IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

S
No. 35 of 2017

BETWEEN: **State of New South Wales**

Appellant

and

10 **DC**

First Respondent

TB

Second Respondent

RESPONDENTS' SUBMISSIONS

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PART I PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II ISSUES

2. Where duty of care is admitted and there is no evidence a discretion was exercised, and where guidelines and practice required reporting to police, was it consistent with the duty of care not to report to police in circumstances where a finding has been made that no reasonable decision-maker could have failed to report.

3. Does vicarious liability require the identification of the negligent officer when the appellant cannot identify which of two possible decision-makers was the relevant decision-maker at the time.

PART III SECTION 78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. The Respondents certify that they have considered whether a notice should be given under section 78B of the *Judiciary Act* 1903 (Cth) and that no notice needs to be given.

PART IV CITATIONS

PART V THE FACTS

5. The Respondents, TB & DC, are sisters. They were born in 1967 & 1970, and were aged 3 & 6 respectively when their mother ("the Mother") entered into a de facto relationship with Leonard Johnson ("the Stepfather").

6. In April 1983, the Respondents complained to the Department of Youth & Community Services ("the Department"), for which the Appellant is legally responsible, that they had each been the subject of ongoing sexual abuse at the hands of the Stepfather stretching back at least 7 years.

7. In the case of TB, the abuse commenced in the Christmas holidays at the end of 1974, just over 12 months into the de facto relationship between the Mother and the Stepfather. TB was then aged 7. In the case of DC, the first sexual assault was in about July 1975, less than 2 years into the Stepfather's relationship with the Mother, when DC was not yet 5 years old.

8. From the initial complaints to the Department, it was clear that the abuse was characterised by frequent sexual assaults (including penile penetration), pornographic photography, actual violence, and threats of violence to intimidate from talking.

9. The initial complaint to the Department in April 1983 was made by TB, then aged 15. DC was 12. It followed physical assault on TB by the Stepfather in the vicinity of a tennis court (the "Tennis Court Incident"). TB's complaint was made to a District Officer named Carolyn Quinn ("the District Officer"), who was responsible to Senior District Officer Francis Maguire ("Maguire") and Assistant Senior District Officer Stephen Frost ("Frost"). Thereafter, the District Officer had primary involvement with the Respondents during the currency of their contact with the Department, which extended for about 7 months until November 1983 in the case of TB, and until July 1984 in the case of DC.

10. TB was first interviewed by the District Officer on 20 April 1983. The short sequence of events immediately thereafter is as follows, as noted by Ward JA in her judgment in the NSWCA (**AB 615-6 [183-5]**):

- On 20 April 1983, the District Officer interviewed TB – who reported the abuse (**AB 289-291**; **AB 615 [183]**);
- In the period 20 to 22 April 1983 "A volunteer care arrangement was made for TB to stay with the family of a friend. She then subsequently moved into her grandmother's home" (**AB 615 [184]**);
- On the night of 21 April 1983, DC was moved to a place of safety (**AB 615 [184]**);
- On 22 April 1983, the District Officer interviewed DC – who reported the abuse on her (**AB 296**);
- On 22 April 1983, the District Officer completed a Child at Risk Notification Form re DC which noted the Stepfather's criminal history (**AB 298**).
- On 22 April 1983, the District Officer approached the Children's Court, the Respondents were charged with being "Neglected Children", and a "place of safety order" was made enabling DC to be placed in care for 14 days;
- On 28 April 1983, the District Officer and Frost interviewed the Mother – who admitted awareness of the Stepfather's sexual abuse of the Respondents, and acknowledged that the Respondents had complained of it to her (**AB 300-1**).

The Children's Court proceedings

11. Following the District Officer's initial approach to the Children's Court on 22 April 1983, the Children's Court proceedings came before the court on at least further 6 occasions in 1983: 2 May; 9 May; 20 June; 15 September; 24 October and 7 November (**AB 303-9**).

12. The Respondents were defendants in the Children's Court proceedings such as to invoke the jurisdiction of the Children's Court and permit the Magistrate to make orders. The Stepfather, however, was not a party to those proceedings and was not bound by the Court's orders.

13. Over the course of the months which followed, orders were made in various forms. Each Respondent spent short periods in foster homes and with various friends and relatives, including their grandmother. Each Respondent also lived for significant periods in the family home with the Mother. The Stepfather did spend some periods living away from the family home. However, the Stepfather visited the home frequently during those periods when he was not residing there (**AB 320.18**).

14. The evidence ultimately did not clearly identify the exact periods when the Respondents were living with the Mother, nor when the Stepfather was residing there. However, the following can be stated:

- TB lived in foster homes or with her grandmother for an initial period of something like 2-3 months, had not yet returned to live with the Mother as at 20 June 1983, but was visiting the home frequently (**AB 315.38**);
- DC spent a much shorter period of perhaps a few weeks living in foster homes or with her grandmother before returning home, where she was living as at 20 June 1983 (**AB 315.35-40**);
- the Stepfather initially stayed for a few weeks in a flat above a business which he and the Mother ran in a nearby suburb before returning to the family home, where he was living as at 20 June 1983 (**AB 315.40-42**);
- after the Stepfather left again, he was recorded as returning to the home *"almost daily"* (**AB 321.25**).

15. During various of these periods, the Children's Court orders in respect of the Respondents made their residence with the Mother conditional upon the Stepfather not attending the home (**AB 303-309**).

