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 REPLY

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 ARGUMENT

A. Scope of duty

2. The Respondents' submissions (**RS**) are directed largely towards the conceded existence of a duty of care on the part of the Appellant and the compatibility or otherwise of a private cause of action generally with the practice of the Department and the contemporaneous criminal law (RS[36]-[38], [40]-[55]). The Respondents do not confront the critical question that arises in the appeal, being the compatibility of the text, context and purpose of the *Child Welfare Act* with a common law duty of the particular scope identified by the majority in the Court below – namely, a mandatory duty actionable in negligence to report the subject abuse to the police.

3. *The Guidelines:* The Respondents rely upon the Department's Interdepartmental Guidelines for Child Protection (**Guidelines**) in an apparent attempt to reconcile the posited duty of care with the statutory framework in which the Department's officers operated (RS[51], [68]). In so doing, the Respondents mischaracterise both the effect and content of the Guidelines. Their reliance in this respect on the evidence of a Departmental officer of his understanding, more than 30 years later, of the effect of the Guidelines is misconceived (RS[53]-[54]).

4. Part 3 of the Guidelines, upon which the Respondents rely, was headed "Discretion" and relevantly addressed at [3.1.3] a decision to involve police in child abuse cases (AB 283.27). It provided that Resident District Officers of the Department "*may* make decisions to involve Police Officers" (AB 283.32; emphasis added) and that it would be "appropriate" for such a decision to be made in certain enumerated circumstances (AB 283.38-50). Any such decision to involve the police "must be made as soon as possible after notification" (AB 283.55-56). Contrary to the Respondents' assertion at RS[51] and [68], it is plain that the Guidelines did not impose any "requirement" to report the subject abuse to the police but instead contemplated a discretion to do so, which discretion should be exercised – if it were to be exercised at all – as soon as possible. So much was accepted by Ward JA in the Court below, who characterised the Guidelines as "procedural" in terms and found that they "d[id] not impose on the Department a mandatory obligation to report suspected child abuse to the police" (AB 642[270]-[271]).

5. Moreover, the Guidelines themselves recognised that "[p]olice involvement is not synonymous with court action" (AB 283.58) and that court action will not always be appropriate in cases of child abuse. Importantly, the Guidelines stated at [3.2.2] that "[o]fficers of the Police Child Mistreatment Unit may make decisions to lay charges under the Crimes Act and/or complaints under the Child Welfare Act when consensus has been reached" and that "[w]here consensus is not reached the matter shall be referred to the Assistant Commissioner (Crime) and to the appropriate Regional Director of the Department" (AB 284.21-30). As Basten JA observed, this statement "patently recognised that there may be conflicting views as to the appropriateness of court action" (AB 573[61]). The potential for such conflict is "inconsistent with the proposition that a child welfare authority should be placed under a common law duty which included reporting cases to the police for the purpose of prosecution" (ibid). The Guidelines therefore expose the very incompatibility that precludes any compulsory common law duty to report the present matters to the police.

6. In so far as the Respondents' submissions seek to justify a mandatory common law duty to report by reference to the then extant offence of misprision of felony (RS[55], [68], [89(iv)]), those submissions misapprehend the nature of the assessment that must be undertaken when determining the scope and content of the duty owed by a public body invested with statutory powers. As the Appellant submitted in chief (at [44]), that assessment is concerned with the compatibility of the common law duty articulated by the majority with the terms, scope and purpose of the relevant *statutory* scheme and, in particular, with the performance of the power conferred by s 148B(5)(b) of the *Child Welfare Act*. The content and theoretical application of the contemporaneous criminal law cannot provide a basis for reconciling the posited duty with the due performance of those statutory functions and powers, with their paramount interest in enhancing the protection of children from abuse. As the evidence in this case indicated, the public interest in prosecuting criminal offenders is not synonymous with the interests of young victims of sexual and physical abuse (see AB 583.1-10, 583.49-51, 594.20-22).

7. *No obligation to prevent harm:* The Respondents' submissions are punctuated by a refrain that "[t]he abuse continued. Reporting would have stopped it" (RS[82], [100]; see also RS[67]). That contention is misconceived as a matter of both fact and law.

8. As a matter of law, the Respondents' contention has the impermissible effect of recasting the common law obligation to which the Appellant (through its officers) was subject as one to *prevent* harm from occurring. As Gummow J remarked (with the concurrence of Heydon J) in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 300 (***Dederer***), "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care" (at [43]) and the obligation to exercise reasonable care "must be contrasted with an obligation to prevent harm occurring to others. The former, not the latter, is the requirement of the law" (at [51]). The Respondents' submission elides the question of whether the Appellant failed to prevent the abuse from continuing (a question of causation grounded firmly in hindsight) with the discrete question of whether the Appellant through its officers exercised reasonable care. That elision distorts the prospective focus of the requisite determination as to the scope and content of the common law duty. Indeed, the same error is apparent in the formulation of the duty favoured by the majority in the Court below. That formulation mandates a particular form of action (*viz.* reporting the abuse to police) without reference to the exercise of reasonable care and would therefore give rise to a quasi-automatic form of liability wherever the abuse was not so reported. So much is starkly at odds with the accepted principle that the exercise of reasonable care is "always sufficient to exculpate a defendant in an action in negligence" (*Dederer* at [50]).

