IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S35 of 2017

BETWEEN:

State of New South Wales

Appellant

and

DC

First Respondent

TB

Second Respondent

APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant by:

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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 legislation confers powers that involve discretionary choices about the steps to be taken for the protection of young persons at risk, and after consideration one range of options is pursued but not another, can the failure to choose that other option give rise to a breach of common law duty sounding in negligence?

3. Where statutory powers are conferred upon the head of a department of a State public service to take steps for the protection of young persons, can the State be held vicariously liable in negligence in the absence of a finding of breach of any relevant duty by any officer?

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

4. The Appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

PART IV CITATIONS

5. The citation for the decision of the Supreme Court of New South Wales is: *TB v State of New South Wales and Quinn; DC v State of New South Wales and Quinn* [2015] NSWSC 575; (2015) Aust Tort Reports 82-223. The citation for the decision of the New South Wales Court of Appeal is: *DC v State of New South Wales* [2016] NSWCA 198; (2016) Aust Tort Reports 82-295.

PART V THE FACTS

6. The Respondents are sisters who were subjected to sustained physical and sexual abuse at the hands of their stepfather (**LX**) between approximately 1974 and 1983. On or shortly before 20 April 1983, TB made an initial complaint regarding that abuse to the then Department of Youth and Community Services (**Department**), at which time DC and TB were aged 12 and 15 years respectively.

7. The Respondents were subsequently interviewed by a case officer of the Department, Ms Quinn, on 20 April 1983 (in the case of TB) and 22 April 1983 (in the case of DC). Officers of the Department took immediate steps to remove both children from the family home. Almost immediately after Ms Quinn's interview with TB, a voluntary care arrangement was made for TB to stay with the family of a friend (CA[184]). In relation to DC, a "Child at Risk Notification" was completed by Ms Quinn and she was moved to a place of safety on the evening of 21 April 1983 (CA[184]). The following day, Ms Quinn obtained an order from the Children's Court enabling DC to be placed in care for 14 days. On 28 April 1983, Ms Quinn interviewed the Respondents' mother (**Ms J**) in the presence of her immediate supervisor (Mr Frost), during which interview Ms J stated that her daughters had previously complained to her of sexual abuse perpetrated by LX (CA[185]).

8. On 2 May 1983, Ms Quinn made an application to the Children's Court, invoking the archaically-titled protection mechanism under the then *Child Welfare Act 1939* (NSW) (***Child Welfare Act***), that each Respondent be found to be a "neglected child" within the meaning of s 72(j) (**Children's Court Proceedings**) (CA[186]). The matter was re-listed on several occasions over the following months, culminating in a hearing on 19 September 1983.

9. On 9 May 1983, the Children's Court Proceedings were listed for mention. The Court ordered that the Respondents be released into the custody of their mother pending the resolution of the proceedings. Both Respondents remained in alternative care until officers of the Department confirmed that LX had moved out of the family home (CA[190]).

10. On 20 June 1983, Ms Quinn prepared a report for the hearing before the Children's Court of the same date which noted that LX had voluntarily left the family home for a short time following DC's placement in care but that he had since returned home. Ms Quinn expressed the view in her report that it was necessary that LX reside away from the home.

11. At the hearing on 20 June 1983, the Children's Court made a finding that each of the Respondents was a "neglected child" and stood the proceedings over to 19 September 1983. The Court charge sheets noted an undertaking proffered by Ms J that LX would leave the home by the coming weekend (CA[193]).

12. On 15 September 1983, Ms Quinn and a child protection officer from the Department interviewed LX. During that interview, LX admitted to having sexually interfered with DC and TB.

13. On 19 September 1983, both Ms J and Ms Quinn gave evidence in the Children's Court Proceedings. The Court had a detailed report from Ms Quinn dated 19 September 1983 that reported LX's admission and his frequent visits to the house, and considered the complex questions surrounding the children's best interests.[1] The transcript of proceedings indicates that there were separate hearings on that occasion for each of the Respondents, with each having separate legal representation (CA[199]). The Children's Court found that a *prima facie* case of improper guardianship had been made out in respect of each Respondent, and adjourned the proceedings to 24 October 1983 for decision. In the meantime, the Court made orders allowing the Respondents to go home on condition that Ms J accept the supervision of Ms Quinn and that LX was not to approach the family home (CA[200]).

14. On 24 October 1983, the Children's Court formally found that the complaints were established[2] as to each of the Respondents. The matter was adjourned to 7 November 1983, on which date the Children's Court made final orders releasing TB and DC into the care of their mother until the ages of 18 and 16 years respectively, on condition *inter alia* that the Respondents have no contact with LX except at their request and that Ms J accept the supervision of Ms Quinn (CA[203]).

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[1] Exhibit A.12 before the primary judge.

[2] The charge sheets do not disclose whether those findings concerned the charges of improper guardianship or neglect: see CA[202].

15. As the majority in the Court of Appeal found, LX continued to avail himself of the opportunity sexually to abuse the Respondents following TB's initial notification of the abuse to the Department in April 1983 (CA[253]). TB left home permanently in March 1984. DC was placed in foster and other institutional care for various periods up to July 1984 when she returned to her mother's care (CA[205]).

16. In August 2001, the Respondents reported the abuse perpetrated by LX to the police. In June 2004, LX was arrested and charged with a number of offences, including the rape and indecent assault of each of the Respondents and assault occasioning actual bodily harm to TB. LX was committed to stand trial in the NSW District Court in February 2005 in respect of the offences committed against the Respondents. At the commencement of his trial in August 2005, LX pleaded guilty to one of the nine charges against him. After each of the Respondents had given evidence, LX pleaded guilty to the balance of those charges. He was sentenced to a term of 10 years' imprisonment, with a non-parole period of 4 years.

PART VI ARGUMENT

A. Scope of duty

The judgments below

17. The primary judge found that, in order to discharge the common law duty of care owed by "the Department" (TJ[27]) in the exercise of its statutory powers,[3] the Director of the Department was obliged to report the abuse of the Respondents to the police and to do so by no later than 28 April 1983 (TJ[106], [108]). The primary judge inferred that "the reports of abuse were not reported to the police" (TJ[102]). However, his Honour was not satisfied to the requisite standard that LX had continued to abuse the Respondents after the initial complaint made to the Department by TB and, on that basis, found that causation was not established (TJ[143], [167]).

18. On appeal, Ward JA (with whom Sackville AJA, in a separate judgment, agreed) upheld the primary judge's finding that "the Department" had breached its duty of care by failing to notify the police of the abuse (CA[179]).[4] Her Honour described the content of the duty of care owed by "the Department" as being a "duty in the exercise of the statutory powers under the *Child Welfare Act* so as 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" (CA[276]). In the circumstances (by which circumstances her Honour appears to invoke J's known history of sexual misconduct, Ms J's apparent unwillingness to address it and the vulnerability of the Respondents), Ward JA found that what was required in order to satisfy the duty to exercise reasonable care in the performance of the statutory powers under the *Child Welfare Act* was

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[3] Relevantly, ss 148B(5)(b) and 158 of the *Child Welfare Act 1939* (NSW).

[4] The majority accepted that the primary judge had not expressly addressed the content or scope of the relevant duty of care; rather, "he addressed it implicitly in considering whether there was a breach by reason of the failure to report the matter to the police": CA[261]. The majority also concurred with the primary judge in concluding that the "most probable inference" was that no formal notification or referral of the matter to the Child Mistreatment Unit or to the police had occurred (CA[322]).

notification to the police (CA[274]-[276]). In reaching that conclusion, the majority gave no consideration to the text or context of s 148B(5) of the *Child Welfare Act* (though passing reference was made to that provision by Ward JA at CA[272], [296], [364]-[367] and Sackville AJA at [405]-[407], [411]), nor to any authorities bearing upon the imposition of tortious liability in such circumstances. In relation to causation, the majority overturned the primary judge's findings and held that the sexual abuse of the Respondents continued after the initial complaint made to the Department in April 1983 (CA[253]).

