
Notes

PSYCHIATRIC INJURY FOLLOWING WORKPLACE TRAUMA OR DEATH: ACTIONS BY FELLOW WORKERS AND RELATIVES IN NEW SOUTH WALES

Peter Handford's recent Note ("Psychiatric Injury: Duty to Employees' Children" (2003) 11 Tort L Rev 127) on the High Court decision in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205; [2003] HCA 33 raises a number of important issues about the law in relation to recovery of compensation for psychiatric injury arising from workplace injury or death. This Note seeks to clarify two issues in areas where Handford suggests previous law is no longer operative.

One conclusion that Handford reaches (at 130) is that the High Court decision in *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 would no longer be applicable under the current New South Wales regime, so that an employee can no longer recover damages at common law for "nervous shock" arising from witnessing a traumatic injury to a fellow employee. It is suggested that there may still be some argument to the contrary.

Handford's Note also suggests (at 132) that the New South Wales Parliament has now "consigned to oblivion" s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), the operation of which was elucidated by the decision in *Gifford*. In fact, this is not quite correct, and one purpose of this Note is to alert readers to the fact that there are some (albeit very limited) circumstances in which s 4 might still, like the proverbial "dead hand" of the medieval testator, "rule from the grave".

Can a worker recover for psychiatric injury occasioned by witnessing an injury to a fellow-worker? *Mt Isa Mines v Pusey* considered

Handford's conclusion about the inability of a New South Wales worker to maintain a claim for psychiatric injury occasioned by witnessing an injury to a fellow-worker is certainly strongly arguable at first impression. Section 151P of the *Workers Compensation Act 1987* (NSW) applies to "damages in respect of (a) an injury to a worker, or (b) the death of a worker resulting from or caused by an injury, being an injury caused by the negligence or other tort of the worker's employer" (s 151E(1), defining the scope of Div 3 of Pt 5 of the 1987 Act, in which s 151P is located). Section 151P provides:

No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:

- (a) the injured worker, or
- (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction.

As a result, it may seem that the intention of the Parliament was to cut off fellow-workers from compensation for loss of the sort occasioned in *Pusey*. This seems to be the view assumed by McHugh J in *Gifford* (at [44]) when commenting in passing on the effect of s 151P:

[Section] 151P does not give plaintiffs a right to recover damages. On the contrary, it *takes away the right to recover damages in an action for nervous shock for workplace injuries* but makes an exception in favour of injured workers and members of their close families.

[Emphasis added.]

On the other hand, his Honour's comments on the impact of s 151P were technically unnecessary for the resolution of the question in the case. The point at issue, as Handford notes, was whether s 151P *created* a separate statutory right in families of injured workers to recover for nervous shock; all the members of the High Court agreed that s 151P did not create such a right, but operated to preclude recovery of damages in some cases which the common law would otherwise allow, except in the cases mentioned in s 151P(a) and (b). The discussion of the issue by Gummow and Kirby JJ at [93]-[94] was effectively concurred in by all other members of the court. But the issue of the precise nature of the rights *precluded* by s 151P was not relevant to the disposition of *Gifford*, it being accepted that the claimants in that case, as the children of the worker, fell squarely within the exception in s 151P(b); none of the other members of the High Court other than McHugh J offered similar views as to the effect of the section.

As a result, there may still be some uncertainty as to whether s 151P completely denies the possibility of an action for nervous shock by a fellow-employee. The question arises in light of the New South Wales Court of Appeal's interpretation of a very similar limiting provision in the former *Motor Accidents Act 1988* (NSW). In *Aboushadi v CIC Insurance Ltd* (1996) Aust Tort Reports 81-384 it was held that the word "injury" in the similar provision (s 77 of the *Motor Accidents Act 1988* (NSW)) denying recovery to anyone except the "injured" person, itself included "psychiatric injury". As a result, the conductor on a train involved in a collision at a level crossing where members of the public were killed, was allowed to proceed with a claim for compensation for resulting nervous shock, even though he had suffered no physical, bodily injury himself.