9. As a matter of fact, the Respondents' assertion that the act of reporting the abuse to the police would have prevented that abuse from continuing cannot be sustained. That assertion (relevant to matters of causation rather than the scope and content of the duty) necessarily assumes that a report to police would be followed by the immediate arrest of LX, a denial of bail, the laying of criminal charges and either a plea of guilty or the prosecution of those charges to a guilty verdict. However, as the Guidelines make plain, court action was *not* an automatic consequence of child sexual abuse being reported to police. So much was confirmed by Ms Quinn, who gave evidence that her experience and her recollection of the relevant period was "that a report to police didn't automatically mean an interview by the police, and it didn't automatically mean a charge" (AB 230.36-38). Nor did the primary judge make any direct finding as to whether LX would have been

denied bail in the event that criminal charges were laid (AB 506[177], [178]) so as to eliminate the possibility of further abuse occurring in the period following any arrest (cf. RS[95]).

10. The Respondents submit that "the Appellant was clearly called upon to take immediate protective action once it was on notice of the extent of risk" (RS[67]). However, contrary to the Respondents' assertion, the officers of the Department did not "[m]erely charg[e] the Respondents with being neglected children" (RS[67]) but instead took "a number of steps" to protect the Respondents from the risk of further harm at the hands of LX, as articulated and accepted by Ward JA in the Court below (AB 644[276]). No complaint is now made as to those actions; rather, as the primary judge recorded, the sole basis upon which the conduct of the Departmental officers was impugned at first instance was that those officers failed to report the subject abuse to the police (AB 462[35], 488[111]). That position was maintained on appeal.

11. In this regard, the Respondents' submission that "the Children's Court was known to offer no protection from the Stepfather" (RS[95]) is inherently inconsistent with the exoneration of Ms Quinn at first instance and with the absence of any challenge by the Respondents to the steps otherwise taken by Ms Quinn and her colleagues during the relevant period. The submission implies that Ms Quinn or other officers of the Department knew, or should have known, that court orders requiring LX not to reside at home and placing associated conditions on his interactions with the Respondents would be ineffective, so as to render negligent the officers' act of recommending such orders. However, no such finding was made either at first instance or in the Court below. Further, the case against Ms Quinn (who had primary responsibility for preparing the various reports and recommendations for the Children's Court) was affirmatively rejected, with the primary judge finding that she had been "careful, conscientious and diligent in the exercise of her functions for the protection of [the Respondents]": AB 488[111], 590[108]. The Respondents' submission cannot co-exist with that finding, from which no appeal was made.

12. The Respondents' emphasis on the question of prevention ultimately serves only to obscure the complexity and delicacy of the choices to be made by those tasked with considering prospectively the "appropriate" course of action for the protection of the Respondents under s 148B(5) of the *Child Welfare Act*. In the result, the Respondents' submissions fail to grapple with those considerations that might legitimately inform a decision *not* to involve the police in the exercise of the power arising under s 148B(5)(b).

13. *Consideration given to reporting:* The Respondents assert at various points in their submissions that there is no written or oral evidence that the Department through its officers ever considered reporting the subject abuse to the police (e.g. RS[75], [82], [89(vi)]). Again, that assertion is apposite not to the scope or content of the duty of care but to the asserted breach of the duty as formulated, and is in any event contrary to the wealth of evidence given on this topic by Ms Quinn. Ms Quinn testified that her usual practice in matters of child sexual abuse was to discuss with her superiors the issue of reporting to the police (AB 209.35-38, 235.12-14, 239.18-19, 239.35-38, 248.43-46) and that "knowing the practice that I had and how strongly I felt about the protection of children, I believe I would have [recommended to my superiors that the matter go to police]" (AB 253.10-13). In this respect, the Respondents' reference at RS[71] to a statement made by Ms Quinn to the police in January 2005 must be understood in the particular context within which that statement was made (as to which, see AB 477[71]).

14. To similar effect, Mr Maguire gave evidence that his usual practice was to report serious sexual assault matters to the police (AB 411[10], 412[17], 415[23], 265.5-8), as did Mr Frost (AB 270.29-31, 273.50-274.16). In those circumstances, the Respondents' contention that "there is no evidence a discretion was exercised" (RS[2]) finds no support in the evidence. A discretion was exercised on each occasion that officers within the Department took action to protect the Respondents, including through the institution and conduct of the Children's Court Proceedings and the various steps that were taken to remove the Respondents from the family home.

