Casenotes

Duty Of Care And The Investigation Of Child Sexual Abuse – The Ultimate Australian Solution?: Sullivan v Moody; Thompson v Connor (2001) 183 ACR 404

It is so well established as really not to need detailed documentation that the fact-finding process as it applies to allegations of child sexual abuse has been somewhat confused, at least insofar as it has been interpreted by the High Court of Australia. As is, by now, notorious, that court in *M v M* (1988) 166 CLR 69 at 75 devised the test of "unacceptable risk" in such cases without specifying the nature of unacceptability and, indeed, of risk. Unfortunately, the general solution has not been clarified or illuminated by the recent decision of that Court in *Sullivan v Moody; Thompson v Connon* (2001) 183 ALR 404, which concerns the existence of a duty of care resulting from investigations into allegations of sexual abuse. *Sullivan v Moody* involved appeals to the High Court of Australia from two decisions of the Full Court of the Supreme Court of South Australia in *Hillman v Black* (1996) 67 SASR 490 and *CLT v Connon* (2000) 77 SASR 449.

In *Sullivan v Moody,* both male appellants had been suspected of sexually abusing their children. The first appellant was the father of a young daughter who had made particular comments to her mother which, ultimately, led to her being examined by a medical practitioner. That practitioner concluded that the daughter had been sexually abused, although no criminal proceedings were laid against the appellant. However, the allegations were pursued in proceedings under the *Family Law Act* 1975 (Cth), but were resolved in his favour. The second appellant was the father of three sons and, in 1986, the appellant's wife attended a sexual assault referral centre with the children. One child was examined by one medical practitioner and the others by another and both practitioners concluded that the children had been sexually abused. The second appellant was charged with sexual offences, although these charges were eventually dropped.

The appellants denied abusing their children and alleged that the various medical practitioners, social workers and others who had been involved in the investigations of the allegations owed them a duty of care to exercise reasonable care in the conduct of the investigation and that, in consequence, they had been negligent in concluding that the appellants had abused their children. They alleged that, as a result of the negligence, they had suffered shock, distress and psychiatric injury, as well as personal and financial loss. The litigation was carried on against the background of the *Community Welfare Act* 1972 in South Australia which, while generally establishing a scheme for the protection of children, required, by reason of s. 25, the respondents, in carrying out their responsibilities under the Act, to regard the interests of children as the paramount consideration. In both cases, at first instance and in the Full Court of the Supreme Court of South Australia, statements of claim had been struck out on the basis that they had failed to disclose a cause of action. The appellants appealed, unsuccessfully, to the High Court of Australia.

Two introductory points must be made: first, the present writer has been critical of both of the decisions of the Full Court of the Supreme Court of South Australia on the grounds that that Court had failed properly to take into account issues raised by earlier case law and, in consequence, failed correctly to evaluate proper policy considerations.[1] It should be said, and this point is connected to the second, that the decisions of the South Australian Full Court are easier to criticise because of the more detailed analysis of policy and earlier case law than exists in the High Court's decision. Second, unlike recent decisions of the High Court in various family related matters (see, for example, *Johnson v Johnson* (2000) 201 CLR 488 on judicial bias in the Family Court of Australia or *Re Colina; Ex parte Torney* (1999) 200 CLR 386 on contempt of court) *Sullivan v Moody* was both unanimous (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) and relatively brief.

The High Court noted (at 412) that the argument for the plaintiff had been conducted on the basis that it was foreseeable that harm of the kind allegedly suffered by the appellants might result from want of care on the part of those who investigated the possibility that the children had been sexually abused. The Court, in response, took the view that the fact that a matter was foreseeable, in the sense of being a real (rather than a far-fetched) possibility did not mean that liability necessarily arose. The reason why that was the case, the Court considered, was twofold: first, the law would subject, "...citizens to an intolerable burden of potential liability and constrain their freedom of action in a gross manner." Second, the High Court took the view that the tort of negligence would subvert

[1] See, F Bates, "Child sexual abuse, the fact-finding process and negligence: an opportunity lost?", (1998) 6 *Tort Law Review* 125 and F Bates, "Policy, bureaucracy, tort law and child sexual abuse : stirring the miasma", (2001) 9 *Tort Law Review* 183.

many other principles of law and statutory provisions which had struck a balance of rights and obligations as well as duties and freedoms.