Given that the definition of "injury" in s 4 of the *Workers Compensation Act 1987* (NSW) simply refers to "personal injury", and that other provisions of the Act (such as s 11A) confirm that this word includes "psychological injury", it would seem to be possible for a worker in Mr Pusey's situation to claim that he himself was the (psychologically) "injured worker" and so to recover despite s 151P. The issue has apparently not been litigated. Of course, a court might take the view that the scheme of the *Workers Compensation Act 1987* (NSW) was sufficiently different to the scheme of the former *Motor Accidents Act 1988* (NSW) to allow it to distinguish *Aboushadi*. Nevertheless, given the known preference of the courts to provide recovery to injured workers where possible, this possible interpretation of s 151P should not be ignored.

The specific motor accident provision discussed in *Aboushadi* (s 77 of the *Motor Accidents Act 1988* (NSW)) and s 141 of the *Motor Accidents Compensation Act 1999* (which had replaced it) have now both been repealed and replaced by the provisions of s 30 of the *Civil Liability Act 2002* (NSW) (see s 3B(2)(e) of that Act for the applicability of these provisions to motor accidents). The terms of s 30 are much more precise in identifying the different parties involved as either "the plaintiff" (the person suffering mental harm) or the "victim" (the person who was "killed, injured or put in peril").

But the situation with respect to workplace injuries suffered by employees, as opposed to motor accidents, is different. By virtue of s 3B(1)(f) of the *Civil Liability Act 2002* (NSW), civil liability arising from a claim for injury to a worker is excluded from the scope of this Act. Thus the situation will continue to be governed by the common law as amended by the *Workers Compensation Act 1987* (NSW), which, as noted, would seem to allow the possibility of an action for psychological injury by a worker witnessing a traumatic injury to, or the death of, a fellow worker

Recovery by relatives of an injured worker: The ongoing effect of section 4 of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW)

The second area requiring consideration is that of a claim for psychological injury by a relative of a worker physically injured or killed in the workplace. This raises the question of the ongoing impact of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW).

Handford provides an excellent summary of the history of this provision, which in brief was enacted initially to overcome the limiting effect of decisions denying any recovery for injury based on “psychological trauma”, and in particular the High Court decision in *Chester v Waverley Municipal Council* (1939) 62 CLR 1. Section 4, as authoritatively interpreted now by the High Court in *Gifford* and explained by Handford, was intended to *extend* the common law to allow such recovery to the family members of the injured person, except that for family members other than parents or spouses there was an additional requirement that they have directly witnessed the relevant event causing injury or death. It did not have the effect of limiting the common law.

And again, at first glance the provisions of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW), s 4 and Sch 3 (not Sch 2, as noted by Handford at 130), seem to have the effect of removing s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) from the statute book. Section 4(1) in standard terms declares that the “provisions of Acts” specified in Sch 3 “are repealed”, and at the top of the list in Sch 3 we find “Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1944*”. Part 3 contained s 4.

But when the provisions of Sch 2 of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) are examined, a slightly different picture emerges. Schedule 2 inserted new Pt 3 into the end of Sch 1 of the *Civil Liability Act 2002* (NSW), the head Act. Section 11 of Sch 1 to the *Civil Liability Act 2002* now provides as follows:

11 Law Reform (Miscellaneous Provisions) Act 1944

Part 3 of the *Law Reform (Miscellaneous Provisions) Act 1944* continues to apply despite its repeal to and in respect of civil liability that is excluded from the operation of Part 3 of this Act by section 3B.

