



Précis Paper

Statutory Good Faith Protections

A discussion of the vicarious liability of the police, the history of their good faith protection clause, and whether this covers negligence.

Discussion Includes

- How is the police commissioners vicariously liable for the actions of their officers?
- Important factors for tort victims of police activity
- Good faith protections across public services
- Legislative history and recent caselaw
- The English position and the Australian Position
- Problems with Ardouin
- Victims of police torts
- *Jennings v Police [2019] SASCF 93*
- Decoys

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Statutory Good Faith Protections

1. In this edition of BenchTV, Steven Churches (Doctor of Philosophy, Barrister, Elliott Johnston Chambers, Adelaide) and Prof. Prue Vines (Faculty of Law, UNSW) discuss the vicarious liability of the police, the history of their good faith protection clause, and whether this covers negligence.

How are the police commissioners vicariously liable for the actions of their officers?

2. In Australia police commissioners generally are now vicariously liable, but it is important to note that that is only a recent possibility.

Important factors for tort victims of police activity

3. The police have a good faith protection clause in their statute.
4. Anything done in the good faith performance of the functions under the Act will not allow claim to pass against the officer who has done the purportedly tortious act.
5. Australian courts have interpreted the good faith protection to cover against negligence, whereas the history of the good faith protection clause from the English precedents back to 1848 is clear that it covers officials against trespass and nuisance.
6. The English judges were very clear that it did not cover actions in negligence.

Good faith protections across public services

7. Good faith protections cover a range of officials, from police to fire brigades to local government officials and child protection services, and any other official who are in physical contact with members of the public.

Legislative history and recent caselaw

8. Good faith protection clauses are to cover officials in a situation where they misapprehend their powers, but in good faith.
9. If they are performing their statutory functions properly then there is no recourse at law.

The English position and the Australian Position

10. The English legislation on good faith protection goes back to 1848, a health act which provided for entry by inspectors, to protect them against trespass and nuisance.
11. The English judges were clear that this did not cover against negligence.
12. The High Court found that negligence should be protected by the good faith clause and Australian legislation has diverged from the English law ever since.

Problems with Ardouin

13. Steven Churches believes that the High Court's finding was incorrect and the English interpretation is sound theory, and the Australian interpretation is inefficient.

Victims of police torts

14. Once *Enever* was abolished it was open to sue against the Commissioner of Police for vicarious liability, however the good faith protection clause was still an obstacle.
15. In NSW and SA there is specific provision that the tort that would exist if it hadn't been for the good faith protection clause will pass to the Crown in any case.
16. Until very recently, there was a rule of thumb that you couldn't sue the police in negligence, because that would have a chilling effect on their operations.

Jennings v Police [2019] SASCFC 93

17. Where the claim arises from a course of police investigation of crime, it will still be very difficult to show negligence.

Decoys

18. The door is now a lot wider than it was before when Australian Courts tended to assume that police and negligence didn't go together.
19. Good faith and negligence are utterly separate.
20. We still need to look at the good faith clauses and there needs to be more clarity.

BIOGRAPHY

Steven Churches

Doctor of Philosophy, Barrister, Elliott Johnston Chambers, Adelaide

Steven graduated in Arts from Sydney University, Law from Tasmania, and with a PhD in Law from Adelaide University. He has been in legal practice since 1976, the bulk of that time as a barrister and part time legal teacher, at the WA, NSW and now SA Bars.

Steven's particular interests lie in statutory interpretation and the relationship of individuals and the community to the State. His practice as a barrister is almost entirely in appellate and judicial review proceedings dealing with administrative and constitutional law issues, or concerning statutory interpretation. Steven has been presenting counsel in a number of High Court cases, including *Bropho* (1990); *Webster v Lampard* (1993); and *McNamara* (2005), all three involving statutory interpretive techniques to restrain the ambit of State immunities or advantages at law.

Steven taught Statutory Interpretation at University of Adelaide Law School, and continues to teach the subject in intensives at Law Schools around Australia and New Zealand

Prof Prue Vines

Faculty of Law, UNSW, Sydney

Prue Vines is co-director of the Private Law Research and Policy Group, and Director of First Year Studies in the Law School at the University of New South Wales. Her research interests are in torts and succession or inheritance. In torts she is interested in the attribution of responsibility in negligence and the use of apologies in civil liability; in succession she is interested in the impact of the common law on Aboriginal people. She teaches legal system, torts and succession at undergraduate and postgraduate levels.

BIBLIOGRAPHY

Cases

Enever v R - [1906] HCA 3 - 3 CLR 969
Board of Fire Commissioners (NSW) v Ardouin [1961]
Mjuqu v Johannesburg City Council 1973 (3) SA 421 (A) (South Africa)
Stephens v Stephens [1970] 3 NSWWR 168
Board of Fire Commissioners v Rowland (1960) SR (NSW) 322
Electro Optic Systems v State of New South Wales [2014] ACTCA 45
Hill v Chief Constable of West Yorkshire [1987] UKHL 12 (UK)
Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 (UK)
Fuller-Wilson v State of New South Wales [2018] NSWCA 218
Jennings v Police [2019] SASCFC 93
Cran v State of New South Wales and Another [2004] NSWCA 92
Sullivan v Moody - [2001] HCA 59
Mid Density Developments Pty Ltd v Rockdale Municipal Council - [1993] FCA 590

Legislation

Fire Brigade Act 1909 (NSW)
Local Government Act No 41 (NSW)
Public Health Act 1848 (UK)
Law Reform (Vicarious Liability) Act 1983 No 38