wotton kearney

Case Alert

Shaping the future of insurance law

High Court finds police have an implied right to enter land to investigate the occupants

***Roy v O'Neill* [2020] HCA 45**

10 DECEMBER 2020

AT A GLANCE

- In handing down its decision in *Roy v O'Neill* on 9 December 2020, a majority (3:2) of the High Court found that the implied licence that permits all entrants to property to speak with the occupants would extend to authorise the entrance by police officers to investigate the occupant for a crime by speaking with them.
- The decision has implications for proactive policing Australia-wide as it gives the police confidence that they can, in certain circumstances, lawfully enter land and speak with occupants in the absence of express statutory authority.
- The authority does remain subject to limitations. The licence will not extend to authorise the entrance onto property if the sole purpose is to subject the occupant to a coercive process.

Background

In 2017, the appellant to the High Court matter, a Northern Territory resident, was subject to a domestic violence order (DVO) for the protection of her partner. Under the terms of the DVO, she was prohibited from being in her partner's company while consuming or being under the influence of alcohol.

In 2018, while the DVO was in force, three Northern Territory police officers attended the appellant's home in Katherine (the premises).

They did so while conducting "proactive domestic violence duties", including proactively checking DVO compliance by going to people's houses.

While on the appellant's premises, at the threshold to her door, the officers administered a breath test to the appellant that returned a positive result for alcohol. As the officers observed the appellant's partner in the premises, they suspected she was in breach of the DVO. The appellant was arrested and charged.

In the Local Court, the Court found that the police officers did not have the power under statute to attend the premises to check compliance with the DVO. The breath test result was therefore excluded as evidence that was unlawfully obtained, and the appellant was found not guilty. The prosecution appealed to the Supreme Court where that appeal was also dismissed. The prosecution appealed again to the Northern Territory Court of Appeal, where the appeal was successful. The appellant then appealed to the High Court.

The issues

The prosecution accepted that the police officers had no express statutory authority to enter the premises. Instead, the prosecution argued that the police were lawfully entitled to enter the premises under an implied common law licence. As was accepted by a majority of the High Court in *Halliday v Nevill* (1984) 155 CLR 1:

> *"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 … 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"*

In *Halliday*, it was found that the implied licence extended to permit police officers to walk upon a private resident's driveway for the purpose of questioning or arresting a trespasser who had been observed committing an offence immediately prior.

The appellant sought to distinguish *Halliday* from the present case, on the basis that the officers who attended her premises did not suspect any offences were being committed by her. She argued that in these circumstances, entry was for an illegitimate purpose and not within the scope of any implied licence. It was argued that it is not a legitimate purpose to enter private land solely for the purpose of investigating whether the occupier had committed crimes.

It was argued this purpose was illegitimate given it directly conflicted with the occupier's interests, and where police had broad statutory powers authorising entrance onto private property in certain circumstances.

The decision

In a split decision, the High Court dismissed the appellant's appeal. There were three judgments, one from Kiefel CJ, another from Bell and Gageler JJ, and the last from Keane and Edelman JJ. Kiefel CJ, Keane and Edelman JJ dismissed the appeal. In dissent, Bell and Gageler JJ would have upheld it.

The majority: Kiefel CJ

Kiefel CJ found that the implied licence described in *Halliday v Nevill* would readily admit the police officer's entrance on the appellant's property. She held at [18]:

> *"It is implied by the law so that police might undertake such enquiries and observations of the appellant as were necessary if she was present at the dwelling unit, to ascertain whether the DVO had been breached and an offence committed, as Constable Elliott expected might be the case. Whether this be called a "check" or an investigation does not matter. It is a non-coercive aspect of police business which involves no adverse effect upon any person … It involves no interference with the occupants' possession. It is difficult to imagine how police could go about their business and more particularly how they could be expected to prevent domestic violence in the public interest unless they were able to make such enquiries and observations of the subject of a DVO and the person it is intended to protect".*

The majority: Keane and Edelman JJ

Keane and Edelman JJ's judgment kept the appellant's partner, the alleged victim of domestic violence, in the forefront. They commenced their judgment by referring to the "plague" of domestic violence in Katherine in the Northern Territory. Their Honours made veiled criticism of the appellant's case, noting: "the appellant's primary argument is that the police have no power merely to knock on the door of an abused occupier living with the abuser simply to ask "Are you ok?".

Their Honours noted that if the appellant was right to say that police could not check on compliance with a domestic violence order, police would lose the ability to check on victims of abuse.

Their Honours turned to the authorities regarding the implied common law licence to enter property. They noted that licence to enter property for lawful communication need not to be desired by, or for the benefit of, the occupier. For instance, a customer who returns to a shop to complain about the quality of goods purchased or the change received has an implied licence to enter the shop, though it might not be for the shopkeeper's benefit. The licence only extends to communication. If an entrant has a sole purpose outside communication, such as filming the occupants, that entrance will be outside the implied licence and is a trespass, as found in *TCN Channel Nine Pty Ltd v Anning*.