19. In dissent, Basten JA rejected the notion that the common law duty required the Appellant through its officers in the Department to report to police the abuse perpetrated by J, as such a proposition "would be to convert a statutory discretionary power, involving a balancing of countervailing considerations, into a common law obligation imposed by the court" (CA[94]). His Honour reasoned that "the common law will not impose a duty of care in circumstances where it would create obligations to consider interests (in this case, the public interest in the prosecution of offenders) potentially inconsistent with the proper exercise of the statutory function (of child protection)" (CA[93]). As Basten JA observed, the potential incoherence in the law that would ensue is "a powerful (if not conclusive) reason" why the duty should not extend so far as that favoured by the majority (CA[90]). In any event, Basten JA was not persuaded that the primary judge erred in failing to be satisfied that LX had continued sexually to abuse the Respondents after TB's initial notification to the Department (CA[8], [152]).

Statutory context

20. Part XIV of the now-repealed *Child Welfare Act* was headed "Committal of Neglected or Uncontrollable Children or Young Persons or of Juvenile Offenders". Section 76 of that Act empowered an officer authorised by the Minister, or a police constable, to apprehend a child "who he has reason to believe is a neglected or uncontrollable child". The term "uncontrollable" was defined as a child "who is not being or cannot be controlled by his parent or by any person having his care" (s 4(1)). The term "neglected child" was defined to include, *inter alia*, a child who in the opinion of the court was "under incompetent or improper guardianship", or whose parents were "unfit to retain the child" in their care: s 72(j), (l).

21. Section 73 of the *Child Welfare Act* provided for "any justice" to issue a warrant for the apprehension of a child or young person where an authorised officer or constable of police, having made "due inquiry", believed the child to be a neglected or uncontrollable child. Any child so apprehended was to be taken to a shelter and, as soon as practicable thereafter, brought before a court (s 78).[5] The court's powers upon finding that a child was "neglected or uncontrollable" were set out in s 82.[6]

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[5] Section 81 of the *Child Welfare Act* then set forth the procedure to be followed where a child was brought before a court as a neglected or uncontrollable child. The parent or guardian of the child, if able to be found, was required to attend "during all the stages of the proceedings" unless excused. The court could make "such interim order as it thinks fit" to provide for the care of the child in question: s 81(8). A neglected or uncontrollable child could not be removed from the custody or charge of a parent other than under the authority of an order of a court: s 81(6).

[6] Those powers included committing the child to the care of another person, to the care of the Minister or to an institution: s 82(1)(c), (d) and (e).

22. The Respondents' case centred upon an asserted failure to exercise the power conferred upon the Director[7] of the Department by s 148B(5), which section appeared in Part XVII of the *Child Welfare Act*, entitled "Procedure, Penalties and General Provisions". Among other things, that Part included provisions allowing for the removal of a child to a shelter and his or her detention there, pending investigation (s 135). Section 136(1) of the *Child Welfare Act* provided as follows:

> Where it appears to a court or any justice that an offence has been committed in the case of any child or young person brought before such court or justice, and that the health, welfare or safety of the child or young person is likely to be endangered unless an order is made under this section, the court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care of the child or young person until a reasonable time has elapsed for the bringing and disposing of any charge against the person who appears to have committed the offence.

23. Section 148B of the *Child Welfare Act* concerned "notification of certain injuries to children" (as indicated in the marginal note). Relevantly, it provided as follows:

> (1) In this section—
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> "court", except in subsection (7)(d), means any court;
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> "prescribed person" means—
>
> (a) a medical practitioner; and
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> (b) a person who is a member of any class of persons prescribed for the purposes of this paragraph, being a person who follows a profession, calling or vocation, other than a solicitor or barrister in the course of his profession, so prescribed, or who holds any office so prescribed.
>
> (2) Any person who forms the belief upon reasonable grounds that a child—
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> (a) has been assaulted; or
>
> (b) is a neglected child within the meaning of Part XIV,
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> may—
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> (c) notify the Director of his belief and the grounds therefor either orally or in writing; or
>
> (d) cause the Director to be so notified.
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> (3) A prescribed person who, in the course of practising his profession, calling or vocation, or in exercising the functions of his office, as the case may be, has reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed shall—
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> (a) notify the Director of the name or a description of the child and those grounds either orally or in writing; or
>
> (b) cause the Director to be so notified,
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> promptly after those grounds arise.

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[7] Being a reference to the permanent head of the Department of Youth and Community Services: s 4(1) of the *Child Welfare Act*.

(4) A prescribed person who fails to comply with subsection (3) shall be guilty of an offence against this Act.

(5) Where the Director has been notified under subsection (2) or (3), 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.

No affirmative duty to report

10 **Summary**

24. In adopting the test that it did, the majority failed to grapple with the text and purpose of the statutory framework within which officers of the Department operated and the compatibility of that framework with the content of the common law duty so propounded. Its fundamental error was to reason from the general proposition (itself contestable) that notification of the subject abuse to the police constituted a "reasonable" step (CA[271], [274]) – a proposition unanchored by any consideration of the statutory source of the Director's discretionary power to do so – to a conclusion that the exercise of reasonable care in discharge of those discretionary powers *mandated* that such a step be taken.

25. Moreover, in formulating the duty as one "to take all reasonable steps" to protect the
20 Respondents from the risk of further abuse, the majority misapprehended the interplay between the relevant statutory powers and the common law duty by which they are conditioned. The common law duty, where it is imposed upon the repository of statutory powers, is one to take reasonable care in the exercise or non-exercise of the powers and functions conferred.[8] In the present case, Ward JA's formulation of the duty ill conforms with the particular statutory power under consideration, being a power to "take such action as [the Director] believes appropriate": s 148B(5)(b). More problematically, her Honour's formulation conceals both the complexity of the judgement that the Director was obliged to make in determining the appropriate course to take and the multifaceted nature of that assessment, as outlined below.

30 **Tortious liability for the exercise of statutory discretions**

26. It is plain that the circumstance that a public authority is the repository of a statutory discretion does not prevent the application of the ordinary principles of the law of negligence.[9] However, as Basten JA observed (CA[62]), the common law will not impose upon such an authority an affirmative obligation to exercise its discretion in a particular way, even where

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[8] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [177] (Gummow J) (***Pyrenees***); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [34] (Gaudron J) (***Crimmins***); *Port Stephens Shire Council v Booth* (2005) 148 LGERA 351 at [90] (Giles JA; Beazley JA and Hunt AJA agreeing).

[9] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

mandamus will lie to compel proper consideration of the power.[10] To impose such an obligation, adopting the language of Gummow J in *Pyrenees Shire Council v Day*, would be "to translate the public law 'may' into the common law 'ought'".[11]

27. In *Pyrenees*, this Court held that the appellant council was liable to pay damages to certain shop owners and tenants in respect of a fire occurring at premises within its local government area. Chief Justice Brennan held that the council was under a public law duty to exercise its statutory powers of fire-prevention. His Honour referred to the House of Lords' decision in *Stovin v Wise*[12] before observing 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" (at [22]). Accepting that the existence of a discretion to exercise statutory powers is not necessarily inconsistent with a duty to exercise it, the Chief Justice found that a duty of the latter kind "may arise from particular circumstances, and may be enforceable by a public law remedy" (at [23]-[24]). His Honour stated (at [24]) that:

> Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

28. Justice Gummow, on the other hand, found that the council was in breach of a common law duty of care owed to the tenants and shop owners having regard to the "significant and special measure of control" over their safety enjoyed by the council (at [168]). His Honour referred to the various "control mechanisms" canvassed for the application of the principles of negligence to local government bodies in the discharge of their statutory functions,[13] before noting that:[14]

> Some of these distinctions and doctrines are entrenched in the common law of Australia, others are not. All of them ... tend to distract attention from the primary requirement of analysis of any legislation which is in point and of the positions occupied by the parties on the facts as found at trial.

