HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

THOMAS PATRICK SULLIVAN APPELLANT

AND

MARGARET CATHERINE MOODY & ORS RESPONDENTS

Sullivan v Moody
[2001] HCA 59
11 October 2001
A21/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

C J Kourakis QC with H M Heuzenroeder for the appellant (instructed by Margaret J Minney)

A J Besanko QC with D C Lovell for the first to fifth respondents (instructed by Fisher Jeffries)

B M Selway QC Solicitor-General for the State of South Australia with M W Mills for the sixth respondent (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

COLIN LESLIE THOMPSON APPELLANT

AND

AILEEN FORSYTH CONNON & ORS RESPONDENTS

Thompson v Connon
11 October 2001
A23/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

C J Kourakis QC with E M Boxall for the appellant (instructed by Norman Waterhouse)

A J Besanko QC with D C Lovell for the first to third respondents (instructed by Joanne Tracey)

B M Selway QC Solicitor-General for the State of South Australia with M W Mills for the fourth respondent (instructed by Crown Solicitor for South Australia)

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CATCHWORDS

Sullivan v Moody
Thompson v Connon

Torts – Negligence – Duty of care – Appellants suspected of sexually abusing their children – Alleged negligence of respondents in investigating and reporting on allegations – Appellants claimed that they suffered shock, distress, psychiatric injury, and consequential personal and financial loss as a result of the accusations – Whether medical practitioners, social workers and departmental officers involved in investigating and reporting upon allegations of child sexual abuse owe a duty of care to suspects.

Torts – Negligence – Duty of care – Proximity – Inapplicability of the *Caparo* test in Australia.

Community Welfare Act 1972 (SA), ss 25, 91, 92, 235a.

1 GLEESON CJ, GAUDRON, McHUGH, HAYNE AND CALLINAN JJ. These two appeals were heard together. In each case the appellant's action for damages, commenced in the Supreme Court of South Australia, was struck out by a Master of the Court on the ground that the Statement of Claim failed to disclose a cause of action. In the case of *Thompson*, an appeal to the Full Court of the Supreme Court of South Australia was dismissed following fully reasoned judgments by the members of the Full Court (Doyle CJ, Duggan and Gray JJ)[1]. In the later appeal of *Sullivan* it was accepted, subject to one qualification, that the decision in *Thompson* meant that the appeal must fail, and it was dismissed[2]. The qualification concerns one defendant in the action, who was regarded as being in a position different from that of the other defendants. He is not a party to the appeal to this Court.

2 The course that was taken in the Supreme Court of South Australia was influenced by the consideration that, in 1996, in a case that had gone to trial, the Full Court of the Supreme Court of South Australia had dismissed a plaintiff's appeal in circumstances that were conceded to be indistinguishable from those of *Thompson* and *Sullivan*. That case was *Hillman v Black*[3]. The Full Court decided in *Hillman v Black* that the defendants did not owe a duty of care to the plaintiff, upholding the decision of the trial judge. That decision meant that, if the present cases had gone to trial, failure at first instance was certain, and failure in the Full Court was very likely. In the light of authority binding him, the Master's decisions were inevitable. In *Thompson*, the appellant endeavoured to persuade the Full Court that, having regard to later authority, it should depart from *Hillman v Black*, but was unsuccessful.

3 The concession that *Hillman v Black* is indistinguishable means that the outcome of the present appeals does not turn upon questions as to the standard of persuasion which a defendant ordinarily needs to satisfy in a strike out application[4]. That case went to trial. The events in issue occurred at about the same time as the events in *Thompson* and *Sullivan*, the relevant statutory regime was the same, and, except for the identity of the doctors and social workers

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1 *CLT v Connon* (2000) 77 SASR 449.

2 *Sullivan v Moody & Ors* [2000] SASC 340.

3 (1996) 67 SASR 490.

4 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

involved, and other matters of immaterial detail, the same allegations are made. If no duty of care was owed in *Hillman v Black*, none was owed in these two cases. For practical purposes, these appeals are challenges to the decision in *Hillman v Black*, and although they are to be decided by reference to the allegations in the pleadings, it is not argued that those allegations are relevantly different from what was alleged, and found, in the earlier case.