16. It is clear, however, that despite the Children's Court orders, there was extensive contact between the Stepfather and the Respondents during the balance of 1983 and into 1984. This is clear from the District Officer's reports to the Children's Court (**AB 315-322**) which record that the Respondents were distressed at that contact being ongoing.

17. The District Officer's report of 20 June 1983 notes:

- TB was increasingly distressed (**AB 315.42**);
- TB attempted to cut her wrists on 2 occasions (**AB 315.48**);
- TB purposely injured herself by dropping a bed on her hand (**AB 316.37**);
- TB ran away from home on several occasions (**AB 316.35**);
- TB asked to be charged as uncontrollable so she could be locked up in a home (**AB 315.50**), despite earlier being desperate to return to the family home (**AB 317.18**).

18. On 15 September 1983, the District Officer interviewed the Stepfather – who freely admitted abuse of the Respondents, and was unrepentant.

19. The District Officer referred to that interview in her report of 4 days later, 19 September 1983 (**AB 320-322**), which also notes:

- TB feels pressured into acquiescing to Stepfather's visits (**AB 320.29**);
- TB terrified of Stepfather, who threatened to *"get her"* (**AB 320.33**);
- Bed-wetting by DC, then almost 13 years of age (**AB 320.56**); and
- DC sitting on Stepfather's lap when he comes to visit (**AB 320.58**).

20. During the period from April 1983 to November 1983, whilst the Children's Court proceedings were current in relation to TB, the contact between the Stepfather and TB varied in extent, including his residing at the family home at times and at other times attending the home *"almost daily"*. The last contact between the Stepfather and TB was in March 1984.

21. In relation to DC, there was frequent contact between the Stepfather and DC at various times when DC was living with the Mother, with whom she continued to periodically reside until July 1984.

The Stepfather

22. The Stepfather was born in 1937 and was aged 37 at the time of the first assaults on the Respondents and 46 at the time of the reporting to the Department.

23. The Stepfather's history of sexual offences (**AB 395-400**) was known to the Department from the outset (**AB 298**), as Ward JA noted (**AB 615 [184]**). A relevant skeletal history of the Stepfather's criminal history is as follows:

- 1963 – sentenced to 5 years jail for indecent assaults on a male person and buggery;
- 1968 – sentenced to 7 years jail for indecent assault on a male person and buggery;
- November 1974 – initial sexual assaults on TB;
- Mid 1975 – initial sexual assaults on DC;
- 1975 – 83 – ongoing assaults on TB and DC;
- 17 January 1983 – handcuffs and rapes his own son's 15 year old girlfriend at knife point; arrested next day, charged and released on bail;
- August 1983 – committal hearing re rape in January 1983, committed for trial;
- 15 September 1983 – interviewed by District Officer in company of another female officer, freely admits sexually assaulting both Respondents, winks salaciously at interviewers;
- 11 February 1984 – arrested and charged with the rape of a young woman at Blacktown RSL/Workers Club.

24. The Stepfather:

(i) was a serial convicted sex offender;

(ii) was on bail for earlier offences at the time of the Respondents' complaint to the Department;

(iii) was uninhibited in committing sexual assaults on the Respondents even while the Mother was present (**AB 312.12-25**);

(iv) committed various sexual offences against the Respondents prior to their complaint to the Department whilst on bail in relation to existing charges.

25. The Stepfather's violence towards the Respondents, TB in particular, was disturbing. In part it appears to have been almost gratuitous. In significant measure, however, it was intentionally intimidatory – particularly in relation to disclosure of the Stepfather's sexual abuse of the Respondents.

26. The "Tennis Court Incident" illustrates something of the severity of the Stepfather's violence towards the Respondents (**AB 289.12-35**; **AB 311.15-40**), including, as it did:

- Hitting TB with a belt and a closed fist at least 10-15 times; and
- Lifting TB off the ground by her neck.

27. The intimidation included:

- holding his hand over TB's mouth until she couldn't breathe (**AB 290.58**);
- verbally threatening TB that if she ever told anyone about the abuse, he would "get her" (**AB 320.34**) – about which TB expressed fear to the District Officer; and
- threatening to bash DC if she said anything (**AB 313.11**).

Many years later, at his trial in 2005, the Stepfather made a throat slitting gesture to the Respondents in open court (**AB 629.30**).

28. It appears that the Stepfather had no remorse, contrition, scruples or inhibitions about committing sexual offences. His freely admitting sexual offences against the Respondents to the District Officer in September 1983 and the manner in which he made veiled sexual advances to those officers at that time are testament to those propositions (**AB 321.42; AB 383 [17]**). The District Officer reported him to be very angry at TB for complaining to the Department, stating that he hated her, calling her a "little bitch" and saying he would "never forgive her" (**AB 321.45**).

29. The contemporaneous documents from the Children's Court proceedings from 1983 record the concerns of various persons, including the District Officer and the Children's Court magistrate in relation to the Stepfather's nature and propensities. Comments in those documents suggest that the Stepfather was a disturbingly serious serial predator, contact with whom would necessarily present an alarming risk of ongoing abuse.

