

Court opens door to domestic violence victim to sue police for negligence

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In refusing to strike out Smith's claim, the court has accepted that it is arguable police could owe a common law duty of care to specific victims of domestic violence to protect them from preventable harm. AAP/James Ross

This week the Victorian Supreme Court refused an application by the State of Victoria to strike out a

claim by Tara Smith and her three children. Smith claims Victoria Police officers were negligent because they failed to prevent numerous breaches of protection orders by her ex-partner, the father of the children. As a result, Smith and the children have suffered ongoing psychological harm.

In refusing to strike out Smith's claim, the court has accepted that it is arguable police could owe a common law duty of care to specific victims of domestic violence to protect them from preventable harm. This is an important decision, because no Australian case has determined the question of whether police owe a duty of care to victims of domestic violence. Finding a duty of care is the first step in a civil action for damages in negligence. Without a duty of care there can be no liability in negligence, no matter how careless the defendant is.

Every year in Australia, more than 100,000 victims of domestic violence take out a protection order. Protection orders impose conditions on the perpetrator's behaviour and victims rely on police to act when perpetrators breach those conditions. Domestic violence legislation and police policies and procedures are focused on victim safety – police failure to follow them can have tragic results. In Victoria, police now have strong powers to respond to domestic violence.

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For Tara Smith and her children, the consequences of the alleged failures by the police resulted in years of continued violence perpetrated by her ex-partner, despite four intervention orders being taken out against him. She claims police knew or should have known about the orders.

In Smith's case, the State of Victoria argued that Australian law does not, and should not, recognise that police owe a duty of care to individual members of the public to investigate violence or prevent certain conduct occurring, unless there are exceptional circumstances. The state also argued that imposing a duty of care on police would result in police owing conflicting duties to individuals versus the general public, it would divert police resources from their public duties and could result in "defensive" police practices.

These arguments reflect recent UK Supreme Court decisions and some earlier Australian legal cases. Some commentators and judges have criticised these policy arguments as unproven, questioning why police should be protected from negligence actions when other professionals and public officers are not.

When the case is finally heard, the court will need to consider the nature of the relationship between the police and Smith and her children, in deciding if the police owe a duty of care. The court will also consider the nature of the harm. So far, no Australian cases have found that police *can't* be sued for negligence.

However, like the UK, Australian courts have been reluctant to impose a duty of care on police in

cases where the allegation is that the police failed to protect a plaintiff from third party harm – in Smith’s case, her ex-partner. In similar cases, the courts have considered the degree of control the police had over the perpetrator of the harm.

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Smith argued that domestic violence legislation and policies give police significant powers to exercise control over a perpetrator of violence. They require proactive policing to protect victims. Smith’s ex-partner was a known re-offender of family violence and the police had the power and responsibility to enforce the protection orders. Smith alleged that the police failed to follow their own training and procedures when they failed to enforce the protection orders.

Had the Victorian Supreme Court decided to strike out Smith’s claim, the allegations of police negligence in this case could not be tested and given a full hearing in court. However, the court has allowed the important question of whether the police could owe a duty of care to a victim of domestic violence to be examined in light of all the facts and evidence of the case.

Police officers have a difficult task in tackling domestic violence. They require specialised and ongoing training to deal with the complex issues involved.

Yet, like other professionals, it should be possible to hold them accountable for their failure to do so. Denying that they owe a duty of care to victims of domestic violence in circumstances of serious failures sends a message to victims that they cannot rely on police for protection.

Note: Tara Smith is a pseudonym.

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