The facts in *Thompson*

4 The plaintiff is the father of three young boys. Each of the first and second defendants is a medical practitioner employed at the Sexual Assault Referral Centre at the Queen Elizabeth Hospital, Woodville, South Australia. The third defendant is the hospital. The fourth defendant, the State of South Australia, operates the Department of Community Welfare. The plaintiff is uncertain whether the first two defendants were employed by the third or the fourth defendant.

5 During 1986, the plaintiff's wife, on separate occasions, attended the Sexual Assault Referral Centre with the boys. Doyle CJ noted that it was common ground that the medical practitioners who examined the boys did so at the instigation of a person or persons employed by the Department of Community Welfare. One of the boys was examined by the first defendant. The other boys were examined by the second defendant. Both the first and second defendants concluded, and reported to the Department of Community Welfare, that the boys appeared to have been sexually abused.

6 Further investigations were carried out by officers of the Department of Community Welfare, who also concluded that there had probably been sexual abuse. They, in turn, referred the matter to the police. The police charged the plaintiff with sexual offences. Those charges were ultimately dropped, but, in consequence of the allegations and charges, the plaintiff suffered shock, distress and psychiatric harm, and consequential personal and financial loss.

7 The plaintiff alleges that each of the first and second defendants (the medical practitioners at the Sexual Assault Referral Centre) "owed a duty of care to the plaintiff to carry out her duties and responsibilities and in particular the examination and diagnoses of persons and in particular children suspected of having been sexually abused … with due care, skill, discretion and diligence." (The introduction of the concept of discretion was capable of causing some confusion, but it played no separate role in argument). In a number of respects, those defendants are said to have acted negligently in their examination,

diagnosis, and reporting. The third and fourth defendants are claimed to be vicariously liable for the negligence of the medical practitioners.

8 The State of South Australia is also alleged to have owed the plaintiff a duty to carry out its responsibilities in relation to the investigation of sexual abuse of children with due care, skill, discretion and diligence, and the officers of the Department of Community Welfare who investigated the matters are alleged to have behaved negligently.

9 Doyle CJ summarised the case as follows:

> "In short, it is a case in which the plaintiff alleges that the first and second defendants carelessly reached a conclusion that the plaintiff's children had been or probably had been subjected to sexual abuse, and reported that conclusion to members of the Department, in circumstances in which the plaintiff would be regarded as the probable or possible perpetrator of that abuse.
>
> …
>
> The State is also alleged to be liable on an independent basis. It is claimed that the employees of the Department owed the plaintiff a duty of care in the course of their employment.
>
> …
>
> It is alleged that employees … gathered and used information about possible sexual abuse of the children without making adequate inquiry as to those facts, without exercising proper care and without following appropriate procedures for such cases. … It is alleged that the employees of the Department failed to establish appropriate protocols for the diagnosis of sexual abuse of children. It is alleged that they failed to establish proper procedures to validate diagnoses of sexual abuse … ."

The facts in *Sullivan*

10 The plaintiff is the father of a young daughter. The daughter said some things to her mother (the plaintiff's wife) and her grandmother, which led the mother to contact the Crisis Care branch of the Department of Community Welfare. She was referred by the Department to the Adelaide Children's Hospital, which in turn referred her to the Sexual Assault Referral Centre at the Queen Elizabeth Hospital.

11 The first defendant was a medical practitioner employed at the Sexual Assault Referral Centre. She examined the daughter and expressed the conclusion that the daughter had suffered sexual abuse. The second and third defendants are social workers who were employed at the Sexual Assault Referral Centre, and Adelaide Children's Hospital, respectively. The plaintiff is uncertain whether the employer of the first and second defendants was the Queen Elizabeth Hospital or the State of South Australia.

12 For presently relevant purposes, the medical practitioner, and the social workers, are alleged to have acted negligently in examining the child and investigating the possibility of sexual abuse. No criminal charges were laid; but the allegations were believed by the plaintiff's wife. They resulted in breakdown of the marriage, and were pursued in Family Court proceedings. They were resolved, in that Court, in favour of the plaintiff.