The Known Risk

30. The District Officer clearly knew that the Stepfather posed a significant ongoing risk to the Respondents:

- Campbell J noted (**AB 470 [56]**) the *"opinion of the District Officer that the* [Respondents] *were at further risk ... "*;
- Her report to the Children's Court of 19 September 1983 (**AB 320**) recorded that the Stepfather freely admitted the abuse, was angry and did not accept responsibility, and his *"attitude is considered extremely destructive for the* [Respondents'] *emotional welfare and appears unlikely to change"* (also noted by Campbell J at **AB 473 [63]**);
- She conceded that the Mother couldn't be trusted to protect the Respondents (**AB 168.25-169.25**); and
- She conceded that she would be worried for the Respondents' safety (**AB 180.18-181.15**).

31. The Mother failed to protect the Respondents from the Stepfather, and the Appellant knew that was the case (see Ward JA's comments at **AB 616 [185]**). The District Officer knew (as she reported to the Children's Court) that the Stepfather had almost daily access with the Mother's knowledge (**AB 321.25**).

32. The District Officer stated in her report of 19 September 1983 (**AB 322.36-42**):

> *"It was considered vital that* [the Respondents] *be protected from the possibility of further abuse and from living in fear of abuse. As* [the Stepfather] *seems unlikely to change this can only be ensured by the girls not residing with him, not being alone with him and only having contact if they requested it. To ensure that pressure to accept* [the Stepfather's] *visits cannot be exerted, it would be necessary for contact to occur away from the family home."*

33. The danger posed by the Stepfather, and the Appellant's knowledge of it, was ultimately summarised by Campbell J (**AB 487.12 [106]**):

> *"There can be no question from what the Department knew from as early as 22nd April 1983, of the Stepfather's serious criminal record for sexual offences and of the information it received from TB and DC and their mother by 6 May 1983, that there was a high degree of probability that the abuse would continue if care was not taken."*

Factual Determinations

34. The following factual matters have been determined in favour of the Respondents:
    (i) The abuse continued after notification to the Department;
    (ii) The Department did not report to the Police;
    (iii) If reported, *"in all probability charges would have been laid"* (Campbell J, **AB 505.10 [172]**); and

(iv) *"Had the stepfather been charged, and bail not refused, he would have complied with what would have been stringent conditions as to his conduct while on bail awaiting trial"* (Campbell J, **AB 506.52 [179]**).

Part VI ARGUMENT

Scope of Duty

35. Duty of care was admitted. Extent or scope of duty is the central issue on the appeal to this Court. Despite the Appellant's concession, it seems to be arguing that no duty or no useful duty exists.

36. *Michael v. Chief Constable of South Wales* [2015] AC 1732 deals with public policy issues for police as an emergency service. It does not apply to the Department. Moreover, having referred (at [93]) to *Modbury Triangle Centre Pty Ltd v. Anzil* (2000) 205 CLR 204, the Supreme Court held in *Michael* (at [98]) that the general rule against liability for injury or damage against a third party, was not absolute. There were two exceptions ([99] to [100]): liability could arise if in a position of control combined with foreseeability; it could also arise if there was the assumption of positive responsibility to safeguard. Either is sufficient. Both applied here from 22 April 1983 when the Department charged the children with being neglected in the Children's Court and the District Officer procured orders for their safety, thereby creating the necessary relationship.

37. Even in respect of claims against police, liability in negligence is not always precluded. See *Knightley v Johns* [1982] 1 All ER 851, where liability was held for an inappropriate instruction to a subordinate by a police officer, causing the subordinate to be injured in an accident. A duty of care to an informer was found in respect of physical risk in *An Informer v A Chief* Constable [2013] QB 579. In *Smith v The Chief Constable of Nottinghamshire Police* [2012] EWCA Civ 161, police were told someone was seen to be dragged from a vehicle. A police driver responded urgently with flashing lights and claimed he used a siren. He struck a pedestrian. In the English CA, it was held that the duty of the police officer to take reasonable care remained undiminished by the emergency.

38. A duty of care can arise even to third parties when there is inadequate supervision of a suicide risk in police cells and a compensation to relatives action follows - see *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL), *Kirkham v Chief*

Constable of the Greater Manchester Police [1990] 3 All ER 246 and *Cekan v Haines* (1990) 21 NSWLR 296, where the NSW CA accepted the existence of such a duty though that claim failed on its facts. See also *NSW v Bujduso* [2005] HCA 76 and *Zreika v New South Wales* [2006] NSWCA 272 in relation to the duty owed to protect from a third party.

Coherence

39. The Appellant (submissions at [12]) appropriately refers to the decision of this court in *Stuart v Kirkland-Veenstra* [2009] HCA 15 at [112] as authority for the proposition that the scope of any common law duty owed by public bodies invested with statutory powers must be determined by reference to the terms, scope and purpose of the relevant statutory regime.

40. An additional question posed by Gummow, Hayne & Heydon JJ at [112] provides further guidance on that enquiry:

> *"Does that regime erect or facilitate 'a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence' "*

41. At first instance, Campbell J addressed this question in some detail.

42. The purpose of the relevant statutory regime in the present case, the *Child Welfare Act* 1939 (NSW) (*"Child Welfare Act"*), was to protect the interests of vulnerable children. The Appellant clearly identified the Respondents as vulnerable at the time of their initial complaints in April 1983.

43. Campbell J noted (**AB 454.30 [15]**) that s 158 of the *Child Welfare Act* provides that "*no suit or action shall lie*" against the Department or its officers for "*any act, matter or thing done ... for the purpose of carrying out the provisions*" of that Act if done "*in good faith and with reasonable care*".

