538) 1 Dyer 35b at 36b [73 ER 79 at 81].

[23] [2007] NSWCA 141; [2007] Aust Torts Reports 81-893 at 69,690 [3].

[24] [1991] HCA 5; (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ; [1991] HCA 5.

[25] *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1 at 10; [1984] HCA 80; *Entick v Carrington* (1765) 2 Wils KB 275 at 291 [1765] EWHC J98; [95 ER 807 at 817]; *Great Central Railway Co v Bates* [1921] 3 KB 578 at 581-582; *Southam v Smout* [1964] 1 QB 308 at 320; *Morris v Beardmore* [1981] AC 446 at 464; *Eccles v Bourque* [1975] 2 SCR 739 at 742-743.

[26] *Halliday* [1984] HCA 80; (1984) 155 CLR 1 at 10.

[27] Above at [18].

[28] s 357G(3).

[29] s 359G(4).

[30] *Halliday* [1984] HCA 80; (1984) 155 CLR 1 at 20 per Brennan J.

[31] [1984] HCA 80; (1984) 155 CLR 1.

[32] [1984] HCA 80; (1984) 155 CLR 1 at 9.

[33] [1935] 2 KB 249.

[34] [1935] 2 KB 249 at 257.

[35] [1935] 2 KB 249 at 255.

[36] Goodhart, "*Thomas v Sawkins*: A Constitutional Innovation", (1936) 6 *Cambridge Law Journal* 22; Feldman, *The Law Relating to Entry, Search and Seizure*, (1986) ("Feldman") at 324-331.

[37] Feldman at 324.

[38] See, for example, *McGowan v Chief Constable of Kingston upon Hull* [1968] *Criminal Law Review* 34; *Albert v Lavin* [1982] AC 546; *McLeod v Commissioner of Police of the Metropolis* [1994] EWCA Civ 2; [1994] 4 All ER 553.

[39] [1982] AC 546 at 565. See also *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 24 [10] per Gleeson CJ; [2004] HCA 39.

[40] See Feldman, "Interference in the Home and Anticipated Breach of the Peace", (1995) 111 *Law Quarterly Review* 562; cf *McLeod v United Kingdom* [1998] ECHR 92; (1998) 27 EHRR 493.

[41] *Addison v Chief Constable of the West Midlands Police* [2004] 1 WLR 29 at 31-32.

[42] *McLeod* [1994] EWCA Civ 2; [1994] 4 All ER 553 at 560.

[43] Set out above at [17].

[44] Set out above at [19].