In other words, despite its repeal, s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) has been “returned from the grave” to continue in application to certain cases. For present purposes, the important point is that those cases include actions by employees, or the families of those employees, against employers for nervous shock based on workplace injury to the employee. This is because, as noted previously, s 3B(1)(f) of the *Civil Liability Act 2002* (NSW) excludes civil liability arising from a claim relating to injury to a worker

from the scope of that Act. Section 3B(1)(f) excludes “civil liability relating to an award to which Division 3 of Part 5 of the Workers Compensation Act 1987 applies”. The wide terms of the *Workers Compensation Act 1987* (NSW) mean that, as well as actions by workers themselves, actions by family members of workers (which are actions “in respect of” an injury to a worker, in terms of s 151E) are also excluded from the coverage of the *Civil Liability Act 2002* (NSW).

As a result it seems that s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) will *continue* to apply to such claims, rather than s 30 of the *Civil Liability Act 2002* (NSW). The reason for this curious (seemingly last-minute?) preservation may lie in the fact that, due to the exclusion of workplace claims under s 3B(1)(f), the new s 30 would not be applicable to such actions (s 28(3) of the *Civil Liability Act 2002* (NSW) makes this clear), and it was thought inappropriate that there be no limitations placed on possible actions flowing from workplace injury or death. It should also be noted that the High Court decision in *Gifford*, clarifying the operation of s 4, was handed down on 18 June 2003, some time after the commencement of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) on 6 December 2002. Thus it seems likely that the operation of s 4 was preserved as a matter of “abundant caution”.

Is there any practical consequence? Does the preservation of the operation of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) give any benefit to anybody?

Section 4 in effect will only be of use to relatives of a worker who is injured and who seek to recover damages for nervous shock. It was designed as a beneficial provision for such relatives (among others) when the common law alone precluded recovery. But now there is a further barrier in the way of unrestricted recovery by relatives of workers, in the form of s 151P of the *Workers Compensation Act 1987* (NSW). Are there circumstances where there is a clash between the two provisions? It could be argued, for example, that s 4 is more generous because it does not contain a specific provision directed to the need for the nervous shock to be a “demonstrable psychological or psychiatric illness”, unlike s 151P. Another area of difference would seem to be that s 4(5) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) extends the definition of “eligible” relatives to a slightly wider group than covered by the *Workers Compensation Act 1987* (NSW); so, for example, “parent” includes “grandparent”. (It might have been argued that “spouse” in s 151P(b) of the *Workers Compensation Act 1987* (NSW) had a more limited meaning than that word had in the last “version” of s 4(5) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), where it included “de facto” relationships. But while there is no specific overall definition of “spouse” in s 3 of the *Workers Compensation Act 1987* (NSW), it turns out that there is one (including such relationships) in s 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), and by virtue of s 3(1AA) of the *Workers Compensation Act 1987* (NSW) the definition in the 1998 Act applies to the 1987 Act.)

So could a grandparent use the provisions of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) to bring an action against an employer for nervous shock flowing from traumatic injury or death to a grandchild? Or another relative mount such an action without rigorous proof of

illness? How should the court resolve the issue where a claimant satisfies the requirements of s 4 of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), but would be precluded from recovering if s 151P of the *Workers Compensation Act 1987* (NSW) were applied?

It seems fairly clear that, in a case like this, s 151P would prevail. On its own terms s 151P applies in the case of workplace injury to “damages”, defined very broadly by s 149(1) of the *Workers Compensation Act 1987* (NSW) as “any form of monetary compensation”. The more specific s 151P should no doubt prevail over the general provision in s 4. In the New South Wales Court of Appeal decision in *Gifford*, for example, Hodgson JA referred to the need for the widow in that case to satisfy not only the “shock” requirement in s 4 but also the more specific requirement in s 151P: see *Gifford v Strang Patrick Stevedoring Pty Ltd* [2001] NSWCA 175 at [50]:

However, in order to recover she must establish “injury arising wholly or in part from mental or nervous shock” within s 4(1), and she *also* has to satisfy the test in s 151P of the *Workers’ Compensation Act*, and establish that she has suffered some “demonstrable psychological or psychiatric illness”.

[Emphasis added.]

In the High Court decision in *Gifford Gummow and Kirby JJ* at [93] also acted on the assumption that the children will need to prove that they satisfy this requirement of s 151P before they can recover.