44. In the same paragraph (**AB 454.36**), His Honour observed that, in *Edgecock v Minister for Child Welfare* [1971] 1 NSWLR 751 at 755, Jacobs JA saw no inconsistency between that provision and the provisions of the legislation then in force for bringing claims against the government.

45. Campbell J (**AB 454.42**) then referred with approval to Studdert J's analysis of s 148B of the *Child Welfare Act* in *TC v State of New South Wales* [1999] NSWSC 31 at [158]:

> "*I am satisfied that this legislation, and in particular s148B, was introduced for the protection of a limited class, namely children at risk. I find no pointer in the statute that parliament did not intend to create a source of a private cause of action. Indeed, s158 may be regarded as an indicator that parliament intended that a private duty could arise under the statute.*"

46. His Honour went on to cite, with apparent approval, a lengthy passage from Sackville AJA's judgment (with which McColl & Basten JJA agreed) in an appellate decision on an interlocutory point in this very case, DC v. State of NSW [2010] NSWCA 15 at [50] – [54], which identified a relevant enquiry as an assessment of the degree of vulnerability of those who depend on the proper exercise of the relevant power, and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute (**AB 452.35-42**).

47. His Honour duly found (**AB 459.18 [26]**) that, in applying this principle, it was difficult to think of a more vulnerable class of persons than children subjected to sexual abuse by parents or guardians as the Respondents were at the material times.

48. His Honour also noted Sackville AJA's comments in the earlier appellate decision (**AB 452.45-52**) that it was self-evident that the risk of harm to a child exposed to an abusive parent or guardian may be very high and it followed that the value of personal autonomy that is said to inform much of the common law of negligence does not militate against the existence of a duty of the kind relied on in the present case.

49. s. 148B (5) (b) of the *Child Welfare Act* specifically contemplates the report of suspected abuse to the police by the Appellant by providing that the Director "*if he is satisfied that the child in respect of whom he was notified may have been assaulted, ill-treated or exposed,* [shall] *take such action as he believes appropriate, which may include reporting those matters to a constable of police*".

50. A plain reading of s. 148B (5) (b) discloses no incoherence between the imposition of a duty of care on the Appellant when notified of sexual abuse of a child and the statutory framework governing the welfare of children as in force in 1983.

51. The Department's guidelines ("the Guidelines") are relevant to coherence. These state (**AB 283.30-50**) that reporting to police should occur as soon as possible, inter alia:

"where the child's safety ... cannot be assured without court action against the perpetrator" or where *"repeated and severe abuse has occurred to the child"*.

52. Similarly relevant are: the *"invariable practice"* of reporting per Maguire, Frost and another district officer named Lynette Whale (per Basten JA at **AB 598.20 [132]**); Frost's statement that on the facts, *"It would be referred to police"* (**AB 274.02**) and the comment by Maguire, the officer in charge, that it was *"a formal requirement"* (**AB 265.05**).

53. Contrary to the Appellant's assertion that imposing a duty on it to report the abuse of the Respondents to police in the present case would conflict with its role in working within the statutory regime, Maguire's evidence at trial (**AB 265.05-10**) was that:

"...there was a formal requirement that, in matters of serious physical, emotional, sexual – specifically sexual – that police be notified. That was a requirement. And that was approved by myself in the role of senior district officer."

54. The Appellant had implemented a "*formal requirement*" to take the precise action the Respondents assert it was required to do to discharge the duty of care owed to them. This demonstrates that the imposition of a common law duty on the facts of this particular case does not give rise to questions of coherence.

55. It is also relevant that in 1983, the common law offence of misprision of felony made it an offence for another person who knows or believes that a felony or serious offence has been committed and who has information material to the possible apprehension of the offender, to fail to report that information to the police or other appropriate authority - see Lord Denning in *Sykes v DPP* [1962] AC 528 at 563.

56. The Appellant attempts to recruit support for its argument on coherence by reference to this court's decision in *Sullivan v Moody* [2001] HCA 59. In *Sullivan*, the Court held, in a joint judgment (at [62]) that the duty did not extend to a relative. The court did not hold that there was no duty to the child. The present case is clearly distinguishable.

57. Campbell J specifically addressed the question of coherence at (**AB 458 [25]**):

"In my view, there is no problem in this case of "indeterminacy of class". A duty to take appropriate action only arises in respect of children who, after notification and investigation, the Department is satisfied require the protection of the Department's intervention by exercise of its statutory powers. Nor is there

any problem with the need to preserve the coherence of other legal principles or of the scheme of CW Act which governs the Department's relationship with the plaintiffs. On the contrary, the whole purpose of the Act is to protect children at risk, taking action to that end does not conflict with the Department's statutory responsibilities; it gives effect to them. To the extent to which the exercise of the Department's statutory powers may extend to reporting apparently criminal conduct to police, the suggested common law duty operates entirely consistently with the criminal law which under the common law in force at the time made it a felony to fail to report serious crime: Sykes v Director of Public Prosecutions [1962] AC 528. In general terms, the law of torts and the criminal law have common origins. There is no incoherence or inconsistency in them working together. An obvious example is the law of assault and battery itself. The same matter may give rise to concurrent criminal and civil liability."

Content of duty

58. Once it is accepted that the Appellant did owe a duty of care to each Respondent, fact specific questions are raised. The facts of the present case were unique.

