

## **STATE OF NEW SOUTH WALES v DC & ANOR (S35/2017)**

Court appealed from: New South Wales Court of Appeal  
[2016] NSWCA 198

Date of judgment: 10 August 2016

Special leave granted: 10 February 2017

The Respondents, DC and TB, are sisters who were subjected to physical and sexual abuse by their stepfather between 1974 and 1983. In April 1983, when TB was aged 15 years and DC was aged 12, TB complained of the abuse to the then Department of Youth and Community Services (“the Department”). An officer of the Department, Ms Carolyn Quinn, immediately interviewed both girls and removed them from the family home. The following month, Ms Quinn commenced proceedings in the Cobham Children’s Court, which later ordered that the Respondents return to live with their mother on condition that the girls have no contact with their stepfather except at their request. (The stepfather had by that time moved out of the family home but continued to visit the Respondents’ mother.) The stepfather meanwhile admitted, during an interview conducted by Ms Quinn and another officer of the Department, that he had sexually interfered with the Respondents.

The stepfather’s abuse was not reported to the police, however, until the Respondents did so in August 2001. In September 2006 the stepfather was convicted of nine offences, including the rape and indecent assault of each of the Respondents and assault occasioning actual bodily harm to TB.

The Respondents later commenced Supreme Court proceedings against both the Appellant (“the State”) and Ms Quinn. The Respondents claimed damages for harm they allegedly suffered after April 1983 on account of the Department’s negligent failure to report the stepfather’s abuse to the police. The Respondents contended that the Department should have reported their complaints to the police, by exercising a discretionary power to do so that was conferred on the Director of Child Welfare (the head of the Department) by s 148B(5) of the *Child Welfare Act* 1939 (NSW) (“the Act”).

On 22 May 2015 Justice Campbell dismissed the Respondents’ claim. His Honour found that the Department owed the Respondents a duty to use reasonable care in the exercise of its power under s 148B(5) of the Act, and that that duty had been breached by a failure to report the stepfather’s abuse to the police. Justice Campbell however found that the evidence did not establish that the abuse had continued after TB’s complaint in April 1983. (His Honour dismissed the claim as against Ms Quinn on the basis that she owed no duty in relation to the relevant power under the Act.)

The Court of Appeal by majority (Ward JA & Sackville AJA; Basten JA dissenting) allowed an appeal by the Respondents and ordered the State to pay damages of \$536,463.60 to DC and \$939,435.60 to TB. The majority found that the stepfather had continued to sexually abuse the Respondents after the time of TB’s complaint to the Department. Their Honours then held that

Justice Campbell had not erred in finding negligence on the part of the Department.

Justice Basten however held that the duty of care owed to the Respondents did not extend to reporting the abuse to the police. This was because such a scope of duty would oblige officers of the Department to consider an interest (the public interest in the prosecution of offenders) that was potentially inconsistent with the proper exercise of functions (of child protection) under the Act. His Honour also considered that the State could be held vicariously liable for the negligence of a particular officer but not for an asserted negligence on the part of "the Department". Justice Basten found that Justice Campbell had not erred by failing to be satisfied on the evidence that the stepfather had continued to abuse the Respondents after April 1983.

The grounds of appeal are:

- The Court of Appeal should have found that any duty of care owed to the Respondents by the State through the Director of Child Welfare in 1983 did not extend to exercising a statutory power to report to police allegations of criminality by the Respondents' stepfather following interviews with the Respondents by officers of the State in April 1983.
- The Court of Appeal erred in failing to identify the basis upon which the State could be held liable by reason of a direct duty owed to the Respondents or vicariously liable for omissions of an officer or officers of the State in circumstances where there was no finding that any such officer was negligent in the performance of any duty.