13 Each of the first, second and third defendants is alleged to have owed a duty to the plaintiff to exercise reasonable care in the conduct of the investigation of allegations of sexual abuse of the daughter. The Queen Elizabeth Hospital and the State of South Australia, in the alternative, are said to be vicariously liable for the negligence of the first and second defendants. The Adelaide Children's Hospital, or alternatively the State, is said to be vicariously liable for the negligence of the third defendant.

14 The State of South Australia is also alleged to have owed the plaintiff a duty of care to exercise reasonable care in the conduct of the investigation of the allegations of sexual abuse of the daughter. It is alleged, through the conduct of its employees and, in particular, officers of the Department of Community Welfare, to have been negligent, in the same manner as the officers in *Thompson* were said to have been negligent.

15 The plaintiff alleges that he suffered shock, distress, psychiatric injury, and consequential personal and financial loss.

16 Doyle CJ said that, in its essentials, the case pleaded in *Sullivan* appeared to be identical to the case pleaded in *Thompson*, and the matters were argued on that basis.

The facts in *Hillman v Black*

17 In that case the plaintiff was the father of a young daughter. His wife came to suspect him of sexually abusing the daughter. She raised her accusations with a social worker at Crisis Care, and was referred to the Sexual Assault

Referral Centre at Queen Elizabeth Hospital. The daughter was examined there by a medical practitioner who formed, and expressed, the opinion that there had been some form of molestation. This opinion was reported by the medical practitioner and a social worker to the police. A custody dispute in the Family Court followed. The defendants were a medical practitioner attached to the Sexual Assault Referral Centre, a psychiatrist at the Adelaide Children's Hospital, who assessed the child in connection with custody and access claims in the Family Court, and their employers. There was also a claim against the Department of Community Welfare. The allegations of negligence and damage were similar to those later made in *Thompson* and *Sullivan*.

The relevant legislation

18 In all three cases the statutory background was the same. There was a difference of opinion in the Full Court in *Thompson* as to whether it was conclusive, but it is plainly relevant.

19 The Department of Community Welfare functions pursuant to the *Community Welfare Act* 1972 (SA) ("the Act"). Section 10 of the Act provides that the objectives of the Department, and of the Minister of Community Welfare, include promoting the welfare and dignity of the community, and of individuals, families and groups within the community, by providing services designed to assist, amongst others, children to overcome disadvantages suffered by them.

20 Part IV of the Act is concerned with "Support Services for Children". Section 25, which states certain principles to be observed, provides that a person dealing with a child under the provisions of Pt IV:

> "…
>
> (a) shall regard the interests of the child as the paramount consideration;
>
> (b) shall seek to secure for the child care, guidance and support within a healthy and balanced family environment;
>
> (c) shall deal with the child in a caring and sensitive manner;
>
> (d) shall have regard to the rights of the child, and to the needs and wishes expressed by him;
>
> and

(e) shall promote, where practicable, a satisfactory relationship between the child and other members of, or persons within, his family or domestic environment."

21 Division III of Pt IV, which is headed "The Protection of Children" provides for regional and local protection panels, and includes the following:

"91(1) Where a person suspects on reasonable grounds that an offence under this Division has been committed against a child, that person –

(a) if he is not obliged to comply with this section – may notify an officer of the Department of his suspicion;

or

(b) if he is obliged to comply with this section – shall notify an officer of the Department of his suspicion,

as soon as practicable after he forms the suspicion.

(2) The following persons are obliged to comply with this section –

(a) any legally qualified medical practitioner;

(b) any registered dentist;

(c) any registered or enrolled nurse;

(d) any registered psychologist;

(e) any pharmaceutical chemist;

(f) any registered teacher;

(g) any person employed in a school as a teacher aide;

(h) any person employed in a kindergarten;

(i) any member of the police force;

(j) any employee of an agency that provides health or welfare services to children;

(k) any social worker employed in a hospital, health centre or medical practice;

or

(l) any person of a class declared by regulation to be a class of persons to which this section applies.

…

(5) Where a person acts in good faith and in compliance with the provisions of this section, he incurs no civil liability in respect of that action.