The overriding of s 4 by s 151P, however, still leaves s 4 (by virtue of s 11 of Sch 1 to the *Civil Liability Act 2002* (NSW)) theoretically able to operate in other areas of civil liability – or at least, in the narrow area of civil liability left after the enactment of that Act! In effect, those areas will be the very limited areas of intentional torts, dust diseases, and tort actions relating to smoking (see s 3B(1)(a)-(c) of the *Civil Liability Act 2002* (NSW); liability for mental harm in relation to motor accidents is covered by the *Civil Liability Act* provisions by virtue of s 3B(2)(e)). Workplace injury is the largest area exempted from the operation of the *Civil Liability Act 2002* (NSW). But as we have seen, any additional benefit conferred on plaintiffs in the area of workplace injury seems to be effectively negated by s 151P of the *Workers Compensation Act 1987* (NSW). The ongoing effect of s 4 in relation to workplace injury, then, is negligible, and it should probably be specifically excluded to avoid inflicting on future generations the confusion that the reader of the present Note feels!

No doubt it was wise to retain s 4 while its operation in workplace claims was still unclear; but now that *Gifford* has clarified it, the provision can be safely put to its final rest.

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REVISING LIABILITY FOR CHILD ABUSE

Introduction

The abuse of children by parents, carers and others is a large and shocking problem. According to one estimate, in England and Wales no fewer than three children under the age of 10 are killed or suffer serious injury every week. The problem continues to engage the attention of various bodies. The Law Commission, concerned that almost two-thirds of investigations that reached a conclusion resulted in no prosecution of any sort, has recently recommended changes to the criminal law (Law Commission Report No 282, *Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)*, HC 1054, 2003). And hot on the heels of the latest in a long line of damning inquiries concerning the fate of a child known by the authorities to be at risk (*Victoria Climbié Inquiry*, Cm 5730, 2003), the government has published a Green Paper detailing its proposals for wide-ranging reform (*Every Child Matters*, Cm 5860, 2003). An implementing *Children's Bill* is currently before Parliament. The Green Paper notes (as others had done before) that there are "striking similarities" in cases where there was a failure to intervene effectively. Poor co-ordination between the various agencies such as the police, doctors and social workers, failures to share information, overburdened frontline workers trying to cope with staff shortages, inadequate supervision and limited training have all been blamed. Given this litany of well-documented and consistent failure across the post-war period (there have been some 70 or so inquiries since 1945), it is perhaps no surprise that the courts, belatedly in the view of some, should be invited to allocate responsibility to pay tort damages to the victims.

As is well known, initially claimants were brusquely rebuffed. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, the House of Lords famously declined to countenance negligence being used to challenge delicate child protection decisions by social services and health care professionals, effectively regarding them as too complex to be justiciable. Despite a protracted failure to safeguard children known to be at risk of parental abuse, apparently it was not "fair, just and reasonable" to saddle the authorities with liability. Subsequently, influenced by human rights considerations and prompted by, or at least in the shadow of, the decision of the European Court of Human Rights in *Osman v United Kingdom* [1999] 1 FLR 193, there has been a discernible shift. In two decisive cases, the House turned its back on the idea that whole categories of activity by public bodies should be protected by means of a "no duty" analysis. In *Barrett v Enfield London Borough Council* [2001] 2 AC 550, their Lordships refused to strike out a claim that a local authority was responsible for mismanaging the welfare of a child *already* in its care. Shortly thereafter, a seven-person Bench in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 found that the careless failure of an educational psychologist to diagnose a pupil as dyslexic was a breach of duty for which the local education authority was, in principle, vicariously responsible. Hence have English courts [AQ: "As a result, English courts have"?] become more reluctant to strike out claims, have accepted that blanket immunities are offensive to common law principles and human rights law alike, and have begun to adopt what has been described as a more "nuanced" (or is that a more sceptical?) approach to policy-based concerns and justiciability.