59. In assessing the content of the Appellant's duty of care in the Court of Appeal, Ward JA addressed the significance of the facts (**AB 642-3 [272-3]**):

"Therefore, in giving content to the common law duty to exercise reasonable care in exercising the powers available under s 148B (5), the guidelines give a clear indication that in matters of suspected child abuse one precaution that might reasonably be taken, depending no doubt on the circumstances of any particular case, in order to avoid the foreseeable risk of further harm to the child, would be notification of the abuse to the police. Relevant to be taken into consideration in determining whether such a precaution was reasonably necessary in the present case would surely be that the suspicion of child abuse can only have been heightened by the step-father's known criminal history/sexual proclivities and the mother's admission, at an early stage of the Department's involvement, that the appellants had complained of abuse at an earlier time. Another relevant factor would no doubt be the nature of the abuse of which complaint was made. Here, on any view of things, it was very serious – penile/vaginal intercourse of children (at a time when they were, according to the initial notification, under 10) by someone in a position of trust and responsibility within the family unit.

Contrary to the assumption implicit in ground 1 of the notice of contention, I do not read his Honour's reasons as determining that the common law duty of reasonable care to be imputed to the Department imposed a mandatory requirement to report all matters of child abuse to the CMU/police or to ensure that a report of abuse be received by the CMU. Rather, I read his Honour's reasons as concluding that, in the circumstances of this particular case, given the matters to which his Honour had referred, which included the serious nature of the reported abuse and the high degree of risk of ongoing harm to which the appellants were exposed, as well as the relatively low burden involved in reporting the matter (as described by Mr Frost (see [54] of his Honour's

reasons)), performance of the duty to take reasonable care in the exercise of the Department's powers did require the Department to notify the police."

60. The Appellant commences by asserting that the scope of the duty does not extend to reporting, despite unsuccessfully alleging below that it did report. Moreover, the Appellant's submissions do not articulate the width of the duty which it has conceded.

61. The Appellant asserts (submissions at [51]):

> *"At its highest, the common law duty of care might have obliged the director of the Department to consider the various courses available in circumstances where s.148B(5) was enlivened."*

62. This submission invites the question:

> *"What is the minimum obligation of the conceded common law duty of care?"*

63. Once a common law duty is conceded, it must have content.

Discretion

64. In *Pyrenees Shire Council v Day* [1998] HCA 3, Brennan CJ (at [18]) directed himself to Mason CJ's assessment of a plaintiff's "*reasonable reliance*" on a defendant exercising a statutory power in *Sutherland Shire Council v Heyman* [1985] HCA 41 at [463]-[464]. Brennan CJ summarised the use of the term "*reliance*" in this context to "*indicate an expectation by the community at large that a defendant would act in a particular way in order to perform a statutory function*".

65. Later in his judgment in *Pyrenees,* Brennan CJ observed (at [23]) that "*the existence of a discretion to exercise a power is not necessarily inconsistent with a duty to exercise it*". His Honour cited with approval the following passage from Earl Cairns LC's judgment in *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-3:

> *"[t]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."*

66. In *Crimmins v Stevedoring Committee* [1999] HCA 59 at [62], McHugh J stated:

> *"...when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered."*

67. In the present case, s.148B (5) (b) of the *Child Welfare Act* empowered the Appellant to take "*appropriate action*" once on notice of ill treatment of children. With the clear object of not just this section, but the entire statutory scheme, being the protection of children, the Appellant was clearly called upon to take immediate protective action once it was on notice of the extent of risk evident in this case. That risk was abundantly obvious in April 1983, as Campbell J found, and as Ward JA found in the NSWCA, Sackville AJA agreeing. Merely charging the Respondents with being neglected children and not reporting their abuse to the Police resulted in that abuse continuing.

68. In *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, Callinan J referred (at [310]) to the reasons of Lord Hoffman in *Stovin v Wise* [1996] UKHL 15 discussing the criteria for determining the existence of a duty of care involving the exercise of "*a mere statutory power*". The present case did not involve a "*mere statutory power*" with a discretion. There was a requirement to report the abuse under the Guidelines and the Appellant's standard practice, a duty under the criminal law to report criminal conduct, and unchallenged findings that no reasonable decision-maker could have failed to report the abuse to the Police. Indeed, in *Graham Barclay Oysters* Callinan J (at [310]), referring to Lord Hoffman, accepted that even if it were a mere discretion, then liability would still arise if in the circumstances it would have been "*irrational not to have exercised the power*".

69. In *Pyrenees,* Gummow J observed (at [168]) that "*The Shire had a duty of care 'to safeguard others from a grave danger of serious harm' "*. In the present case there can be no doubt that the Stepfather posed a likely danger of serious harm to the Respondents to whom he continued to have access after orders not binding on him were made in the Children's Court.

No discretion exercised

70. In light of the Appellant's position below that the abuse was reported to police, and findings that it was not, an argument in this court that the Appellant exercised a discretion and decided not to report is neither credible nor maintainable.