15. The Respondents contend that the "better view is that the [Appellant] inadvertently did not follow its own established procedure of reporting" (RS[71]). However, it was not put to either Mr Maguire or Mr Frost in cross-examination that they had failed to follow their usual practice in the instant case, whether inadvertently or otherwise, likely due to the Respondents' focus on Ms Quinn at trial. Although Ms Quinn could not specifically recall whether she raised with her superiors the matter of reporting to the police, it was nevertheless put to her in cross-examination that she had failed to do so, and she was able to give evidence as to her belief of what happened based upon her usual practice (e.g. AB 235.5-15). A like approach could and should have been taken with Messrs Maguire and Frost, despite their inability to remember the case (cf. RS[102]). *If* in fact the usual practice was not followed and the police were not formally notified, despite a thorough and expeditious investigation, proceedings in the Children's Court over the course of several months and the involvement of a number of Departmental officers, then the more probable inference arising from those circumstances is that a conscious decision was taken not to involve the police or to pursue any criminal prosecution. *Ex hypothesi*, it would "appear that the routine practice was not treated as mandatory in all cases" and was not considered necessary or appropriate in the present case for the protection and safety of the Respondents (AB 596[128]). The imposition of a mandatory common law duty to report the present matter to the police would therefore be inconsistent with the judgement inferentially formed both by the individual officers having primary responsibility for the Respondents' case, and by the magistrate at the Children's Court who "gave extensive consideration to the appropriate orders in the course of a number of hearings" (AB 596[127]). Such a duty is not grounded in any prospective assessment of what reasonable care in the exercise of its statutory powers required of the Departmental officers at the relevant time.

16. In this regard, and contrary to the Respondents' submission, the Appellant does not argue "that no duty or no useful duty exists" (RS[35]). The answer to the question rhetorically posed by the Respondents at RS[62] has been articulated and recorded at various stages of the proceedings: see e.g. AB 668[365], 669[367], 681[406]-[407].

17. *Section 43A:* The Respondents seek to invoke the primary judge's findings with respect to s 43A of the *Civil Liability Act* as an aid in identifying the scope of the common law duty in question (RS[80]). Such an approach is contrary to established authority (see AS[37]) and has the effect of inverting the requisite inquiry into the scope and content of the duty. As Basten JA observed in the Court below, s 43A does not affect the scope of any common law duty but instead identifies the standard of care to be applied in determining whether the duty so identified has been breached, and critically, it does so "assuming that a relevant obligation is established" (AB 581[78]; see also AB 588[100]-[101]). The formulation of the scope of the duty itself is therefore properly anterior to any application or consideration of s 43A.

18. The primary judge did not expressly address the scope or content of the duty; at most, his Honour addressed it implicitly when considering whether the failure to report constituted a breach of duty (as observed by Ward JA: AB 640[261]). By adopting that approach, his Honour's assessment of the question posed by s 43A assumed, without actually determining, the content of the duty. His Honour's finding at AB 486[104] was predicated upon the existence of the very obligation that is now in dispute, being a common law obligation on the part of the Appellant through its officers to notify the police of the abuse perpetrated by LX (see AB 461[33]-[34], 462[35], 463[39], 464[44], 465[46]). Further, that finding was made without first addressing the proper construction of s 148B(5) of the *Child Welfare Act* having regard to the text, scope and purpose of that provision and the consistency or otherwise of the propounded obligation with that particular discretionary power. It is a logical corollary of the Appellant's principal submission, that the scope of the duty does not extend to any mandatory duty to report, that the basis for the primary judge's findings on the twin questions of s 43A and breach falls away.

B. Vicarious liability

19. The Respondents' submissions ultimately reduce to the proposition that the State may be held vicariously liable, without any identification of a tortious act by an individual officer, where the moving party does not know which individual breached a duty of care.

20. Plainly, imperfections in memory and in the documentary record cannot obviate the need to make a finding of negligence on the part of an individual officer or employee before the State may be held vicariously liable. Were the position otherwise, then the burden of proof placed on a plaintiff could readily be circumvented in any case involving tortious acts allegedly committed in the course or scope of employment. As Charlesworth J observed in *Okwume v Commonwealth of Australia* [2016] FCA 1252 at [236], "[t]he allegation that the Commonwealth [and by analogy, the State] is vicariously liable for the torts of individual officers requires that [the Applicant] prove liability in tort of the individual officers concerned".

21. Contrary to the Respondents' assertion, it is *not* sufficient for this purpose that as between Messrs Maguire and Frost, "one of them failed" (RS[102]). The Respondents bore the onus of establishing that one or more Departmental officers had acted negligently and that the Appellant should be held vicariously liable for that tortious conduct. The Respondents by their pleadings, and at trial, identified Ms Quinn as the relevant Departmental officer, but failed to prove a case against her. Absent any finding that an officer negligently exercised or failed to exercise the powers and functions under the *Child Welfare Act* in breach of a common law duty owing to the Respondents, no vicarious liability was capable of arising.

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