29. The remaining members of the Court similarly approached the liability of the council through the application of the common law principles of negligence.[15]

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[10] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [9] (Gleeson CJ), [79]-[80] (McHugh J) (***Graham Barclay***); *Crimmins* at [82] (McHugh J; Gleeson CJ agreeing); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465 (Mason J).

[11] *Pyrenees* at [122] (Gummow J); as quoted by Basten JA at CA[64].

[12] [1996] AC 923 at 953.

[13] Including the distinction between policy and operational decisions, misfeasance and nonfeasance, statutory powers and statutory duties, and the doctrine of general reliance: at [125]. His Honour subsequently rejected the doctrine of general reliance: at [157], [163].

[14] At [126]. This passage was quoted with approval by French CJ in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [52] (***Kirkland-Veenstra***).

[15] At [73] (Toohey J), [115]-[116], [118] (McHugh J), [244] (Kirby J).

30. The interaction between statutory powers and the principles governing liability in negligence has been the subject of consideration in subsequent decisions of this Court. In *Crimmins v Stevedoring Industry Finance Committee*,[16] the Court revisited the topic in the context of a claim for damages in negligence in respect of the exercise by the respondent of its powers under the *Stevedoring Industry Act 1956* (Cth). The majority held that the respondent authority owed a common law duty to take reasonable care to protect the claimant from reasonably foreseeable risks of injury arising from his employment by registered stevedores. Central to that conclusion was the degree of control that the respondent authority exercised, or was capable of exercising, over the contracts of employment of waterside workers and their exposure to the risk of inhaling asbestos fibres during the course of their employment.[17]

31. In dissent, Gummow J held that the respondent did not owe the posited common law duty. His Honour observed that, in some cases, the powers vested by statute in a public authority "may give to it such a significant and special measure of control over the safety of the person or property of the plaintiff as to oblige it to exercise its powers to avert danger or to bring the danger to the knowledge of the plaintiff" (at [166]). Here, in contrast to the Council in *Pyrenees*, the respondent lacked the necessary "practical and legal measure of control" over the identified risks (at [168]). Justice Hayne (with whom Gummow J agreed) likewise re-iterated the importance of control in determining whether the posited duty existed. His Honour noted that the respondent had the power to take the various steps urged by the claimant, including to supply protective equipment to employers and to warn of certain dangers, but that it did not have the power to coerce the employer to give effect to any such warning or to wear any such protective equipment. Thus, even if the asserted duty were performed, it would be for others to determine whether the steps taken by the respondent in discharge of that duty were given effect (at [303]-[305]). Those remarks are of particular resonance in the instant case, where officers of the Department had no control over the use that might be made by police of any report made under s 148B(5) of the *Child Welfare Act*.

32. The relevance of a public authority's control over the source of harm in determining whether tortious liability should be imposed was again emphasised in *Graham Barclay Oysters Pty Ltd v Ryan*.[18] There, a representative action was brought on behalf of a group of consumers who contracted hepatitis A after consuming contaminated oysters obtained from private commercial suppliers. Relevantly, the representative applicants sought damages in negligence from the State and the local council in respect of an asserted failure to exercise statutory powers conferred on the council for the conduct of sanitary surveys of the fisheries in question.

33. This Court held unanimously that that neither the State nor the council owed a duty of care to consumers of the contaminated oysters. That conclusion largely turned upon the insusceptibility of the State's decision (*viz.* not to require the conduct of sanitary surveys) to

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[16] (1999) 200 CLR 1.
[17] At [45] (Gaudron J), [93], [107] (McHugh J), [227] (Kirby J), [357] (Callinan J); see also [276]-[277], [304]-[305] (Hayne J, dissenting).
[18] (2002) 211 CLR 540.

curial review under the rubric of negligence,[19] and the absence of control on the part of the council over the risk of the harm that eventuated.[20] Thus, Gummow and Hayne JJ (with whom Gaudron J agreed) emphasised the "fundamental importance" of control over the relevant risk of harm in discerning any common law duty of care on the part of a public authority.[21] Their Honours concluded that the council had not been conferred with "such a significant and special measure of control over the risk of danger that ultimately injured the oyster consumers" as to warrant the imposition of a common law duty.[22]

34. More recently, in *Stuart v Kirkland-Veenstra*[23] the plaintiff claimed damages against certain police officers and the State of Victoria for breach of an asserted common law duty of care by failing to exercise the statutory power to apprehend her late husband before he committed suicide. Section 10(1) of the *Mental Health Act 1986* (Vic) empowered a member of the police force to apprehend a person who appeared to be mentally ill if the member had reasonable grounds for believing that the person was *inter alia* likely to attempt suicide.

35. This Court held that the police officers did not owe the propounded duty of care. Chief Justice French held that, since the police officers did not form a belief that the deceased was mentally ill or was likely to attempt suicide, no duty of care could arise (at [57]-[58]); Crennan and Kiefel JJ gave substantially similar reasons (at [148]-[150]). Justices Gummow, Hayne and Heydon found that the common law of Australia did not recognise such a general duty of care as that posited by the plaintiff, which could not logically be confined to cases of self-harm or to cases in which powers under mental health legislation may be engaged (at [107]). In observations germane to the present case, Gummow, Hayne and Heydon JJ noted that:[24]

> ... the critical observation that must be made about s 10(1) is that it gives *power* to police officers: '[a] member of the police force *may* apprehend ...' (emphasis added). The sub-section does not in terms impose on police officers an obligation to exercise that power of apprehension if a person appears mentally ill and there are reasonable grounds for the officer to believe that the person has recently attempted or is likely to attempt suicide or to cause serious bodily harm to that person or to some other person. And there may very well be circumstances in which a police officer acting reasonably would not exercise the power even if the conditions for its exercise were met.

36. Their Honours noted that the postulated duty of care was said to require "not only consideration of the exercise of the power but also its exercise whenever reasonable to do so". The "immediate answer" to that proposition was that this was not what the relevant section provided (at [108]-[109]). Further, statutory power to act in a particular way coupled with reasonable foreseeability of harm in the event that such power is not exercised is not sufficient to establish a common law duty (at [112]). That question would require

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[19] At [176] (Gummow and Hayne JJ; Gaudron J agreeing).
[20] At [150], [154] (Gummow and Hayne JJ; Gaudron J agreeing), [319], [323] (Callinan J).
[21] At [150]. The factor of control was likewise regarded as of "fundamental importance" by Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [102]-[103].
[22] At [154]; see also Callinan J at [323].
[23] (2009) 237 CLR 215.
[24] At [82] (emphasis in original); Crennan and Kiefel JJ expressly agreed with the final sentence in this passage, noting that this may account for the choice implied by the word "may" in the sub-section: at [144]. See also [84].

consideration of such factors as the degree of control exercised over the risk of harm that eventuated, the degree of vulnerability of the beneficiary of the alleged duty and the consistency or otherwise of the asserted duty with the terms, scope and purpose of the relevant statute (at [113]). Here, the factor of control was of "critical significance", as in a number of cases concerning the exercise of statutory power, for it was not the officers who controlled the source of the risk of harm to the deceased; it was the deceased alone who was the source of that risk (at [114]). Those observations apply with equal force to the position of the Department in the present case vis-à-vis the source of the risk of further harm to the Respondents.