…

92(1) Any person having the care, custody, control or charge of a child, who maltreats or neglects the child, or causes the child to be maltreated or neglected, in a manner likely to subject the child to physical or mental injury, shall be guilty of an offence and liable to a penalty not exceeding one thousand dollars or imprisonment for a period not exceeding twelve months."

22 There is also a general provision in the Act which provides:

"235a(1) A person shall not incur any civil liability for any act or omission done by him in good faith in the exercise or discharge of his powers, functions, duties or responsibilities under this Act.

(2) A liability that would, but for subsection (1), lie against a person shall lie against the Crown."

The argument for the appellants

23 The appellants in the present appeals, like the appellant in *Hillman v Black*, had no personal dealings with the medical practitioners, social workers, departmental officers, or hospitals involved in investigating, and reporting upon, the allegations of child sexual abuse. They were family members who were actual or potential suspects in relation to such allegations. Each appellant contended that he had not abused his children and that he had been injured as a result of the respondents' negligence in reaching and reporting an opinion suggesting or asserting the contrary.

24 We are not directly concerned with any potential tortious liability to the children involved. The appellants did not seek advice, assistance, care or treatment for themselves or their children, from any of the respondents. The children were the objects of the immediate concern of the respondents, who were obliged, by s 25 of the Act, to regard the interests of the children as the paramount consideration.

25 The appellants submit that it was reasonably foreseeable that they would suffer harm of the kind alleged in consequence of negligence on the part of the defendants in investigating and reporting upon the allegations. That is not disputed. But foreseeability of harm is not sufficient to give rise to a duty of care. Conscious of a number of difficulties, including indeterminacy of liability, the appellants disclaimed any suggestion that the fact that they were actual or potential suspects of itself gave rise to a duty owed to them by the defendants of a kind that would give rise to liability in negligence. They did not contend that such a duty would be owed to a neighbour, or a stranger, who was suspected of molesting the children. The parental relationship between the appellants and the children, it was said, distinguished these cases from the ordinary case of an investigation of a possible crime. The appellants did not argue that public authorities or individuals who, in the course of their official or professional duties, or otherwise, investigate, and report upon, possible offences, normally owe a legal duty to take reasonable care not to cause harm to people who might be suspected of being offenders, even though it is obviously foreseeable that such people might be adversely affected by carelessness in investigation and reporting.

26 The appellants pointed out that the Act obliges people dealing with children to consider the familial as well as the personal interests of the child. (See, for example, s 25(e)). The relationship between a child and its parents is an aspect of the welfare of the child. It was argued that, if an opinion is negligently formed that a parent has abused a child, the likely disruption of the parent/child relationship is directly against the interests of the child. In that respect there was said to be a coincidence of interest between parent and child.

27 The appellants also sought to confine the extent of the duty for which they contended, by excluding expressions of opinions and communications about the precautions necessary to protect children. The duty claimed was limited to the acts of undertaking medical examinations and associated interviews, making and communicating diagnoses, and, in the case of the Department, conducting further review and investigations. This unconvincing distinction appears to have been made in an attempt to avoid the incongruity of a proposition that, in deciding what precautions should be taken to protect a child from apprehended sexual

abuse, decision-makers owe a duty to take care to protect a suspected abuser from emotional distress and other forms of harm.

The decision of the Full Court in *Hillman v Black*

28 Matheson, Prior and Perry JJ all concluded that, on the facts found by the trial judge which, so far as they were material to the issue of duty of care, were not in dispute, and were as alleged by the plaintiff, the defendants owed no relevant duty of care to the plaintiff.

29 The case was decided at a time when proximity was commonly treated in Australian courts as what Deane J described in *Jaensch v Coffey*[5] as a "broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another". More will be said of that later. Matheson J reached the conclusion "that the necessary relationship of proximity was not proved"[6].

30 As to the Department, Matheson J was strongly influenced by the decision of the House of Lords in *X (Minors) v Bedfordshire County Council*[7] and, in particular, by what Lord Browne-Wilkinson said about one of the cases which formed part of that litigation ("the *Newham* case") where the facts bore a striking similarity to the facts in *Hillman.* His Lordship said that a "common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties"[8]. He also said[9]:

> "… the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment … if a liability in damages were to be imposed, it might well be that local

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5 (1984) 155 CLR 549 at 584.

