

Case Report – State Government liability for failure to prevent child abuse

Special Leave to Appeal Granted to State of NSW

By Jeremy Smith, Compliance Officer

Introduction

In this case, the High Court granted special leave to appeal from the decision in *DC v State of New South Wales* [2016] NSWCA 198 (**summarised in the November 2016 edition of the Case Law Update**), in which the State of New South Wales (the **State**) was held liable for the failure of the Department of Youth and Community Services (the **Department**) to prevent the continuing sexual abuse of two children who were the subject of child protection proceedings in the 1970s and 1980s.

Facts

The respondents (**DC and TB**) were sexually and physically abused by their step-father, LX, during the 1970s and early 1980s. In April 1983, TB brought the abuse to the attention of the Department, which investigated the allegations and commenced child protection proceedings under the *Child Welfare Act 1939* (NSW) (**Child Welfare Act**). The abuse allegations were substantiated by admissions from LX and the sisters' mother obtained during the investigation. Following this, the Children's Court made orders placing DC and TB into their mother's care with conditions that were intended to restrict the step-father's access, though there were questions regarding the effectiveness of these orders. In 2001, the sisters filed a complaint with New South Wales Police, which culminated in LX pleading guilty to 9 criminal charges in relation to abuse that had occurred pre-April 1983.

Soon afterwards, the sisters commenced negligence proceedings against the State on the basis that in failing to report LX to the police, the Department failed to discharge its duty of care, which it owed them by virtue of its powers under the *Child Welfare Act*, to act reasonably in the exercise of their statutory powers. Specifically, they alleged that this duty of care required the Department to report LX to the police pursuant to section 148B(5) of the *Child Welfare Act*, which then read:

Where the Director has been notified under... [the *Child Welfare Act*], he shall –

- (a) promptly cause an investigation to be made into the matters notified to him; and
- (b) if he is satisfied that the child in respect of whom he was notified may have been assaulted, ill-treated or exposed, take such action as he believes appropriate, which may include reporting those matters to a constable of police.

The sisters alleged that LX had continued to abuse them post-April 1983, and that as a result the State was liable for the injuries (specifically post-traumatic stress disorder).

In the Court of Appeal, the sisters successfully appealed the trial judge's decision in the New South Wales Supreme Court. The majority judgement accepted documentary evidence including interview records and Departmental file notes as supporting a finding that the abuse had continued to occur post-April 1983. Ward JA (with whom Sackville JA agreed) held that the duty owed by the State was a duty, in exercising the powers under the *Child Welfare Act*, to take 'all reasonable steps in the circumstances of the appellants' case to protect them from the risk of further physical and sexual abuse (and consequent physical and mental harm) at the hands of the step-father'. The Court found that the Department had breached its duty of care on the basis that case officers in the Department were aware of LX's conduct, of his pre-existing criminal record for sexual offences against minors and formally reporting abuse was consistent with internal guidelines in place at the time and was also



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consistent with usual practice. The Department's failure to notify police therefore constituted a breach of its duty of care. Basten JA, however, dissented on the basis that the discretionary power should not be construed as requiring the Department to do more than 'consider the available options', and to do so was to 'convert' it to a 'common law obligation' rather than a statutory power.

The State proceeded to a special leave application to the High Court.

Special leave application

Applicant's submissions

Counsel for the Applicant (the State of NSW) submitted that there were two important questions that warranted an appeal:

- Where a duty of care is established by a legislative power that gives the responsible person a number of different choices to be exercised at their discretion depending on the circumstances, if the responsible person, in considering the available options, chooses one such option but not another, does the 'failure to choose the other option give rise to a breach' of that duty of care?
- In cases where legislation empowers a head of a government department to take steps to protect certain people, in this case children, can the State be held vicariously liable where there is no finding of a breach of duty by any officer?

In relation to the first question, the Applicant submitted that the majority of the Court of Appeal erred in formulating the scope of the duty of care owed to the Respondents by the Department. They argued that the wide breadth of the discretionary power in question required the director to make 'complex multifactorial judgements' before deciding which actions were 'appropriate'. Citing Basten J's dissenting opinion, they submitted that as a matter of principle, construing the duty of care as a duty to take all reasonable steps was inconsistent with the 'discretionary power to take such steps as the Director considers appropriate'. In support, they argued that to do so was to ignore the complexity of such situations. Further, they continued, there was no guarantee that reporting LX to the police would have been any more effective than pursuing the

matter through child protection proceedings unless it led to LX's immediate arrest and incarceration.

With regards to the second question, the Applicant also submitted that no breach of duty by officers involved had been established for which the Department could be held vicariously liable.

Respondent's submissions

The Respondent submitted that 'in this particular case duty of care was admitted' and the only relevant question was 'whether it extends to reporting to police in the particular case'.

The Respondent argued that the proper construction of the duty was that it imposed a 'continuing' obligation on YACS to continue monitoring the situation and to take further action when it became apparent that the orders made by the Children's Court were 'ineffective' in protecting the girls. In support of this proposition, they pointed to the assessment of a YACS district officer that LX was 'unlikely to change', and emphasised that the evidence demonstrated that once the girls were back with the mother, LX 'was getting regular access to the girls'. Furthermore, they pointed to evidence that 'the mother openly admitted to the YACS officer that the abuse was continuing'.

In these circumstances, they argued that 'nothing else was going to protect the girls' other than reporting the matter to police. Furthermore, they continued, there was no evidence that reporting the matter to the police was ever actually considered. They submitted that the fact-dependant nature of the case meant that the issue of principle raised by the Applicant should not factor into the proper construction of the scope of the duty in this case.

Further, on the question of vicarious liability, they submitted that they were not required to 'identify the particular individual' but 'merely... to identify the failure', which they submitted they had done.

The Court's decision

The Court granted the application for special leave in relation to the issues of the scope of the duty of care owed by the Department and vicarious liability of the State where no specific failure by an officer of the Department was identified.

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Conclusion

This case is noteworthy because it is a reminder that statutory bodies or holders of statutory powers may owe a duty of care that will entitle others to sue in negligence.

The High Court's consideration of the scope of a duty of care established by a statutory power will provide guidance on the way that such powers are to be exercised.

*If you have any questions arising out of this article, please contact **Jeremy Smith** on (03) 9865 1342 or email jeremy.smith@healthlegal.com.au*