37. The principles expounded above remain applicable notwithstanding the operation of ss 5B and 43A of the *Civil Liability Act 2002* (NSW) (***Civil Liability Act***).[25] Section 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.[26]

Approach in other common law jurisdictions

38. The approach adopted by courts in other common law jurisdictions provides no support for the imposition upon a public body of an affirmative duty to exercise a statutory discretion in a particular manner so as to protect a claimant from harm at the hands of a third party.

39. In the Court below, Basten JA referred (at [70]-[75]) to the decision of the Supreme Court of the United Kingdom in *Michael v Chief Constable of South Wales Police*,[27] where the Court held that the police did not owe a common law duty of care to the late relative of the claimants, who was murdered by her former partner after police failed to respond promptly to an emergency call made by her. Lord Toulson (with whom Lords Neuberger, Mance, Reed and Hodge agreed) observed that "English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T)" (at [97]).[28] The fundamental reason for that position was expressed as follows (at [97]):[29]

> ... the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.

40. In keeping with this approach, the courts in the United Kingdom will typically be slow to interfere with a discretionary statutory power through the imposition of tortious liability for the

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[25] The primary judge found that the statutory power in s 148B(5) of the *Child Welfare Act* was a "special statutory power" within the meaning of this provision, and neither party challenged that approach: see CA[78].

[26] CA[78] (Basten JA); *Curtis v Harden Shire Council* (2014) 88 NSWLR 10 at [234] (Basten JA; Bathurst CJ relevantly agreeing); *Bankstown City Council v Zraika* (2016) 218 LGERA 131 at [109] (Leeming JA; Gleeson and Simpson JJA agreeing); *Warren Shire Council v Kuehne* (2012) 188 LGERA 362 at [117] (Whealy JA; McColl JA agreeing).

[27] [2015] AC 1732.

[28] This approach was subsequently affirmed in *The Mayor's Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] 4 All ER 283; *Hong Cassley v GMP Securities Europe LLP* [2015] EWHC 722 (QB) at [281].

[29] Two recognised exceptions to the general rule were said to arise where the defendant was in a position of control over the third party actor or otherwise assumed a positive responsibility to safeguard the claimant from harm: at [99]-[100].

manner of its exercise. In *Barrett v Enfield London Borough Council*,[30] Lord Slynn (with whom Lords Nolan and Steyn agreed) observed that "if an authority acts wholly within its discretion – i.e. it is doing what Parliament has said it can do, even if it has to choose between several alternatives open to it, then there can be no liability in negligence" (at 571). Meanwhile, Lord Hutton (with whom Lords Nolan and Steyn also agreed) opined that the content of any common law duty owing in such circumstances must be determined "against the background that [the public authority] is given discretions to exercise by statute in a sphere involving difficult decisions in relation to the welfare of children" (at 591). His Lordship continued (at 591; emphasis added):

> Accordingly when the decisions taken by a local authority in respect of a child in its care are alleged to constitute negligence at common law, the trial judge, **bearing in mind the room for differences of opinion as to the best course to adopt in a difficult field and that the discretion is to be exercised by the authority and its social workers and not by the court**, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent.

41. This statement is consistent with the subsequent remarks of the House of Lords in *Phelps v Hillingdon London Borough Council*.[31] There, Lord Clyde (with whom Lords Jauncey, Lloyd and Nicholls agreed) observed that where a statutory authority must choose between various courses of action, all within its statutory powers, and the choice involves weighing priorities and resources, it will "in general be inappropriate that someone injured through the particular decision ... should have a remedy in damages", although a decision may be "so totally unreasonable as to amount to an abuse of the discretion" and so give rise to liability in negligence (at 674).

42. A similar approach to that favoured by the courts in the United Kingdom is evident in the decisions of courts in New Zealand[32] and Canada.[33] Thus, in *Hill v Hamilton-Wentworth Regional Services Board*,[34] the Supreme Court of Canada observed as follows with respect to the standard of care applicable to police officers where a common law duty is owed (at [73]):

> This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight.

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[30] [2001] 2 AC 550.
[31] [2001] 2 AC 619.
[32] See e.g. *B v Attorney-General* [2004] 3 NZLR 145 at [27]; *Ellis v Counties Manukau District Health Board* (2006) 25 FRNZ 655 at [164], [171], [174].
[33] See *Hill v Hamilton-Wentworth Regional Services Board* [2007] 3 SCR 129; *D (B) v Children's Aid Society of Halton (Region)* [2007] SCJ No. 38 (SCC) at [41].
[34] [2007] 3 SCR 129.

43. In short, then, the ambit of the duty of care articulated by the majority in the Court below is contrary to established principle in so far as it converts a discretionary statutory power into a mandatory common law duty to pursue a particular course of action. In contrast to the "exceptional" circumstances confronting the Court in *Pyrenees* and *Crimmins*,[35] the power under s 148B(5) of the *Child Welfare Act* to report matters to police did not endow the Appellant through its officers in the Department with any practical or legal measure of control over the relevant risk of harm. The Department's officers possessed no power to compel the police to take action upon receipt of any such report, whether by effecting an arrest or through the laying of charges against LX. Thus, even if the posited common law duty were performed, it would fall to persons outside of the Department to determine whether the steps taken by the Director in discharge of that duty were given effect. The Director's capacity to control or minimise the risk of further harm to the Respondents was limited to the powers conferred by the *Child Welfare Act* with respect to the institution and conduct of proceedings in the Children's Court and the removal of the children from their home, which powers were duly exercised.

Context and coherence

44. The scope of any common law duty owed by public bodies invested with statutory powers must be determined prospectively by reference to the terms, scope and purpose of the relevant statutory regime.[36] Having identified the statutory function or power whose exercise is the subject of a common law duty, it is then necessary to address whether the posited duty would give rise to inconsistent obligations in the performance of that function or conflicting claims upon the exercise of the power.[37] The reasons of the majority in the Court below disregard those questions entirely.

45. There is no warrant in the text of s 148B(5) for positively requiring that the Director of the Department report to police the abuse suffered by the Respondents. Upon the satisfaction of the pre-conditions articulated therein, that subsection empowers the Director to "take such action as he believes appropriate, which *may* include reporting those matters to a constable of police" (emphasis added). The provision does not in terms impose on the Director an obligation to exercise the power of reporting to the police if he or she is satisfied that a child in respect of whom a notification has been made has been assaulted or ill-treated. Instead, the Director is invested with a discretion – no doubt by reason of the breadth and delicacy of the issues engaged in determining the "appropriate" course of action.[38] As the Court has observed in a different statutory context, the existence of that discretion recognises that there will properly be circumstances in which the Director, acting reasonably, would *not* report the

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[35] So described in *Amaca Pty Ltd v New South Wales* (2004) 132 LGERA 309 at [64] (Ipp JA; Mason P and McColl JA agreeing).

[36] *Kirkland-Veenstra* at [112] (Gummow, Hayne and Heydon JJ); *Graham Barclay* at [146], [149] (Gummow and Hayne JJ); *Pyrenees* at [126] (Gummow J).

[37] *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1 at [159] (Meagher JA; Leeming JA agreeing); *Sullivan v Moody* (2001) 207 CLR 562 at [60] (**Sullivan**); *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [29]-[33].