6 (1996) 67 SASR 490 at 501.

7 [1995] 2 AC 633.

8 [1995] 2 AC 633 at 739.

9 [1995] 2 AC 633 at 750.

> authorities would adopt a more cautious and defensive approach to their duties. … If the authority is to be made liable in damages for a negligent decision … there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children."

31 Reference was also made by his Lordship to the United Kingdom regulatory scheme which "involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare"[10].

32 Matheson J considered that the same applied to the South Australian legislation.

33 As to the medical practitioners who examined the child, Matheson J said that they "were not retained to advise the appellant, and did not assume a duty of care to him. It was for [the child] alone that they were invited to exercise their professional skill and judgment. The appellant was not their patient."[11]

34 Prior J reasoned to like effect in relation to the Department. As to the medical practitioners, he emphasised that in those cases there was a similar problem of potential conflict between the interests of the child and the interests of the plaintiff which, in turn, exposed the doctors to a conflict of duty and interest if they were subject to a common law duty of care to the plaintiff[12].

35 Perry J approached the case as one of statutory construction, the object being to determine whether the statutory provisions excluded tortious liability[13]. He concluded that they had that effect, not only in relation to the Department and its officers, but also in relation to the medical practitioners to whom the Department referred a child.

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10 [1995] 2 AC 633 at 751.

11 (1996) 67 SASR 490 at 502.

12 (1996) 67 SASR 490 at 510.

13 (1996) 67 SASR 490 at 515-516.

The decision of the Full Court in *Thompson*

36 Unlike the other two members of the Full Court and Perry J in *Hillman*, Doyle CJ did not find in the Act any implied intention to exclude the imposition of a duty of care. That, however, did not resolve the issue; it merely left it open. He went on to consider factors tending for and against a conclusion that a duty existed.

37 Factors in favour of the plaintiff were: that the duty alleged related to a positive act, not a mere failure to act; that it would have been known to the defendants that carelessness on their part would result in harm to the plaintiff and loss of contact with the children; that, in the case of the medical practitioners, the duty suggested was a duty to act competently when exercising their professional skills; and that the plaintiff was vulnerable in that there was nothing he could do to protect himself against the consequences of the defendants' lack of care.

38 Factors against the plaintiff were: that the harm suffered by the plaintiff was not the direct result of the conduct of the individual defendants, and complex causation issues were involved; that the legal "relationship" between the plaintiff, the medical practitioners, and the employees of the Department, if there was one, was difficult to define, and not analogous to any existing relationship in which a similar duty of care was found to exist; that as a general rule, professionals such as doctors and social workers owe a duty to those for whom and to whom they make their services available, and in whose interest they act; that the plaintiff had a potentially adverse interest to the children, whose welfare was the primary concern of the defendants; and that there is a potential for indeterminate liability, there being no reason in principle to restrict any duty of care to family members.

39 As to the Department, and its employees, Doyle CJ, like Matheson J in the earlier case, was strongly influenced by the reasoning of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*.

40 As to the doctors, Doyle CJ considered that their primary duty was to the State which requested the examinations and to the child they were asked to examine. That did not necessarily exclude a duty to other people as well. But here there was no reliance on the doctors by the plaintiff, and no undertaking of responsibility to the plaintiff. He said, concerning the doctors:

> "The parents of the child, or at least the parent who was a potential suspect for a conclusion of sexual abuse to be reached, could hardly be regarded

as a person whose interests they could be expected or required by law to consider."

41 Gray J, with whose reasons Duggan J agreed, considered the legislative scheme to be critical. The question was whether the provisions of that scheme were incompatible with there being a duty owed to the plaintiff. The statute imposed a duty upon the defendants to protect children, to investigate allegations of child abuse, and to make necessary reports. The interests of the child were to be the paramount consideration. If the Department or its officers owed a duty of care to an alleged abuser, this would discourage or inhibit the performance of their statutory duties. An adverse report would obviously be likely to cause family disruption, but to impose duties to an abuser would put children at risk. Medical practitioners, social workers and others were obliged by the State to report suspicions. From all this there was inferred a statutory intention "that the common law should be excluded in so far as the alleged perpetrator of abuse is concerned".