The new duty to children

JD v East Berkshire Community Health NHS Trust [2003] 2 FLR 1166; [2003] EWCA Civ 1151 is the latest development. Ironically, the claims here arose not from delayed or fainthearted decisions but from commendably enthusiastic, albeit allegedly mistaken, interventions. In three conjoined appeals, child welfare professionals (principally doctors) suspected parents of inflicting various forms of physical abuse. The parents sought damages for the psychiatric harm they said they had suffered from what they claimed were negligently made false allegations or their consequences. In one case a claim was also brought on behalf of a child. Consistent with *Bedfordshire*, initially all claims were struck out as disclosing no reasonable cause of action. However, the English Court of Appeal in a single unanimous judgment delivered by Lord Phillips MR came to the “firm conclusion” that a “no duty” decision, at least so far as concerns the claim of an affected child, “cannot survive the *Human Rights Act*” (at [83]). The child’s negligence action was accordingly reinstated. Thus, it must now be regarded as at least arguable that where (parental) abuse is suspected and the authorities exercise their statutory powers to investigate it or initiate or pursue child protection measures, they must use reasonable care. Effectively, they are under a duty to rescue children they know or ought to know are at risk, and must manage their subsequent care appropriately. In contrast, the claims of the parents were rejected with equal unanimity (at [86]). How did this bold, if partial, volte-face come about?

First, the Court of Appeal set about restricting *Bedfordshire* to what was described as its “core proposition”, namely, that decisions whether or not to *take* a child into care were not reviewable by way of a claim in negligence (at [49]). Apparently, no broader general immunity for public bodies had been intended or created. And so far as concerned the reasoning used by Lord Browne-Wilkinson in *Bedfordshire* to justify even that limited outcome, the Court of Appeal noted that much of it had been “called into question” by subsequent high authority. Both *Barrett* and *Phelps* had doubted the force and universality of many of the sorts of policy concerns used to justify the conclusion that imposing a duty of care was not “fair, just and reasonable”. The fact that it might be difficult to disentangle the (often multidisciplinary) contributions of the various agencies involved in child protection decisions was relevant, but not decisive. It might not even be relevant once a child (as in *Barrett*) is in the care and control of a single lead agency, such as a local authority’s social services department. The familiar fears of a flood of (hopeless) claims, the diversion of resources, or the prospect of liability inducing overly cautious attitudes had also been written down. Commonwealth authority encouraged the English Court of Appeal. In *Attorney-General v Prince* [1998] 1 NZLR 262, the New Zealand Court of Appeal had declined to strike out a claim alleging negligent adoption, being unwilling to credit such fears “in the absence of any data as to potential claims”. Additionally, in between hearing argument and delivering judgment in *East Berkshire*, the advice of the Privy Council in *B v Attorney-General* [2003] UKPC 61 had fortuitously become available. It provided further support insofar as it overturned a decision of the New Zealand Court of Appeal (taken prior to *Prince*) to strike out claims by two girls separated from their father as the result of what was alleged to have been a carelessly conducted inquiry into sexual abuse. Again, however, no duty to the suspected parent was held to exist (see Bates F, “Child Sexual Abuse and Duties of Care” (2004) 12 Tort L Rev 12).

The English Court of Appeal next considered the impact of the *Human Rights Act 1998* (UK), having earlier in the judgment rejected an attempt to “resurrect” the much-criticised ruling in *Osman* to the effect that a “no duty” strike out created immunity and so offended a claimant’s Art 6 right to a court [AQ: add “hearing”?] (at [22]). It was noted that the Strasbourg court in *Z v United Kingdom* [2001] 2 FLR 612 had recanted *Osman* in light of later domestic developments (principally *Barrett*) and a clearer understanding of the structure of English negligence law. The European Court of Human Rights, whilst recognising the delicate and often difficult nature of child protection decisions, including the desirability of maintaining family units wherever possible, nonetheless held in favour of the long-suffering *Bedfordshire* children. The four-year failure to take effective steps to protect them from serious parental abuse and neglect violated their Art 3 right not to be subjected to inhuman or degrading treatment. The rejection of the children’s claim to compensation in these circumstances engaged the Art 13 entitlement to an effective remedy. From this it follows that the state may not exclude Convention-based litigation, even though there may be no parallel common law duty.