71. The better view is that the Respondent inadvertently did not follow its own established procedure of reporting. If the Appellant failed to consider reporting it did not exercise the discretion. If the Appellant considered reporting, but made a conscious decision not to do so, the District Officer, dealing with day to day management of a challenging case, would have been aware of it. In a statement to police in January 2005, the District Officer claimed (**AB 384.15**) that the family was *"etched in her memory"*, yet in the same statement (**AB 384.15**) stated:

> *"I am unsure why the matter did not get reported to the police."*

72. In *Stuart v Kirkland-Veenstra* [2009] HCA 15, the High Court unanimously found that there was no basis for exercising the power to apprehend because Mr Veenstra showed no signs of mental illness. Therefore, no duty of care arose. In the present case, the power to report expressly existed and duty of care is conceded. The preconditions for exercising the power to report were amply made out by reference to the Guidelines and practice.

Continuing duty

73. It is important to bear in mind that the duty must, necessarily, be a continuing one. The Appellant, through its Departmental Officer knew that the Stepfather: (a) had inflicted serious physical and sexual abuse on the Respondents for several years prior to it being notified of the same in April 1983; (b) was "*unlikely to change*" and (c) had continued access to the Respondents after orders had been made in the Children's Court which were not binding on him.

74. The Appellant's duty was a continuing duty and with each new set of facts, the need to report became greater. The child Respondents were back home within a very short space of time and it was known that the Stepfather had access to them. The Departmental Officer feared for their safety and noted DC sitting on the Stepfather's knee and the distress and fear of TB, as well as self-harm.

75. Even after the Stepfather freely admitted the abuse, there was still no apparent consideration given to reporting.

76. Once it had become clear that proceedings in the Children's Court were not stopping the Stepfather from having access to the Respondents, more action was clearly required.

***Civil Liability Act* 2002 (NSW), s.43A**

77. It is common ground that the *Civil Liability Act* 2002 (NSW) has retrospective application to the circumstances the Respondent's claim. After dealing with factual matters, the Trial Judge considered, inter alia, the applicability of s.43A of the *Civil Liability Act.* That section imports a notion of *"Wednesbury unreasonableness"* in circumstances of the exercise of a "special statutory power" by a public or other authority.

78. His Honour then went on to find (**AB 486 [104]**) that:

> *"no authority acting reasonably could properly consider the failure to report the abuse of* [the Respondents] *to the police to be a reasonable exercise of the powers conferred upon* [the Appellant] *by s 148B(5)(b) CW Act."*
>
> [emphasis in original]

79. Importantly, there has never been a challenge to that finding, either in this Court or in the Court below.

80. The Appellant states (submissions at [37]):

> *"s.43A assumes the existence and scope of a duty of care and identifies the standard to be applied in determining whether that duty has been breached."*

However, in a case such as the present, where the existence of a common law duty is conceded, but the scope of the duty is in issue, the Trial Judge's finding in respect of s.43A can assist in determining not only whether the duty has been breached, but also in identifying its scope.

81. Basten JA states (**AB 586 [94]**) that to require reporting to police:

> *"... would be to convert a statutory discretionary power, involving the balancing of countervailing considerations, into a common law obligation imposed by the Court...* [which] *step is not warranted and should be rejected."*

82. There is no written or oral evidence to establish that reporting to police was even considered. Given the s.43A finding, the overwhelming inference must be that it was not considered. The abuse continued. Reporting would have stopped it.

83. It follows from Campbell J's s.43A finding that either:

i) The failure to report arose because reporting to the Police was not considered (thus breaching by omission the duty to consider all available options); or

ii) The Department considered reporting the matter to Police, but, having done so, failed to then report in circumstances where no reasonable authority could have failed to report (thus breaching by considering in a negligent manner).

84. Basten JA also states (**AB 586.48**):

> *"The* [Respondents] *formulated that the proposed duty as one requiring that a step be taken which was not taken."*

85. However, the duty was never formulated in those terms. The duty is articulated at paragraph 52 of each Further Amended Statement of Claim (**AB 13.40-50; 63.40-50**) as:

a) To take all reasonable steps to ensure the welfare of the [Respondents]; and
b) To take all reasonable steps to protect the [Respondents] from any further physical, emotional or sexual abuse by [the Stepfather].

86. By reference to that pleading, this was not a failure to act, but a failure to act adequately or appropriately (misfeasance).

87. The Appellant refers to Brennan CJ's comments in *Pyrenees* (submissions at [27]) that:

> *'if a decision not to exercise a statutory power is a rational one then "there can be no duty imposed by the common law to exercise the power"'.*

88. However, given Campbell J's unchallenged s.43A finding that no reasonable authority could fail to exercise the statutory power in a particular way (here by failing to report), then the decision not to exercise is not a rational one.

89. It must be remembered that:

i) A history of severe, repeated sexual & physical abuse over years was the subject of complaint to the Department.
ii) There is a high degree of reliance on the Department by the Respondent girls, whose sexual abuse by their stepfather has manifestly been acquiesced in by their natural mother.

iii) There are multiple warning signs of the clear danger of further abuse, both at the time of initial complaint, and during the Department's continuing involvement (as set out in the District Officer's periodic reports to the Children's Court) .

iv) It is a criminal offence by established principles not to report the commission of an offence as serious as those committed by the Stepfather.

v) The Trial Judge makes an unchallenged finding that no reasonable decision maker could have failed to report the matter to Police.

vi) There is no evidence that the Department ever even considered reporting to Police (inferentially from the trial judge's s.43A finding, no such consideration was given).

90. In the circumstances, it would be strange if the potential theoretical existence of countervailing considerations as to the direction in which the discretionary power could be exercised, a conceded common law duty to take care in their actions should be held not to be wide enough to encompass reporting.