The supposed duty of care

42 The argument was conducted upon the basis that it was foreseeable that harm of the kind allegedly suffered by the appellants might result from want of care on the part of those who investigated the possibility that the children had been sexually abused. But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

43 In *Donoghue v Stevenson*[14], the House of Lords, by a majority of three to two, held that such a duty was owed by the manufacturer of a beverage to a consumer of the beverage where the manufacturer sold the product to a

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14 [1932] AC 562.

distributor and it was ultimately sold to the consumer in circumstances such that the consumer could not discover a defect in the beverage by inspection. It was established that it was not necessary for a plaintiff to show that a case was covered by, or closely analogous to, existing precedent, and that there were general principles by reference to which a claim in negligence fell to be decided. The first principle was that, in order to support an action for damages for negligence, a plaintiff must "show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury"[15].

44 Lord Atkin, noting how difficult it was to find in the authorities statements of general application defining the relations between parties that gave rise to that duty, and pointing out that there must be some element common to all the particular relations which had been held to involve a duty, said[16]:

> "To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett MR in *Heaven v Pender*, in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide".

45 In *Heaven v Pender*, Brett MR, addressing the question what is the proper definition of the relation between two persons which imposes on one of them a duty to observe, with regard to the person or property of the other, care to prevent injury, said[17]:

> "… whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

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15 [1932] AC 562 at 579 per Lord Atkin.

16 [1932] AC 562 at 580.

17 (1883) 11 QBD 503 at 509.

46 Ten years later, in *Le Lievre v Gould*[18] A L Smith LJ described that as a statement of principle "that a duty to take due care [arose] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other". That statement appears to refer to a limited form of proximity: proximity of person or property. But Lord Atkin said that it was not to be understood as limited to physical proximity. It was intended "to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act"[19]. Even so, his Lordship was speaking of "close and direct relations". He went on to acknowledge that there will no doubt be "cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises"[20].

47 The references to "relations", and to the problem of deciding which relations are sufficiently proximate to give rise to a duty of care, in part reflects the previous history of the law of negligence, the focus of attention often being particular categories of relationship. The search was for a unifying principle which informed the decisions in respect to those categories. The actual conclusion in *Donoghue v Stevenson* was that, at least in certain circumstances, the manufacturer of a product intended for human consumption stood in a sufficiently proximate relation to an ultimate consumer of the product to attract a duty of care. But Lord Atkin, in his formulation of principle, was seeking to find "a valuable practical guide", and warned against "the danger of stating propositions of law in wider terms than is necessary"[21]. Consistently with his reasoning, he might also have warned against the danger of stating such propositions in more categorical terms than is appropriate.

48 As Professor Fleming said[22], "no one has ever succeeded in capturing in any precise formula" a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of

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18 [1893] 1 QB 491 at 504.

19 [1932] AC 562 at 581.

20 [1932] AC 562 at 582.

21 [1932] AC 562 at 583-584.

22 Fleming, *The Law of Torts*, 9th ed, (1998) at 151.

care of the kind necessary for actionable negligence. The formula is not "proximity". Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality[23], it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established[24]. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity between the medical practitioners who examined the children, and the fathers who were suspected of abusing the children, might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue.

49 What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*[25] does not represent the law in Australia[26]. Lord Bridge himself said that concepts of proximity and fairness lack the necessary precision to give them utility as practical tests, and "amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope"[27]. There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* approach a utility beyond that claimed for it by its

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23 eg *Jaensch v Coffey* (1984) 155 CLR 549 especially at 584-585 per Deane J; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52 per Deane J.

24 *Hawkins v Clayton* (1988) 164 CLR 539 at 555-556 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 210 per McHugh J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 96-97 [270]-[274] per Hayne J.

25 [1990] 2 AC 605 at 617-618.

26 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [9] per Gleeson CJ, 210-212 [77]-[82] per McHugh J, 302 [333]-[334] per Hayne J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at 182 [101] per Hayne J; 176 ALR 411 at 436.

