

A wrong without a remedy

Sullivan v Moody & Ors and Thompson v Cannon & Ors [2001]

HCA 59 (11 October 2001)

The factual bases of these cases is indistinguishable from the South Australian Full Court decision in *Hillman v Black*,¹ where it was held that no duty of care was owed by a statutory authority, or its employees or agents, to a person who was wrongly accused of sexually abusing a child.² However, since that decision was based upon the use of proximity as the determinant of whether a duty of care exists in a novel case, the plaintiffs were given leave to appeal the reasoning and decision in *Hillman*.

In each of the cases the father was alleged to have sexually abused his children. These allegations resulted in the children being examined by doctors who reported their conclusions of suspected sexual abuse to the South Australian Department of Community Welfare. The Department's authority to act in these circumstances was based upon the *Community Welfare Act 1972* (SA).

Significantly, neither of the fathers was ever convicted of a criminal offence in relation to these events but each suffered adverse consequences in relation to their marriage and access to their children. The damage claimed was "shock, distress and psychiatric harm, and consequential personal and financial loss". The critical issue on appeal was whether the fathers were owed a

duty of care by the doctors who carried out the medical examinations and/or the Department who authorised and then acted upon the examination results.

The High Court decision

The five Justices³ delivered that rarity in the area of torts law, a single unanimous joint judgement. They held that neither the doctors nor the Department owed a duty of care to the plaintiffs/fathers. Significantly, despite s25 of the Act requiring the Department to promote, where practicable, a satisfactory relationship between the child and family members, the Court declined to draw any distinction between parents wrongly accused of sexual abuse and third parties to the family unit such as "a relative other than a parent, or a school teacher, or a neighbour, or a total stranger."⁴ This allowed the Court to raise the spectre of indeterminate liability.

Fundamentally, their Honours determined that to hold that a duty of care was owed would threaten the coherence of the law and would be incompatible with the statutory duty the defendants owed to children who were suspected of being sexually abused.⁵ In addition, the Court determined that to hold that a duty of care was owed would cut across other causes of action such as defamation for which defences such as privilege would be available.

The Court also took the opportunity to reaffirm the demise of "proximity"⁶ and to confirm that the three-stage *Caparo* approach does not represent the law in Australia.⁷ Instead their Honours stated, "Different classes of case give rise

to different problems in determining the existence and nature or scope, of a duty of care ... The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle."⁸

Comment

Whilst the decision in this case means that there is no remedy in tort available for a parent wrongly accused of child sexual abuse, the Court left open the question of "any potential tortious liability to the children involved."⁹ Unfortunately, this decision provides little practical assistance to practitioners who might wish to advise such a child when he or she reaches legal maturity. **PL**

Footnotes:

¹ (1996) 67 SASR 490 and see the decision at first instance at (1995) Aust Torts Rep 81-340.

² For a discussion of the Court of Appeal decision see F Bates, *Child Abuse, the Fact Finding Process and Negligence: an Opportunity Lost*. (1998) 6 Tort L Rev 125; and for the decision at first instance, F McGlone, *The Best Interests of the Child?* (1996) 4 Tort L Rev 18.

³ Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

⁴ At [63].

⁵ At [60], for example.

⁶ At [48].

⁷ At [49].

⁸ At [50].

⁹ At [24].