Because the facts in the three appeals in *East Berkshire* arose before the *Human Rights Act* came into force in October 2000, there was no claim under the Act. Nevertheless, it was “necessary” to assess whether the Act “has affected the common law principles of the law of negligence” (at [55]). *Z v United Kingdom* having demonstrated that the factual basis of child protection decisions can no longer be insulated from judicial inquiry where human rights considerations arise, the Court of Appeal concluded that the policy reasons in *Bedfordshire* for protecting such decisions from common law scrutiny (“insofar as those reasons have not already been discredited by subsequent decisions of the House of Lords”) had largely lost their force (at [79]-[85]). The risk that potential liability might inhibit child-care professionals from taking what they believe to be the right course of action will thus “henceforth be present, whether the anticipated litigation is founded on the *Human Rights Act* or on the common law duty of care” (at [82]). Given the obligation of the local authority to respect a child’s Convention rights, it followed that recognising “a duty of care to the child ... should not have a significant adverse effect on the manner in which they perform their duties” (at [83]). The alleged chilling effect of duty was thereby effectively discounted. Though the court does not say so, we noted earlier that numerous inquiries have shown that the usual causes of child protection failures are over-stretched resources, poor information-sharing and inadequate co-ordination, rather than litigation-induced staff timidity.

The decision in *East Berkshire* does not signify that there will be a common law duty in every case, that the content of the duty will necessarily replicate the obligation not to violate a child’s Convention rights, or that liability to pay damages is inevitable. However, it is clear that the function of controlling potential liability to abused children, previously entrusted to the duty concept, has now largely been devolved to the level of breach (and causation).

No duty to wrongly suspected abusers

The Court of Appeal in *East Berkshire* also concluded that because the interests of children are paramount, there could be no competing duty owed to suspected parents whose interests in maintaining custody and contesting abuse allegations are potentially in conflict with those of the child. The very existence of the new

duty to children was said to provide “cogent reasons of public policy” that precluded recognising a duty in favour of suspected parents (at [86]). It was essential that “bold decisions” about what was best for children should not be inhibited or compromised by fears that a duty to the suspected abusers might coincidentally be infringed (at [96]). The Privy Council had come to a similar conclusion in *B v Attorney-General* where it was said that “the interests of the alleged perpetrator and of the children as alleged victims are poles apart” (at [30]). It would not be “satisfactory” if welfare professionals and their employers were to find themselves facing both ways, as it were. The decision of the High Court of Australia in *Sullivan v Moody* 207 CLR 562; [2001] HCA 59, which was not cited in *East Berkshire*, is to much the same effect.

This is an impressive array of authority, but are the reasons and the result sound? Seemingly, a parent wrongly suspected can have no remedy, however egregious the error or Draconian the consequence. In an extreme case, for example, where a child is put up for adoption, the natural parent may lose all contact with the child. Intuition, considerations of corrective justice, and countervailing arguments suggest this cannot be right. Providing child welfare authorities with what amounts to immunity from parental claims looks awkwardly out of place in the post-*Barrett* and *Phelps* era, particularly since no common law immunity can free public authorities or the courts from respecting human rights-based obligations.