[38] Compare *X v State of SA (No 3)* [2007] SASC 125 at [193].

matter to police.[39] Those circumstances are considered further below. The formulation of the duty of care by the majority as being one to "take *all* reasonable steps" (CA[276]; emphasis added) is inconsistent with the discretionary power to take "such action as [the Director] believes appropriate", which indicates a legislative intention that the repository "decide for itself whether and in what manner the power should be exercised".[40]

46. Nor does the context and purpose of the *Child Welfare Act*, and more specifically s 148B(5) thereof, provide any basis for the imposition of a positive duty to act in the manner mandated by the majority of the Court of Appeal. The purpose of s 148B, as identified by Basten JA, was plainly to enhance the protection of children from abuse (CA[49], [79]). Conformably with that purpose, Ms Quinn and fellow officers of the Department took immediate steps to remove the Respondents from their home following receipt of the initial complaint, and instituted proceedings in the Children's Court which would have the effect of removing LX from the home and would thereby eliminate, or at least reduce, the risk of further abuse being inflicted. No complaint is now made as to those actions.

47. To require that, in addition to those steps, the matter be reported to police for the apparent purpose of arrest and prosecution is to assume rather than confront the possible consequences of that course for the Respondents; the same vice is apparent in Ward JA's emphasis upon the obviousness of the "need to protect the children from access to them by the step-father" (CA[275]), in support of her Honour's articulation of the content of the duty. Thus, the possibility that LX might be granted bail in the event of an arrest actually taking place would need to be considered by the Director, along with the question of whether LX would plead guilty to any charges subsequently laid. In the absence of such a plea, the requirement for the Respondents to give evidence against LX and the ramifications of that experience for them would likewise need to be addressed by the repository of the discretion under s 148B(5).

48. In this regard, DC gave evidence of a conversation with Ms Quinn at the time of the subject events in which the latter indicated that LX could not be charged "because [TB] is not mentally capable of coping with the stress of it".[41] Ms Quinn's awareness of the precarious mental state of TB in particular is evident in her report of 20 June 1983, where Ms Quinn noted that she had recently become aware that TB had cut her wrists on two occasions (CA104], [188]). As Basten JA noted in the Court below, concerns such as these as to the deleterious effect upon the Respondents of giving evidence against their step-father are to some degree borne out by the criminal proceedings that ultimately took place in 2005, where the experience of giving evidence against LX "appears to have triggered a psychological collapse in each case" (CA[85]). The complexities of the choices to be made about the welfare of the Respondents, and TB in particular, and the paramount importance given to

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[39] *Kirkland-Veenstra* at [82] (Gummow, Hayne and Heydon JJ), [144] (Crennan and Kiefel JJ).
[40] *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at [18] (Brennan CJ).
[41] As Basten JA noted, it is not clear whether the primary judge rejected DC's account of that conversation but in any event, the circumstances of the conversation were "less important than the plausibility of the explanation (whether proffered by the district officer or not)": CA[84].

protecting them from "the possibility of further abuse and from living in fear of abuse", are evident in Ms Quinn's report of 19 September 1983 to the Children's Court.[42]

49. These considerations, which are by no means exhaustive, illustrate that the primary purpose of the *Child Welfare Act* to protect victims of child abuse from further harm would in many cases be subverted rather than advanced by the imposition of a positive duty actionable in negligence for the Director to report the matter to police. The interests of young victims of sexual and physical abuse, and the (separate) public interest in prosecuting criminal offenders, are not co-extensive and will in many cases directly conflict. Indeed, there are reasons for thinking that the reporting mechanism in s 148B(5) was not intended as a means of instituting criminal proceedings: see Basten JA at CA[44]-[45]. The power conferred by s 148B(5) is one for the protection of children rather than the enforcement of the criminal law, which doubtless informs the content of the power to take "such action as [the Director] believes appropriate". A mandatory duty at common law for the Director to report matters to police would serve impermissibly to "distort [the] focus" of the statutory decision-making process and its primary emphasis upon the protection of young victims of abuse.[43] Incompatibility of this kind between the powers and functions arising under the *Child Welfare Act* and the posited duty to report to the police ought properly to preclude a finding that the duty extends so far.[44] The majority in the Court below did not advert to those considerations.

50. This principle is illustrated by the decision in *Hunter and New England Local Health District v McKenna*,[45] where this Court held that the respondent hospital did not owe a common law duty of care towards the relatives of a mentally ill man who killed his friend after being discharged from the hospital. The effect of the relevant Mental Health Act was that a mentally ill person was not to be detained unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available. This Court found that the provisions of the Act identified those matters to which the hospital and the doctors were required to have regard in exercising or declining to exercise the powers, duties and responsibilities prescribed by the legislation regarding the involuntary admission and detention of mentally ill persons. Those provisions were inconsistent with the imposition of the propounded common law duty of care (at [33]).

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. However, as Basten JA observed in dissent, "that too was done" (CA[94]; see also [82]). So much was at least implicitly acknowledged by Ward JA, who remarked that the "Department certainly took a number of steps" to protect the Respondents from the risk of further harm at the hands of their stepfather, including "carrying out a prompt investigation, placing the children away from the home, and instigating proceedings in the Children's Court" (CA[276]). Indeed the evidence went further, supporting an inference that consideration had at least

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[42] Exhibit A.12 before the primary judge.
[43] *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [93] (Spigelman CJ; Mason P and Giles JA relevantly agreeing) (***Paige***).
[44] *Sullivan* at [42], [50], [55], [60], [62]; *Paige* at [131], [177], [182] (Spigelman CJ; Mason P and Giles JA relevantly agreeing).
[45] (2014) 253 CLR 270.

been given to reporting the matter to the police in accordance with the Department's usual practice at the time (contrary to the inference drawn by the majority at CA[369] that there was a failure to "consider/implement" that step).[46]

52. As set out above, the abuse experienced by each of the Respondents and the appropriate means of protecting them from further harm was the subject of regular consideration by the Children's Court in 1983 over the course of a number of hearings in the Children's Court Proceedings. The Children's Court was empowered by s 136 of the *Child Welfare Act* to make "such order as circumstances require for the care of [the Respondents]" if their health, welfare or safety were likely to be endangered. However, at no stage did the relevant magistrate inquire of Ms Quinn as to whether the Department had reported the subject complaints to the police, nor suggest that such a course be taken or considered. As Basten JA remarked, "[i]f an independent judicial officer responsible for making orders for the protection of children and clearly intent on that exercise did not think reporting to the police essential for the purpose of protecting the victims, it reeks of hindsight for a court, 30 years later, to adopt a different view" (CA[127]).

53. There being no other challenge to the decisions taken by the officers of the Department in discharging the various powers and functions under the *Child Welfare Act*, it follows that no liability in negligence arises.

B. Vicarious liability

The judgments below

54. The Respondents' pleaded case against the Appellant was twofold:

a) First, that the State itself owed the Respondents a direct duty of care;[47] and

b) Secondly, that the State was vicariously liable for the "acts and conduct" of "the Second Defendant" (Ms Quinn) and "[the Department's] officers and employees".[48]

55. The particulars of negligence with respect to the allegations against Ms Quinn at first instance were materially identical to those made against the Appellant.[49] No such allegations were made against any named or otherwise identified officers or employees of the Department.

56. As Basten JA observed, no legal basis for the direct duty asserted to be owed by the Appellant was identified by the Respondents (CA[15]). His Honour also noted that, though the Appellant was sued pursuant to s 5(2) of the *Crown Proceedings Act 1988* (NSW), neither that section nor its predecessors created a cause of action (CA[15]). In any event, the primary judge made no finding that the Appellant owed a direct duty of care to the

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[46] See the oral evidence of Ms Quinn at T462.12-14; T466.9; T466.18; T466.35-38; T475.45; T476.1-6; Statement of Francis Patrick Maguire dated 7 July 2014 at [10], [17], [23]; Oral evidence of Mr Maguire at T512.5-10; Oral evidence of Mr Frost at T568.25-31, T571.50 – T572.5.

[47] Second Further Amended Statement of Claim at [52].

[48] Second Further Amended Statement of Claim at [56]; Defence to the Second Further Amended Statement of Claim at [56].