91. The Appellant's reference to a suggested contrary reason for not reporting (submissions at [48]) was to evidence rejected at first instance (**AB 485 [105]**), and not subject to appeal.

92. Campbell J's s.43A finding assists in assessing several of the further authorities referred to by the Appellant.

93. The reference to *Barrett v Enfield London Borough Council* (submissions at [40]) does not preclude liability for unreasonable behaviour. The same applies to the reference to *Hill v Hamilton-Wentworth Regional Services Board* (submissions at [42]) where the test was reasonableness. The s.43A finding necessarily negates any suggestion of counselling perfection from hindsight.

94. The Appellant seeks to distinguish the factual circumstances in this case from those in *Pyrenees and Crimmins* (submissions at [43]). The basis is whether or not the Department had direct control over the risk of further harm.

95. In this particular case, the risk of further harm was known to be high, and the Children's Court was known to offer no protection from the Stepfather. Reporting to police was found by the Trial Judge to offer protection (Campbell J, **AB 505 [172]** & **AB 506**

[178]). Accordingly, the Department, with responsibility for *"child welfare"*, had direct control over the risk of subsequent harm.

96. The duty to report was a continuing duty. It arose when the Mother admitted the abuse had occurred to her knowledge over many years (April 1983). It arose when the District Officer became aware within weeks that the girls were returning home and the Stepfather had resumed access. It arose when the District Officer knew of TB's fear, distress and self harm. It arose when the District Officer found out that the access was "almost daily". It arose when the District Officer knew that DC was sitting on the Stepfather's lap. It arose when the District Officer reported that the Stepfather freely admitted the abuse, was unrepentant and, in her words, was "unlikely to change".

97. The failure to consider and/or report at each step of increased knowledge in relation to abused girls for whom the Department had assumed responsibility demands a remedy.

Vicarious liability

98. The Appellant argues that the Respondents had to establish who failed to report to police and obtain a finding of individual negligence.

99. Maguire, Frost and Lynette Whale agreed that it was the *"invariable practice"* to report to police in this situation (see Basten JA at **AB 598.20 [132]**). The Guidelines said it should have been reported as soon as possible, amongst other reasons *"where the child's safety ... cannot be assured without court action against the perpetrator"* or where *"repeated and severe abuse has occurred to the child"* (**AB 283.30-50**).

100. Maguire said it was *"a formal requirement"* (**AB 265.05**) and Frost said that on the facts "*it would be referred to police*" (**AB 274.02**). The abuse continued. Reporting would have stopped it.

101. Maguire was the senior officer and decision-maker under s.148. In his absence, Frost was the decision-maker. Frost knew of the case (having attended one of the interviews) but that did not make him the decision-maker.

102. Neither could remember this case. It could not be put to them individually that they failed because it is not known from records or oral evidence which was the decision-maker. Clearly, one of them failed and, for vicarious liability, that is sufficient. *Parker v*

Commonwealth (1965) 112 CLR 295 at 301 does not require that the officer who failed be named.

PART VII APPLICABLE LEGISLATIVE PROVISIONS

103. Annexed.

PART VIII ORDERS SOUGHT

10

104. The Respondents seek the following orders:

(i) That the appeal be dismissed.

(ii) That the Appellant pay the Respondents' costs of the appeal.

PART IX ESTIMATE OF TIME

105. It is estimated that 2 hours will be required for the presentation of the Respondents' oral argument.

20 Dated : 7 April 2017

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 35 of 2017

BETWEEN:

State of New South Wales
Appellant

and

DC
First Respondent

TB
Second Respondent

ANNEXURE - APPLICABLE LEGISLATIVE PROVISIONS

No.	Description of Document
1.	*Child Welfare Act* 1939 (NSW) s 158 as in force between 20 April 1983 and 31 July 1984.

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Reprinted under the Acts Reprinting Act, 1972

[Reprinted as at 6th August, 1980]

New South Wales

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Act No. 17, 1939 (1), as amended by Act No. 48, 1940 (2); Act No. 63, 1941 (3); Act No. 9, 1952 (4); Act No. 14, 1955 (5); Act No. 9, 1956 (6); Act No. 21, 1960 (7); Act No. 15, 1961 (8); Act No. 27, 1961 (9); Act No. 74, 1964 (10); Act No. 23, 1965 (11); Act No. 33, 1965 (12); Act No. 11, 1966 (13) (as amended by Act No. 27, 1969); Act No. 27, 1967 (14) (as amended by Act No. 27, 1969 and Act No. 90, 1973); Act No. 27, 1969 (15); Act No. 37, 1969 (16); Act No. 60, 1970 (17); Act No. 90, 1973 (18); Act No. 65, 1975 (19); Act No. 97, 1976 (20); Act No. 19, 1977 (21); Act No. 20, 1977 (as amended by Act No. 100, 1977) (22); Act No. 43, 1977 (23); Act No. 100, 1977 (24); Act No. 163, 1978 (25); Act No. 131, 1979 (26); and Act No. 28, 1980 (27).

Note.—(1) See also Evidence Act, 1898, sec. 43A; and Adoption of Children Act, 1965.

(2) This Act is reprinted with the omission of all amending provisions authorised to be omitted under sec. 6 of the Acts Reprinting Act, 1972.

