

HIGH COURT REVOKES GRANT OF SPECIAL LEAVE IN A DECISION CONCERNING THE SCOPE OF DUTY OF A STATUTORY AUTHORITY IN CHILD ABUSE CASES

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The High Court declined to consider the scope of the duty of care owed by a state government department when exercising power under child welfare legislation.

IN ISSUE

The scope or extent of the common law duty owed in exercise of statutory or discretionary power and, if such duty was breached, whether the State of NSW was vicariously liable

THE BACKGROUND

The respondent sisters (stepdaughters) suffered sustained physical and sexual abuse by a stepfather over a period of many years. In April 1983, one of the stepdaughters made a complaint to the Department of Youth and Community Services (the Department) under the now repealed *Child Welfare Act 1939* (NSW) (the Act). In circumstances where the Director of the Department was notified of child abuse or neglect, the Act required the Director of the Department to take appropriate action including reporting such matters to the police where appropriate. While the Department took immediate steps following the complaint, it did not report the abuse to the police.

In 2008, the stepdaughters commenced proceedings in the Supreme Court of NSW against the State and one of the officers of the Department, alleging that the Department breached its duty of care to them by not reporting the abuse to the police.

THE DECISION AT TRIAL

At first instance, the trial judge found that the Department had breached its duty of care owed to the stepdaughters, however was not satisfied that the abuse continued after notification of the complaint. The trial judge ultimately found for the State and held that the breach was not a necessary condition of the harm suffered by the stepdaughters.

THE ISSUES ON APPEAL

The issue before the Court of Appeal was whether the abuse continued in the period post-April 1983. The Department challenged the trial judge's finding that the scope of its duty

extended to a duty to report the abuse to the police.

THE DECISION ON APPEAL

By majority, the Court of Appeal found that the abuse had continued after the complaint to the Department and that the Department breached its duty of care owed to the stepdaughters.

By grant of special leave, the State appealed to the High Court.

THE ISSUES BEFORE THE HIGH COURT

The grounds of the State's appeal to the High Court encompassed two issues of principle, first, the extent or scope of the common law duty owed in exercise of a statutory discretionary power (namely, whether the Department's duty extended to exercising the power to report the abuse to the police) and, second, if that duty was breached, whether the State was vicariously liable.

THE HIGH COURT DECISION

On 10 May 2017, the High Court revoked special leave in relation to the ground of appeal concerning the vicarious liability of the State. In revoking leave, the High Court reasoned that a concession made by the State regarding its vicarious liability may not have reflected the true state of the applicable law at the time of the complaint because the *Law Reform Vicarious Liability Act 1983*, which provided (and continues to provide) for vicarious liability of the Crown in the State of NSW, was not in force at the time of the complaint and did not operate retrospectively.

On 14 June 2017, the High Court revoked special leave in relation to the remaining ground of appeal, which related to whether the scope of the duty of care owed by the State extended to exercising the power to report the abuse to the police.

The State accepted that there was a common law duty to use reasonable care in the exercise of the powers conferred by the Act for the protection of children at risk. The State further accepted that there would be cases where the only reasonable exercise of those powers would be to report the matter to the police.

In a joint judgment, their Honours found that having regard to the course taken by the State at the trial, and in the appeals, this case was not an appropriate vehicle for considering the scope and extent of the common law duty owed in the exercise of the powers under the Act.

IMPLICATIONS FOR YOU

The decision serves as a reminder for statutory authorities and their insurers of the nature of tortious duties of care which may be imposed upon those authorities.

[New South Wales v DC \[2017\] HCA 22](#)

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