[49] Second Further Amended Statement of Claim at [53].

Respondents and the absence of such a finding was not challenged in the Court below (CA[25]).

57. In respect of Ms Quinn, the primary judge found that she did not owe any duty of care to the Respondents actionable in negligence and that, in any event, the steps actually undertaken by her "were appropriate action for the purpose of s 148B(5)(b)" of the *Child Welfare Act* (TJ[32], [111]). Ms Quinn was not joined as a party to the appeal to the Court below and no challenge was made to the finding that she did not owe a duty of care. It followed that the Respondents' appeal to the Court of Appeal logically fell to be assessed on the basis that the Appellant was vicariously liable for the "acts and conduct" of other "officers and employees" of the Department.[50] But no "acts and conduct" were pleaded against any such officer or employee.

58. The majority in the Court of Appeal addressed the questions raised by those proceedings in terms of a duty of care owed by "the Department" (see e.g. CA[276], [412]). However, New South Wales State Government departments such as the former Department of Youth and Community Services do not have separate legal personality but are rather "aspects or manifestations of the Crown in the right of the State of New South Wales".[51] Nor is the Department a "person" for the purpose of s 5B and associated provisions of the *Civil Liability Act*.[52]

59. Justice Ward stated that the primary judge's finding of breach on the part of the Department "must be understood as relating to a failure by the relevant superior officer or employee of the Department to whom Ms Quinn reported the abuse and who had the responsibility to implement the guidelines" (CA[216]). However, no "superior officer or employee" was held to have acted negligently in breach of any common law duty, either at first instance or on appeal. Absent such a finding, there was no relevant tortious act for which the Appellant could vicariously be held responsible.

No breach by individual officer(s)

60. The starting point is that an employer is vicariously liable for tortious acts committed by an employee in the course or scope of the latter's employment.[53] In the context of proceedings brought against the Crown, an action for negligence does not lie unless either an officer or servant thereof owed a duty of care to the claimant in the performance of his or her duties, or the Crown itself owed such a duty which the subject officer or servant was selected to

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[50] Second Further Amended Statement of Claim at [56]; Defence to the Second Further Amended Statement of Claim at [56].

[51] *Haines v Tempesta* (1995) 37 NSWLR 24 at 30; *The Application of the Attorney General for New South Wales dated 4 April 2014* (2014) 246 A Crim R 150 at [36] (Macfarlan JA; Beazley P and Bellew J agreeing).

[52] While the term "person" is relevantly defined by s 21(1) of the *Interpretation Act 1987* (NSW) to include "a body corporate or politic", the Department does not meet this description: see *Okwume v Commonwealth of Australia* [2016] FCA 1252 at [235] (Charlesworth J). More generally, see *Lipohar v The Queen* [1999] HCA 65; 200 CLR 485 at [48] and [107]; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156 at [50]; and *Sneddon v State of New South Wales* [2012] NSWCA 351 at [206].

[53] See e.g. *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 at [48]-[58]; *Hollis v Vabu* (2001) 207 CLR 21; *Prince Alfred College Incorporated v ADC* (2016) 90 ALJR 1085.

perform.[54] However, vicarious liability on the part of the Crown will be established only where a breach of such a duty of care has been committed by an individual officer.[55] This requires a claimant to identify the officer and prove the tortious act concerned.[56]

61. This principle was enunciated by Windeyer J in *Parker v Commonwealth*,[57] where his Honour reviewed the authorities before observing (at 301; citations omitted) that:

> ...however the principle of liability should be expressed, I think that the Commonwealth is only liable for the acts or omissions of a servant if the servant would himself be liable. In the recent case of *Imperial Chemical Industries Ltd v Shatwell* [1964] UKHL 2; (1965) AC 656, at p 686, Lord Pearce said: 'Unless the servant is liable the master is not liable for his acts; subject only to this, that the master cannot take advantage of an immunity from suit conferred on the servant'.

62. The present case does not necessitate any inquiry into the discrete question of whether vicarious liability will exist where the primary wrongdoer is immune from suit or where some procedural bar otherwise exists to such a claim.[58]

63. Here, neither the primary judge nor the majority in the Court of Appeal made any finding that an individual officer or employee of the Department was liable in tort for the negligent exercise or non-exercise of the powers and functions arising under the *Child Welfare Act*. Indeed, Sackville AJA apprehended that the Respondents' claim rested upon an "independent duty of care" owed by the Department (CA[412]) and framed his Honour's additional observations accordingly without directing attention to the position of individual officers (see e.g. CA[410]-[412]).

64. Save for Ms Quinn, the only individual whose acts and conduct were the subject of direct consideration by the majority was Mr Frost, being Ms Quinn's immediate supervisor within the Department and the individual responsible for child protection matters in the relevant office. Justice Ward accepted that the duty of care "owed by the relevant Departmental officers (in this case Ms Quinn's superior officers) in April 1983 included a duty to consider the various courses available" (CA[368]). Such a reference must be taken to capture Mr Frost as one of the "superior officers" in question, though no express finding was made as to any common law duty of care owing by him.

65. Earlier, Ward JA found that the "most probable inference" arising from the evidence was that no formal referral of the matter to police took place (CA[322]) and noted that implicit in such a finding was the conclusion "that, for whatever reason, Mr Frost did not follow the 'general

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[54] *Field v Nott* (1939) 62 CLR 660 at 670 (Latham CJ); *Parker v Commonwealth* (1965) 112 CLR 295 at 300 (Windeyer J).

[55] *Parker v Commonwealth* (1965) 112 CLR 295 at 300-302 (Windeyer J); *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 352-3 (Starke J); *De Bruyn v South Australia* (1990) 54 SASR 231 at 235 (King CJ); *Robertson v The Queen* (1997) 92 A Crim R 115 at 121-22 (Steytler J; Malcolm CJ and Franklyn J agreeing).

[56] *Okwume v Commonwealth of Australia* [2016] FCA 1252 at [236] (Charlesworth J).

[57] (1965) 112 CLR 295.

[58] As to which, see s 3C of the *Civil Liability Act 2002* (NSW). More generally, see *Smith v Moss* [1940] 1 KB 424; *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268 at [115] (Beazley JA; Mason P and Young CJ in Eq agreeing); *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78 at [48]-[58].

practice', or his usual practice, in this particular case" (CA[323]). However, Ward JA then observed (at CA[323]) that:

> That does not require a finding that he recklessly disregarded his duties ... nor was there some denial of procedural fairness to the respondent arising from the fact that it was not put to him in cross-examination that he had not followed his usual practice in this instance. Mr Frost's professional reputation was not in issue.

66. Whatever be the precise import of those remarks, at no stage did either Ward JA or Sackville AJA in his Honour's additional observations find that Mr Frost had breached a duty of care by failing to follow his usual practice of reporting matters of child sexual abuse to the police. Absent any finding of breach with respect to Mr Frost or indeed any other relevant officer or employee, there was no proper basis upon which the Appellant could be held vicariously liable in negligence.

67. The error that infected the majority's approach was the failure to interrogate the vicarious character of the Appellant's liability by addressing the anterior question as to whether an individual officer or employee of the Department had acted negligently. As Basten JA concluded in dissent, "[a]ny liability of the State was vicarious so that, in the absence of a finding as to a relevant duty breached by its officers, no liability arose" (CA[95]).

PART VII APPLICABLE LEGISLATIVE PROVISIONS

68. See annexure.

PART VIII ORDERS SOUGHT

69. The Appellant seeks the following orders:

a) The appeal be allowed.

b) Orders 1 and 2 of the NSW Court of Appeal made on 10 August 2016 be set aside and, in lieu thereof, the appeal to that Court be dismissed.

c) The Appellant pay the Respondents' costs of this appeal.