However, if the entrant has a dual purpose, including lawful communication, that entrance will usually be authorised. For example, in *Barker v The Queen*, Mason J used the example of a person who entered a shop with the intention of stealing. That person was not a trespasser the moment they set foot in the door, as their entrance was (at least at first) within the ambit of the shopkeeper's implied invitation. Their Honours held:

> *"This implication in law of a licence in instances of mixed purposes reflects the realities and incidents of social life. The realities and incidents of social life do not require the drawing of imperceptible, jurisprudential distinctions based upon whether a purpose within a licence is or is not accompanied by other subjective motivations or purposes that might lie outside the licence, especially where the other subjective motivations or purposes might be conditional, subservient, or uncertain, or might never be acted upon. If such distinctions were drawn the operation of an implied licence would be practically unworkable"*

Turning to entrance by police, their Honours referred to established authority to the effect that police do not lose implied licence to communicate where the motive for communication is to investigate the occupier for an offence, as found in *Robson v Hallett*.

On the facts of this case, their Honours accepted that if the police officers entered for the sole purpose of subjecting the occupant to a coercive process, such as administering the breath test, that would have been unlawful. But they did not accept that was so on the facts. The police officers' evidence was that they entered for a dual purpose, including to conduct a "check" on compliance with the AVO and also to perform the breath test. Keane and Edelman JJ concluded that if one of the officers' purposes was lawful communication, their entrance was lawfully justified:

> *"The finding … that the police officers had a purpose of enquiring about the welfare of [the appellant's partner] is sufficient foundation for the conclusion that the police had an implied licence to enter the curtilage of the premises … implied licence would not have been negated by any other subjective motivation for the enquiry such as to investigate [the appellant]."*

Their Honours held that it was lawful for police officers to enter land with a 'dual purpose' including, contingent on what they were told after lawful communication, doing something coercive (such as administering a breath test in this case). They noted that were it to be otherwise, police could never knock on the door a person suspected of domestic violence merely to enquire about compliance with a DVO or the welfare of a co-habitant, since any police officer in those circumstances would intend to exercise coercive power if it were required for protection of an occupier. Were it to be otherwise:

> *"Proactive policing would be dead. The police could no longer knock on the door of the very occupiers who might be in the most desperate need, to ask "Are you ok?""*

Their Honours joined with Kiefel CJ and dismissed the appeal.

In dissent: Bell and Gageler JJ

Bell and Gageler JJ took a different view of the legality of entry with a "dual purpose". They commenced their judgment with this statement:

> *"In the Australian way of thinking, a home is a sanctuary … 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. 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… so as to talk to me."*

Their Honours found that the implied licence to "knock and talk" applied just as much to police officers as anyone else. The police officers could knock and talk even if they are investigating a crime, and even if the occupant is a suspect. Their Honours found that police are also perfectly entitled to ask questions of the occupant, although the occupant is equally entitled to refuse to answer and to insist that the officers leave.

Their Honours noted, however, that the implied licence to "knock and talk" does not extend to compel the occupant to do anything. They then considered the situation where an entrant had two purposes: both to talk, but also, perhaps, to coerce if cooperation was not forthcoming. In their view, entrance with such a mixed purpose was unlawful:

> *"A police officer who walks up my path, stands at my doorstep and knocks on my door exceeds the limits of the permission granted by the implied licence, and is therefore a trespasser, if the police officer has any conditional or unconditional intention of ordering me to do anything."*

Applied to this case, had the police officers turned up merely to talk to the appellant, they would not have exceeded the implied licence. They would have been just talking. However, one of the officers had turned up intending to take a sample of the appellant's breath for alcohol analysis. In their Honours' view:

> *"That coercive purpose took [the police officers] beyond the scope of the implied licence; it made them trespassers. The fact that [police] had the more general "dual purpose" of checking on [the appellant's] compliance with the DVO makes no difference. The fact, if it be the fact, that the coercive purpose might have been contingent on Ms Roy being home and appearing to be drunk can also make no difference. That Ms Roy chose to comply with the request for a breath test is similarly of no moment. Where criminal consequences flow from a failure to comply, the giving of a direction is clearly coercive."*

They would have dismissed the appeal.

The issue for government agencies

The High Court's decision is an important one for government agencies and their officers, including police, health, housing and welfare workers.

It confirms that officers of the state have the implied licence to enter properties and speak with the occupants of those properties. It also confirms they may conduct coercive activities in certain circumstances, and as long as those activities are not the sole purpose of the visit.

This decision allows officers of the state to conduct their duties proactively. It also protects them, in this context, from agency-level liability.

Need to know more?

For more information please contact us.

Greg Carruthers-Smith
Partner, Sydney
T: +61 2 8273 9965
E: greg.carruthers-smith@wottonkearney.com.au

Patrick Thompson
Senior Associate, Sydney
T: +61 2 8273 9820
E: patrick.thompson@wottonkearney.com.au

FOR MORE INSIGHTS FROM W+K, VISIT:
https://www.wottonkearney.com.au/knowledge-hub/