It needs be borne in mind that where a child has been unjustifiably taken into care, a parent (just as much as the child itself) may have a claim for breach of the Art 8 right to family life. This is so whether the suspected abuser is the parent (see *P v United Kingdom* (2002) 35 EHRR 31) or a third party (see *M v Newham London Borough Council* [1995] AC 633). In *Newham*, the mother’s current cohabitee was suspected of sexually abusing her daughter, wrongly as it transpired later. The House of Lords denied that either mother or daughter was owed a duty of care. An outflanking challenge to that conclusion was successfully mounted in the European Court of Human Rights, reported as *TP v United Kingdom* [2001] 2 FLR 549. The mother argued that had she been allowed to comment on her daughter’s videotape evidence sooner, the mistake would have been revealed earlier and the duration of their separation may have been shorter. The Strasbourg court refused to say that the original decision to seek a place-of-safety order had been wrong. There were good reasons to suspect that KM had been abused, as well as doubts about the ability of TP to protect her daughter, so that her removal had been “in accordance with the law” and done in pursuit of a “legitimate aim”, as Art 8(2) requires. The authorities were properly entitled to a wide margin of appreciation when deciding whether a child needs protecting. In the language of negligence, there had been no breach, initially. However, as regards later decisions that restrict a parent’s right of access, the European Court of Human Rights declared that “stricter scrutiny” was justified. The subsequent serious delays and other shortcomings had deprived TP of the opportunity to challenge the conclusion that KM could not safely be returned to her, which prevented the process being regarded as “necessary in a democratic society”. Accordingly, both mother and daughter’s Art 8 rights had been unfairly infringed. Article 13 dictated there should be an effective remedy for the anxiety neurosis the unnecessarily protracted separation had induced. While this is not the same as saying that a local authority owes parents a duty of care, the effect is much the same. Allowing parents to be “involved in the decision-making process

... to a degree sufficient to provide them with the requisite protection of their interests” (at [72]) reads a procedural requirement into Art 8. This ought not to be problematic for child protection authorities since, even at the earliest stage when consideration is being given to the question whether the child is at risk, it is usual for parental views to be considered at that point.

Prima facie, one of the arguments in *East Berkshire* that was used to justify recognising a duty towards children seems to apply equally to parents. Since the Convention rights of parents must be respected, the authorities are necessarily exposed to the risk that a court may be asked to second-guess decisions claimed to infringe them. Even if it were desirable, it is no longer possible to screen the authorities from the pressure that the threat of litigation imposes. In these circumstances, recognising a concurrent common law duty of care towards parents would be unlikely to further inhibit or otherwise adversely affect the way that child protection functions are performed.

But what of the claimed conflict between the interests of children and their suspected parents, which was said to be sufficient to deny all responsibility towards the latter? This conflict was not so much examined as asserted. In fact, parents are not always hostile to decisions that may result in separation or restricted access. In *Bedfordshire*, for example, the father twice asked the council to take the children into care, and it was only after the mother threatened to batter them that they were placed with foster parents. Moreover, where parents *are* opposed to decisions they believe to be unfair or heavy-handed, breach is arguably a better mechanism for resolving disputes because it admits of the possibility that the authorities were wrong, which a flat denial of duty does not. This option was not sufficiently evaluated.

A breach analysis would not put the authorities in an impossible quandary or necessarily result in them having to pay damages. The apparent conflict can be accommodated by drawing a distinction between initial decisions to provide immediate protection to children believed to be at risk and the conduct of subsequent (and less urgent) investigations. At the earlier stage, the authorities should be entitled to act on the precautionary principle, and to err on the side of caution in cases of doubt. The courts, by sanctioning a “safe rather than sorry” strategy, could thereby treat the authorities as having simultaneously discharged their initial (low-level) duty to the parent. That duty ought to reflect the legislative schemes, which invariably dictate that parental interests take second place behind the paramount interests of children. Accordingly, early intervention may be justified where there appears to be a grave and immediate risk, even if the supporting evidence is presently less than certain. At this point, the standard of care owed to a suspected abuser may amount to little more than saying that decisions must be taken in good faith. So long as the courts are prepared to prioritise the child’s security, employing *Bolam* in this way will not only maintain a strong breach barrier against parental claims but will minimise the (potential but untested) danger that suboptimal protection may otherwise be provided to children. Even at a later stage, where a care order is sought, the British statute currently only obliges the authorities to show that harm to the child is “likely”. According to Lord Nicholls in *Re O (Care: Preliminary Hearing) O and N (Children) (Non Accidental Injury: Burden of Proof)* [2004] 1 AC 523; [2003] 2 WLR 1075 at 1081 this means merely “a possibility that cannot sensibly be ignored”, which he noted “is a comparatively low level of risk”. In *TP v United Kingdom*, the European Court of Human Rights was