The present writer cannot agree with either of those assertions, especially because of the way in which they were couched. Although it is trite law to state, as did the High Court, that a defendant will only be liable in negligence in circumstances where the law imposes a duty to take appropriate care, that is (or ought to be) only the beginning of the inquiry. The fundamental issue, surely, is when ought such a duty to be imposed? A basic pointer is, it is suggested, to be found in the judgment of Richardson P of the New Zealand Court of Appeal in *Gartside v Sheffield, Young and Ellis* [1983] NZLR 37 at 51 where it was said that the recognition of a duty of care shared two important social objectives: first, to compensate deserving plaintiffs and, second, to promote professional competence. The *Gartside* case was concerned with legal practitioners and their responsibilities, but the analogy can, in this writer's view, be extended to medical practitioners and bureaucrats. Further, it has been admitted in various cases, including in the judgment of Prior J in *Hillman v Black* at 505, that the personal consequences for a person who is the object of ill-founded allegations of child sexual abuse can be extremely serious.

In *CLT v Connon*, there was judicial dispute between Doyle CJ and Gray J, regarding the relevant statutory provisions (*Community Welfare Act* 1972 (SA) ss 25, 91, 92), the former considering that the provision might provide a framework as the recognition of a duty, whilst the latter most emphatically did not. The High Court has ((at 2001) 183 ALR 404 at 408, 412, 417) accepted uncritically that the latter's view was correct because the purpose of the legislation was the protection of children. With respect, the High Court have failed to take into account a major policy initiative to be found in the *Family Law Act* 1975, as amended in 1995. The aims of the new Part VII, which was introduced in that year, were set out in s 60B(1) which states that the object of the new Part is to:

> "...ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities concerning the care welfare and development of their children."

Although Part VII is principally concerned with the consequences for children when their parents' marriage is dissolved, an analogy more in keeping than many of the others which were attempted during the history of the litigation in *Sullivan v Moody* becomes apparent.

Even if the sole purpose of the legislation, as was claimed, was the protection of children, that can be achieved in various ways. The provisions in the *Family Law Act* were aimed at ensuring that children had effective contacts and relationships with both of their parents where that was possible and desirable. Hence, it is suggested that if a child's relationship with a parent is damaged by an inept medical or bureaucratic policy, practice,

or decision and, particularly if a child or parent (who is more likely to contemplate legal action) suffers damage which is legally recognised, the imposition of a duty of care is likely to protect the relationship and, hence, the child. This is the more so when the comments of Richardson J in the *Gartside* case (above) are taken into appropriate account.

The recently introduced provisions in the Family Law Act were the result of policy derived by the Australian Family Law Council in its Report *Patterns of Parenting After Separation* (1992) which, in its initial chapters, represented a synthesis of social science literature which documented the need for children to have ongoing contact with both of their parents. In that thoughtful context, many of the assertions made boldly by the High Court in *Sullivan v Moody* do not compare, or stand up with, well. Thus, the High Court stated, (2001) 183 ALR 404 at 417, that the respondents':

> "...professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect the persons who were suspected of being the sources of that harm. The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount."

As has been suggested, both of these assertions are, at the very least, questionable.

The treatment of the policy issue generally by the High Court, (2001) 183 ALR 404 at 415, is still less satisfactory. There, the Court stated that:

> "The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to moral problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision making in particular cases."

What are those principles? On one level, one can agree with Lord MacMillan in *Donoghue v Stevenson* [1932] AC 562 at 619 that:

> "The criterion of judgment must adjust and adapt to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty, to take care, and that the party complaining should be able to prove that he has suffered damage as a consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship..."

On the other, there is the dictum of Widgery J to be found in *Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569 at 557 that, "The categories of negligence never close, but when the court is asked to recognise a new category, it must proceed with some caution."

The only way to decide between those attitudes is, in particular cases, to look for policies which underpin them. This is the more so, as Grey J had pointed out in *CLT v Connon* at 461 that the judges in the High Court decision in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 who had rejected the notion of proximity as a guide for the recognition of a duty had not replaced it with anything else.

In fine, the High Court's decision in *Sullivan v Moody* is a great disappointment on a number of levels. First, the logical processes to be found in it are seriously flawed. Second, the Court, especially, did not consider the relevance of policy both in relation to finding duty itself and nor did they deal in sufficient detail with the policy implications to be found in the facts of the particular case. Child sexual abuse and its ramifications are complex and may have repercussions for people other than those who are subject to the abuse. *Sullivan v Moody* has not resolved any of these issues even remotely satisfactorily.

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