P 63964D—A

(1) Child Welfare Act, 1939, No. 17. Assented to, 23rd October, 1939. Date of commencement (sec. 120 excepted), 1st December, 1939, sec. 1 (2) and Gazette No. 185 of 24th November, 1939, p. 5541.

(2) Youth Welfare Act, 1940, No. 48. Assented to, 9th December, 1940. Date of commencement, 1st January, 1941, sec. 1 (2).

(3) Child Welfare (Amendment) Act, 1941, No. 63. Assented to, 25th November, 1941. (Repealed by Act No. 23, 1965, s. 4 (2).)

(Reference notes continued on pages 2 and 3.)

2,018 [$3.90]

CHILD WELFARE ACT 1939 No. 17[a]

Date of last reprint: 6 August 1980

The Act has been wholly repealed by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1987 No. 58.

Amendments not included in current print

Made by	Provisions affected
Child Welfare (Amendment) Act 1979 No. 131, Sch. 1 (4) (h)[f]	s. 48H
Child Welfare (Amendment) Act 1981 No. 43	ss. 12; 83; 86; 87
Miscellaneous Acts (Local Courts) Amendment Act 1982 No. 168 (as amended by Statute Law (Miscellaneous Amendments) Act 1984 No. 153)	ss. 4; 11; 12; 14
Child Welfare (Probation and Parole) Amendment Act 1983 No. 195	s. 54
Child Welfare (Criminal Injuries Compensation) Amendment Act 1984 No. 72	s. 83
Miscellaneous Acts (Search Warrants) Amendment Act 1985 No. 38	s. 145
Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985 No. 59	ss. 12; 83; 86; 87
Miscellaneous Acts (Annual Reports—Departments) Amendment Act 1985 No. 157	s. 160

[a] The Act was to be wholly repealed by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1982 (as amended by Miscellaneous Acts (Community Welfare) Amendment Act 1983). The Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1982 was not commenced and was repealed by the Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1987.

[f] See reference to the amendment in the footnote on page 69 of the reprint.

AMENDMENTS ARE SHOWN IRRESPECTIVE OF WHETHER THEY ARE IN FORCE AT THE DATE OF ISSUE OF THIS SHEET. FOR FURTHER INFORMATION ABOUT THE EXACT STATUS OF LEGISLATION ETC., PLEASE CONSULT THE MONTHLY ACTS TABLES OR CONTACT THE LEGISLATION INFORMATION SERVICE AT THE PARLIAMENTARY COUNSEL'S OFFICE ON (02) 228 7139.

Person falsely representing himself as an officer.

Amended, Act No. 90, 1973, Sch.

154. Any person, not being an officer or employee of the Department of Youth and Community Services, who, for any fraudulent purpose—

(a) assumes or uses the designation of officer, or inspector, or falsely represents himself to be officially associated in any capacity with the Department of Youth and Community Services; or

(b) uses any designation which he previously held in the said Department,

shall be guilty of an offence against this Act.

Contempt of court.

cf. Act No. 27, 1902, s. 152.

Amended, Act No. 33, 1965, s. 4 (2).

155. If any person shall, during any proceedings before a court, be guilty of contempt, such person may be punished in a summary way by such court by a fine not exceeding ten dollars or by imprisonment for a period not exceeding ten days.

Right to administer punishment: Parent or teacher.

cf. Act No. 21, 1923, s. 116.

156. Nothing in this Act contained shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful care of a child or young person, to administer punishment to such child or young person.

A person not to be twice punished for the same offence.

Act No. 21, 1923, s. 117.

157. Where a person is charged with an offence against this Act for which he is also punishable under any other Act or at common law he may be prosecuted and punished either under this Act or under any other Act, or at common law, but no person shall be punished twice for the same offence.

No action to lie against person who has acted in good faith, etc.

cf. Act No. 45, 1898, s. 172.

Amended, Act No. 90, 1973, Sch.

158. (1) No suit or action shall lie against the Minister or any officer or employee of the Department of Youth and Community Services for or on account of any act, matter or thing done or commanded to be done by him, and purporting to be done for the purpose of carrying out the provisions of this Act, if the Minister or the officer or employee has acted in good faith and with reasonable care.

(2) * * * * * * Repealed. Act No. 19, 1977, Sch. 1.

(3) Proceedings in such suit or action as aforesaid may, on application to the court in which such suit or action was commenced, be stayed upon such terms as to costs or otherwise as the court may think fit, if the court is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care. Stay of proceedings. Amended. Act No. 19, 1977, Sch. 1.

159. The expenses incurred in respect of the administration of this Act shall be defrayed from such moneys as Parliament shall appropriate for that purpose, and if there are no such moneys available, such expenses shall be defrayed out of the Consolidated Revenue Fund by warrant under the hand of the Governor directed to the Colonial Treasurer. Expenditure of money appropriated by Parliament. cf. Act No. 21, 1923, s. 121.

The said Treasurer shall pay out of the said fund only such charges as are certified to be correct under the hand of the Minister and countersigned by the Director, and all payments in pursuance of such warrants shall be credited to the said Treasurer, and the receipt of the person to whom the same are paid shall be his discharge in respect of the sum therein mentioned in the passing of his accounts. All payments made under any such warrant shall be recouped out of the vote for the purpose of this Act so soon as there are sufficient funds to the credit of such vote.

160. The Minister shall furnish a report to Parliament every year on the working of this Act. Minister to report to Parliament. Act No. 21, 1923, s. 122.