prepared to concede a wide margin of appreciation (discretion) to the domestic authorities when taking initial child-protection decisions. This approach should be mirrored in tort actions so as to avoid placing them in an impossible “Catch 22” position.

Furthermore, merely showing that a decision (at whatever stage) was “erroneous” does not constitute proof of actionable negligence. The New Zealand Court of Appeal in *Prince* observed that a claimant is likely to encounter difficulties when trying to establish that the decision questioned “fell outside the bounds sanctioned by professional opinion”. It is by no means clear, for example, that had the parents’ claims in *East Berkshire* been permitted to go to trial, they would have been able to demonstrate that the authorities unfairly disregarded their interests, lacked any proper basis for suspecting them, or acted prematurely. And if courts were prepared to have regard to the reality of limited resources, the height of the breach barrier will have been further raised.

Almost as an afterthought, the English Court of Appeal in *East Berkshire* suggested a further reason why the claim of a parent should be barred, namely, that it may have “the elements of a claim in defamation”. The court suggested that qualified privilege among other defences would likely be available and that it “cannot be open to a claimant to by-pass these defences by advancing a claim for defamation in the guise of a claim for negligence” (at [102]). Oddly, there was no mention of *Spring v Guardian Assurance plc* [1995] 2 AC 296, which held that merely because a claimant might have a defeasible libel action did not preclude the possibility of suing in negligence for damage done to his job prospects by a negligently written job reference. Whilst the precise scope of *Spring* is uncertain, its general thrust is that merely because some other (libel) remedy is unavailable should not mean that a good negligence claim is denied if the result will be a serious injustice. The purpose of privilege is to facilitate honest speech. Parents opposed to particular care decisions are not so much challenging the speech rights of decision-makers or complaining that their reputations have been smeared as contesting the basis of decisions they claim have negligently harmed them and their relationship with their children.

Conclusions

East Berkshire confirms the recent dramatic shift in British judicial attitudes towards compensating vulnerable children let down by the authorities. By conceding the possibility of duty, it aligns common law doctrine and human rights jurisprudence more closely. In contrast, its woeful “no duty to parents” ruling puts them in conflict. For this reason, *East Berkshire* is unlikely to be the last word on the issue.

The English Court of Appeal was unexpectedly sanguine about the possibility of the authorities being overwhelmed by a flood of claims. Commonly, in negligence litigation, empirical evidence is either unavailable or inconclusive when the sorts of “should” questions that duty poses require an answer. Unsurprisingly, in these circumstances, judges tend to fall back on common sense and hunch. The size (and cost) of this potential problem is simply not known. The statistics relating to the extent of abuse (see NSPCC, *Child Maltreatment in the United Kingdom* (2000)) and the numbers on the child protection register or in care (see *Every Child Matters*) are not very helpful. On the other hand, a recent survey worryingly claims that paediatricians are being deterred from working in the field by a dramatic increase in these sorts of

complaints (see Hobbs C, “Demonising Child Experts is Damaging Children’s Protection”, *The Guardian*, 21 April 2004). It may be that few claims will result from well-meaning but incompetent interventions of the sort alleged in *East Berkshire*. History suggests that claims are more likely to arise out of failures by the statutory agencies to act soon enough or decisively enough. In terms of draining limited resources, the greater problem may turn out to be the alarming scale of abuse inflicted on children consigned to institutional care of one kind or another (see, for example, *Lost in Care* (HC 201, 2000), which threatens to generate large numbers of long-delayed, evidentially difficult and costly claims.

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