PART IX ESTIMATE OF TIME

70. It is estimated that 2 hours will be required for the presentation of the Appellant's oral argument.

Date: 17 March 2017

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S35 of 2017

BETWEEN:

The 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) ss 72, 76, 82, 136(1) and 148B as in force between 20 April 1983 and 31 July 1984.
2.	*Civil Liability Act 2002* (NSW) ss 5B and 43A as currently in force (note that these provisions have remained unaltered since their commencement).

Filed on behalf of the Appellant by:

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CHILD WELFARE

LAST OF THE PROVISIONS REPEALED 1-9-1993 (See GG 94 of 27-8-93 P4862)

1-8-1980) ACT REPEALED BY ACT No. 58/1987.

CHILD WELFARE ACT, 1939, No. 17

Reprinted under the Acts Reprinting Act, 1972

[Reprinted as at 6th August, 1980]

New South Wales

ANNO TERTIO

GEORGII VI REGIS

* *

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]

(2) In this Part of this Act and in any regulations made in relation to any of the matters referred to in this Part of this Act, the expression "street trading" includes the hawking of newspapers, matches, flowers and other articles, shoe-blacking and any other like occupation carried on in any public place.

PART XIV.

COMMITTAL OF NEGLECTED OR UNCONTROLLABLE CHILDREN OR YOUNG PERSONS OR OF JUVENILE OFFENDERS.

72. In this Part of this Act— Definitions.

"Drug" means drug of addiction or prohibited drug, as defined in section four of the Poisons Act, 1966, as subsequently amended, and includes any substance injurious to health. New definition added, Act No. 27, 1969, s. 2 (1) (c) (i).

"Neglected child" means child or young person—

(a) who is in a brothel, or lodges, lives, resides or wanders about with reputed thieves or with persons who have no visible means of support, or with common prostitutes, whether such reputed thieves, persons or prostitutes are the parents of such child or not; or

(b) who has no visible lawful means of support or has no fixed place of abode; or

(c) who begs in any public place, or habitually wanders about public places in no ostensible occupation, or habitually sleeps in the open air in any public place; or

(d) who, without reasonable excuse, is not provided with sufficient and proper food, nursing, clothing, medical aid or lodging, or who is ill-treated or exposed; or

(e) who takes part in any public exhibition or performance within the meaning of Part XIII of this Act whereby the life or limb of such child is endangered; or

(f) who, not being duly licensed under this Act for that purpose, is engaged in street trading within the meaning of Part XIII of this Act; or

(g) whose parents are drunkards, or, if one be dead, insane, unknown, undergoing imprisonment, or not exercising proper care of the child or young person, whose other parent is a drunkard; or

Substituted paragraph, Act No. 27, 1969, s. 2 (1) (e) (ii).

(h) who is found—

(i) in any place where any drug is unlawfully manufactured, prepared, administered, consumed, used, smoked, distributed or supplied; or

(ii) administering, consuming, using or smoking any drug,

and is in need of care, protection or control by reason thereof;

(i) who is living under such conditions as indicate that the child or young person is lapsing or likely to lapse into a career of vice or crime; or

(j) who in the opinion of the court is under incompetent or improper guardianship; or

(k) who is destitute; or

(l) whose parents are unfit to retain the child or young person in their care, or, if one parent be dead, insane, unknown, undergoing imprisonment, or not exercising proper care of the child or young person, whose other parent is unfit to retain the child or young person in his care; or

(m) who is suffering from venereal disease and is not receiving adequate medical treatment; or

(n) who is falling into bad associations or is exposed to moral danger; or

(o) who, without lawful excuse, does not attend school regularly; or Amended, Act No. 27, 1969, s. 2 (1) (e) (iii).

(p) who tattoos himself, or allows himself to be tattooed by another person, in any manner on any part of his body without having first obtained the written permission of his parent or guardian to be tattooed in that manner on that part of his body. New paragraph added, Act No. 27, 1969, s. 2 (1) (e) (iii).

73. Any justice may, upon oath being made before him by an officer authorised by the Minister in that behalf or by any constable of police, that, having made due inquiry, he believes any child or young person to be a neglected or uncontrollable child or young person— Warrant for apprehension. Act No. 21, 1923, s. 50.

(a) issue his summons for the appearance of such child or young person before a court; or

(b) in the first instance issue his warrant directing such child or young person to be apprehended.

74. Any officer authorised by the Minister in that behalf or any constable of police may, although the warrant is not at the time in his possession, apprehend any child or young person for whose apprehension a warrant has been issued under section seventy-three of this Act. Apprehension. cf. Act No. 21, 1923, s. 51.

Warrant to search in brothel.
Act No. 21, 1923, s. 52.
Amended, Act No. 27, 1969, s. 2 (1) (f).

75. (1) If it appears to any justice on information laid before him on oath by any credible person, that there is reasonable cause to suspect that a child or young person is in a place which is a brothel, or is in a place where any drug is unlawfully manufactured, prepared, administered, consumed, used, smoked, distributed or supplied, and is in need of care, protection or control by reason of being in such a place, such justice may issue his warrant authorising any constable of police or any other person named therein to search in such place for any child or young person, and to take such child or young person to a place of safety there to be detained until dealt with pursuant to this Act.

(2) Any constable of police or person authorised by warrant under this section to search for a child or young person may enter (if need be by force) into any house, building or other place specified in the warrant, and may remove such child or young person therefrom.

(3) Such constable of police or person may be accompanied by—

(a) a medical practitioner, or

(b) the person giving the information if he so desires, unless the justice otherwise directs.

(4) It shall not be necessary in the information or warrant to name the child or young person.

Apprehension of child in brothel, etc.
Act No. 21, 1923, s. 53.
Amended, Act No. 27, 1969, s. 2 (1) (g).

76. Any officer authorised by the Minister in that behalf or any constable of police may without warrant apprehend any child or young person who is in a place which is a brothel, or is in a place where any drug is unlawfully manufactured, prepared, administered, consumed, used, smoked, distributed or supplied, and is in need of care, protection or control by reason of being in such a place, or who he has reason to believe is a neglected or uncontrollable child or young person.

(ii) a person aged 18 years or upwards who has his guardianship;

(iii) in the case of a child or young person, with the consent of a person referred to in subparagraph (i) or (ii) or, in the case of a young person, with his consent—a person aged 18 years or upwards who is neither a person referred to in either of those subparagraphs nor a member of the police force; or

(iv) a duly qualified legal practitioner of his own choosing,

or unless the person acting judicially is satisfied that there was a proper and sufficient reason for none of the persons referred to in subparagraph (i), (ii), (iii) or (iv) to have been present at the place in the police station where the statement, confession, admission or information was made or given throughout the period of time during which it was made or given and the person so acting considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.

(4) Subsection (3) does not apply in respect of any particulars required to be given by or under any other Act.

82. (1) If a court finds that a child or young person is a neglected or uncontrollable child or young person it may— Power of court at hearing. cf. Act No. 21, 1923, s. 58.

(a) admonish and discharge the child or young person; or

(b) release the child or young person on probation upon such terms and conditions as may be prescribed or as the court may, in any special case, think fit, and for such period of time (whether expiring before or after the date upon which the child or young person attains the age of eighteen years) as the court may think fit; or

(c) commit the child or young person to the care of some person who is willing to undertake such care upon such terms and conditions as may be prescribed or as the court may, in any special case, think fit, and for such period of time (whether expiring before or after the date upon which the child or young person attains the age of eighteen years) as the court may think fit; or

(d) commit the child or young person to the care of the Minister to be dealt with as a ward admitted to State control; or

(e) commit the child or young person to an institution, either generally or for some specified term (whether expiring before or after the date upon which the child or young person attains the age of eighteen years) not exceeding three years.