27 [1990] 2 AC 605 at 617-618.

original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

50 Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party[28]. Sometimes they may arise because the defendant is the repository of a statutory power or discretion[29]. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits[30]. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships[31]. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle. In *Donoghue v Stevenson*, for example, Lord Buckmaster, in dissent, was concerned that, if the manufacturer in that case was liable, apart from contract or statute, to a consumer, then a person who negligently built a house might be liable, at any future time, to any person who suffered injury in consequence; a concern which later cases showed to have been far from fanciful[32]. The problem which has caused so much difficulty in relation to the

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28 eg *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164; 176 ALR 411.

29 eg *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992; 180 ALR 145.

30 eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

31 eg *Hill v Van Erp* (1997) 188 CLR 159 at 231 per Gummow J.

32 [1932] AC 562 at 577.

extent of tortious liability in respect of negligently constructed buildings was not only foreseeable, but foreseen, in the seminal case on the law of negligence[33].

51 In *Dorset Yacht Co Ltd v Home Office*[34], Lord Diplock said:

> "…[T]he judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care".

52 Conversely, conduct and relationships may have been held not to give rise to a duty of care, and the reasons for that holding may provide an important guide to the solution of the problem in a new case.

53 Developments in the law of negligence over the last 30 or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is "fair" or "unfair". There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.

54 The present cases can be seen as focusing as much upon the communication of information by the respondents to the appellants and to third parties as upon the competence with which examinations or other procedures were conducted. The core of the complaint by each appellant is that he was injured as a result of what he, and others, were told. At once, then, it can be seen that there is an intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis[35]. It would allow

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33 cf *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Bryan v Maloney* (1995) 182 CLR 609.

34 [1970] AC 1004 at 1058.

35 cf *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.

55 More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed.

56 How may a duty of the kind for which the appellants contend rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty? A similar problem has arisen in other cases. The response to the problem in those cases, although not determinative, is instructive.

57 In *Hill v Chief Constable of West Yorkshire*[36], the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out[37] that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate.

58 Earlier, in *Yuen Kun Yeu v Attorney-General of Hong Kong*[38], the Privy Council held that a regulatory authority did not owe a duty of care to corporate depositors. Their Lordships pointed to the responsibilities and discretions of the authority, and concluded that there was no intention on the part of the legislature that, in considering whether to register or deregister a company, there should be a common law duty of care superimposed upon the statutory framework.

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36 [1989] AC 53.

37 [1989] AC 53 at 63.

38 [1988] AC 175.

59 Reference has already been made to the reasoning of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*[39].

60 The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.

61 There is also a question as to the extent, and potential indeterminacy, of liability. In the case of a medical practitioner, the range of people who might foreseeably (in the sense earlier mentioned) suffer some kind of harm, as a consequence of careless diagnosis or treatment of a patient, is extensive.

62 The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to

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39 [1995] 2 AC 633.

the latter, the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable. That they are irreconcilable is evident when regard is had to the case in which examination of a child alleged to be a victim of abuse does not allow the examiner to form a definite opinion about whether the child has been abused, only a suspicion that it *may* have happened. The interests of the child, in such a case, would favour reporting that the suspicion of abuse has not been dispelled; the interests of a person suspected of the abuse would be to the opposite effect.

63 Furthermore, the attempt by the appellants to avoid the problem of the extent of potential duty and liability is unconvincing. They sought to limit it to parents. But, if it exists, why should it be so limited? If the suspected child abuser were a relative other than a parent, or a schoolteacher, or a neighbour, or a total stranger, why should that person be in a position different from that of a parent? The logical consequence of the appellants' argument must be that a duty of care is owed to anyone who is, or who might become, a suspect.

64 A final point should be noted. The appellants do not contend that any legal right was infringed. And, once one rejects the distinction between parents and everybody else, they can point to no relationship, association, or connection, between themselves and the respondents, other than that which arises from the fact that, if the children had been abused, the appellants were the prime suspects. But that is merely the particular circumstance that gave rise to the risk that carelessness on the part of the respondents might cause them harm. Ultimately, their case rests on foreseeability; and that is not sufficient.

Conclusion

65 The duty of care for which the appellants contend does not exist.

66 The appeals should be dismissed with costs.