New subsection added, Act No. 20, 1977, Sch. 4 (2).

(2) If a court finds that a child is a neglected child it may release the child—

(a) upon such terms and conditions as the court may think fit and as are willingly undertaken to be observed by the child's parents, one of the child's parents or another person approved by the court; and

(b) for such period of time (whether expiring before or after the date upon which the child attains the age of 16 years) as the court may think fit.

Powers of court. Summary offences. cf. Act No. 21, 1923, s. 59.

83. (1) Where a child or young person is charged before a court with a summary offence, the court may, if the child or young person admits the offence, or if the court finds the charge is proved—

(a) release the child or young person on probation upon such terms and conditions as may be prescribed or as the court may, in any special case, think fit, and for such period of time (whether expiring before or after the date upon which the child or young person attains the age of eighteen years) as the court may think fit; or

(2) A certificate referred to in subsection one or (1A) of this section shall be obtained at the expense of the Department of Youth and Community Services, and retained by the Director. Amended, Act No. 27, 1969, s. 5 (b) (ii); Act No. 90, 1973, Sch.

(3) Any person who contravenes the provisions of this section shall be liable to a penalty not exceeding forty dollars. Amended, Act No. 33, 1965, s. 4 (2).

135. Any officer authorised by the Minister in that behalf or any constable of police may take any child or young person, in respect of whom there is reason to believe that an offence has been committed, to a shelter, and such child or young person, and any child or young person who seeks refuge in a shelter, may be there detained until he can be brought before a court. Removal of child to a place of safety. cf. Act No. 21, 1923, s. 44.

136. (1) Where it appears to a court or any justice that an offence has been committed in the case of any child or young person brought before such court or justice, and that the health, welfare or safety of the child or young person is likely to be endangered unless an order is made under this section, the court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care of the child or young person until a reasonable time has elapsed for the bringing and disposing of any charge against the person who appears to have committed the offence. Care of child pending investigation. Act No. 21, 1923, s. 45.

(2) An order under this section may be enforced notwithstanding that any person claims the custody of the child or young person.

137. (1) Any constable may arrest without warrant any person who commits, or who is reasonably suspected by such constable to have committed, an offence against this Act if the name and residence of such person are unknown to such constable and cannot be ascertained by him. Arrests without warrant. cf. Act No. 21, 1923, s. 46.

(2) * * * * * Repealed, Act No. 163, 1978, Sch. 1 (8).

(iii) neglects him;

(iv) does not well and truly observe, perform, and keep all the covenants, conditions, and agreements contained in any indenture or agreement entered into by him respecting any ward, and which by such indenture or agreement he has bound himself, or agreed, to observe, perform or keep,

shall be guilty of an offence against this Act.

Offence by person who tattoos a child or young person.
New section added, Act No. 27, 1969, s. 2 (1) (v).

148A. A person who in any manner tattoos any part of the body of a child or young person shall be guilty of an offence against this Act unless he has first obtained the written permission of the parent or guardian of the child or young person to tattoo the child or young person in that manner on that part of his body.

Notification of certain injuries to children.
New section added, Act No. 20, 1977, Sch. 5 (4).

148B.. (1) In this section—

"court", except in subsection (7) (d), means any court;

"prescribed person" means—

(a) a medical practitioner; and

(b) a person who is a member of any class of persons prescribed for the purposes of this paragraph, being a person who follows a profession, calling or vocation, other than a solicitor or barrister in the course of his profession, so prescribed, or who holds any office so prescribed.

(2) Any person who forms the belief upon reasonable grounds that a child—

(a) has been assaulted; or

(b) is a neglected child within the meaning of Part XIV,

may—

(c) notify the Director of his belief and the grounds therefor either orally or in writing; or

(d) cause the Director to be so notified.

(3) A prescribed person who, in the course of practising his profession, calling or vocation, or in exercising the functions of his office, as the case may be, has reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed shall—

(a) notify the Director of the name or a description of the child and those grounds either orally or in writing; or

(b) cause the Director to be so notified,

promptly after those grounds arise.

(4) A prescribed person who fails to comply with subsection (3) shall be guilty of an offence against this Act.

(5) Where the Director has been notified under subsection (2) or (3), 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.

(6) Where a person notifies the Director pursuant to subsection (2) or (3)—

(a) the notification shall not, in any proceedings before a court, tribunal or committee, be held to constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct;

(b) no liability for defamation is incurred by reason of the making of the notification;

(c) the notification shall not constitute a ground for civil proceedings for malicious prosecution or for conspiracy;

(d) subject to subsections (7) and (8), the notification shall not be admissible in evidence in any proceedings before a court, tribunal or committee and no evidence of its contents is admissible; and

(e) subject to subsection (7), a person shall not be compelled in any proceedings before a court, tribunal or committee to produce the notification, or any copy of, or extract from the notification (if it is capable of being produced) or to disclose, or give any evidence of, any of the contents of the notification.

(7) Subsection (6) (d) and (e) does not apply in relation to—

(a) the admissibility in, or of, evidence of a notification made under subsection (2) or (3);

(b) the production of such a notification, a copy thereof or an extract therefrom; or

(c) the disclosure or giving of evidence of the contents of such a notification,

either—

(d) in any proceedings before a court, within the meaning of section 81B, in which the child to whom the notification relates is brought before the court as a neglected child; or

(e) in support of, or in answer to, a charge or allegation made in proceedings referred to in subsection (6) (d) or (e) against any person in relation to his exercising or performing any of his powers, duties or functions in pursuance of this Act.

(8) Subsection (6) (d) does not apply where a notification under subsection (2) or (3) is tendered in evidence, or evidence in respect of such a notification is given—

(a) by the person by whom the notification was, or was caused to be, made; and

(b) in answer to a charge or allegation made against him in proceedings referred to in subsection (6) (d).

Medical examination: reputedly injured children.

New section added, Act No. 20, 1977, Sch. 5 (4).

148C. (1) Where the Director or a constable of police believes on reasonable grounds (which may consist wholly or partly of information received by him) that a child has suffered injury to his health as a result of the child's having been assaulted, ill-treated or exposed, he may serve a prescribed notice—

(a) naming or describing the child; and

(b) requiring the child to be forthwith presented to a medical practitioner specified or described in the notice at a hospital or another place specified in the notice for the purposes of the child's being medically examined,

on the person who appears to him to be a parent of the child or to have the care of the child for the time being.

(2) A person who fails to comply with the requirement contained in a notice served on him under subsection (1) shall be guilty of an offence against this Act unless it is proved that the person was not a parent of the child described in the notice and did not have the care of the child at the time the notice was served.

(3) Where a person fails to comply with the requirement contained in a notice served under subsection (1), a constable of police or an officer authorised by the Minister in that behalf may present the child in respect of whom the notice was served, or cause the child to be presented, to a medical practitioner at a hospital or another place for the purpose of the child's being medically examined.

Civil Liability Act 2002 No 22

Current version for 1 July 2015 to date (accessed 13 March 2017 at 12:51)

Status information

New South Wales

Status information

Currency of version

Current version for 1 July 2015 to date (accessed 13 March 2017 at 12:51).
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Provisions in force

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See also:

Discount Rate Reduction (Miscellaneous Acts Amendment) Bill 2017 [Non-government Bill: Mr C G Barr, MP]
Motor Accident Injuries Bill 2017

Responsible Minister

Attorney General

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the *Interpretation Act 1987*.

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Civil Liability Act 2002 No 22

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

Civil Liability Act 2002 No 22

43A Proceedings against public or other authorities for the exercise of special statutory powers

(1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.

(2) A ***special statutory power*** is a power:

(a) that is conferred by or under a statute, and

(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

(3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

(4) In the case of a special statutory power of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.