ROBERTSON & ANOR. v. SWINCER[1]

The plaintiff, a young boy, successfully sued the defendant driver for damages in negligence after sustaining injuries when struck by the defendant's car. Subsequently, the defendant sought contribution from the plaintiff's parents, alleging a negligent failure to exercise reasonable supervision over the boy.

The trial Judge in the Supreme Court of South Australia held that the parents were not guilty of negligence, finding the events which took place as unforeseeable. Thus, it was unforeseeable that the child would leave the front garden, go out on the footpath, cross the road, turn around and attempt to return. An appeal by the driver to the Full Court was dismissed.

Robertson & Anor. v. Swincer is a noteworthy case in that it comments on the question of whether parents are liable for non-feasance in the course of discharging their responsibility for the care of their child. It will be submitted that this question, or rather, the consummation of an answer is still far from resolved. Also, the case entails Lord Wilberforce's two-stage duty test as expounded in *Anns v. Merton London Borough Council*[2] — a test which has been rejected by the High Court of Australia.[3] Furthermore, policy considerations precluding a general duty of care as suggested by the Court, require further discussion. It will be submitted that some considerations require qualification or re-articulation in order to reinforce their merit and that other considerations mentioned are superficial and questionable.

The driver's claim for contribution was based upon the Wrongs Act 1936 (S.A.)[4] and was conditioned upon the existence of a duty of care owed to the boy by the parents. The Full Court rejected this claim, utilizing the test for the existence of a duty of care as articulated by Lord Wilberforce in *Anns v. Merton London Borough Council*. King C. J. denied that a duty of care existed by virtue of the second limb of this test (policy), while Legoe J. held both limbs of the test were not satisfied. Millhouse J. considered policy on its own as sufficient to preclude a duty of care.

A difficulty encountered initially by the Court was the lack of certainty or guidance from judicial authority as to the question of law of what circumstances give rise to a duty owed to children by their parents.[5] However, the Court did ascertain certain circumstances where, irrespective of blood relationship, a duty of care to protect a child will arise. For example, such a duty arises where a person has created a foreseeable risk of injury to the child.[6]

Furthermore, where a person has assumed the direct care of a child, she or he may be under a duty to prevent injury to that child.[7]

However, the specific circumstances of the present case involving an omission of the parents,

[1] 1989 Australian Torts Reports 80-271. Supreme Court of South Australia, Full Court. 21 September 1989. King C.J., Legoe and Millhouse JJ.

[2] [1978] A.C 728.

[3] See *Jaensch v. Coffey* (1984) 155 C.L.R. 549, 552-554 and *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424,.440-443 and 506-508. The boundaries of this rejection and its relevance will be discussed further.

[4] Section 25(1).

[5] See Legoe J. 68, 881. '. . . the cases do not provide a short, nor quick, nor complete answer . . .' See also *Posthuma and Posthuma v. Campbell and others* (1984) 37 S.A.S.R. 321, 322, where the '. . . inconclusiveness of the High Court judgments . . .' are commented upon and where '. . . a legal duty of care for the safety of the child . . .' is considered '. . . an open question for South Australian Courts . . .' Also see Fleming, J. G., *The Law of Torts* (6th ed. 1983) 642 '. . . after widely conflicting decisions by lower courts, the High Court of Australia has now provided some authoritative guidance, *without however clearing up all doubts* . . .' (emphasis added). Furthermore, see Heffey, P. G. 'The Duty of Schools and Teachers to protect Pupils from Injury' 11 Monash University Law Review 1 (1985), 3, '. . . judicial opinion has differed as to whether the relationship of parent and child is also an example (of a duty arising out of a special relationship) . . .'

[6] See *Hahn v. Conley* (1971) 126 C.L.R. 276; *McCallion v. Dodd & Anor.* [1966] N.Z.L.R. 710; *Pask v. Owen* (1982) 2 Qd R. 421.

[7] *Young v. Rankin* (1934) S.C 499 was accepted by Legoe J. Note also *Smith v. Leurs* (1945) 70 C.L.R. 256, 259 and *Dickinson v. Dickinson and the Motor Vehicle Insurance Trust* (1986) 3 S.R. (W.A.) 233, 240. In the latter case, the defendant was liable as he had assumed the '. . . the direct care of [the] children . . .'

presented the Court with a relatively novel situation. Correctly, the Court assumed no existence of a *general* duty of care.[8]

Counsel for the driver submitted that there was a duty of care in the circumstances due to the foreseeability of the events which took place, citing *The Council of the Shire of Wyong v. Shirt & Ors.*[9] which held that unlikely events could still nevertheless be foreseeable. Legoe J. dismissed this claim on the basis that the instant case involved policy considerations while the cited case did not entail such considerations.

It is submitted that the concept of foreseeability, on its own, cannot establish a duty of care. Perhaps Legoe J. in addressing the use of *The Council of the Shire of Wyong* should have referred to the statements of Jacobs J. in *Posthuma and Posthuma v. Campbell and others*[10], '. . . the . . . question — was there a duty of care? [cannot] be answered by the test of foreseeability of risk . . .'[11] Instead, the Court, in attempting to apply a test to establish whether there existed a duty or not, used Lord Wilberforce's two-stage duty test.[12]

However, this test has been rejected by the High Court of Australia, most forcefully in *Sutherliand Shire Council v. Heyman.*[13] The crux of this rejection lies with the view that Lord Wilberforce's first test only considers foreseeability and that foreseeability alone is sufficient to establish proximity.[14] In contrast, the High Court uses proximity as a limiting device and as a separate test.[15]

The inapporopriateness of the use of the two-stage duty test in the present case is accentuated by the particular circumstances of this case. At the most extreme view, *Anns, supra*, is deemed not amenable to omissions[16] because non-feasance does not fall within the rule as expressed by Lord Atkin in *Donoghue v. Stevenson.*[17]

However, the High Court has accepted that non-feasance falls within the ambit of the *Donoghue, supra*,[18] but nevertheless holds that the approach in *Anns, supra* is inappropriate for omissions.[19]

Hence, in the instant case, the use of the two-stage duty test may be inappropriate and thus may be a ground for further appeal. However, even if proximity was used as the test, a duty of care may still be precluded due to policy. As Gibbs C. J. states, '. . . in many cases, [the tests will] lead to the same result, the difference being one of emphasis . . .'[20]

In the instant case, the Court disposed of any proposed link between the duty of teachers with the duty of parents. Clearly, claims of a nexus must be rejected. Basically, teachers are trained to care for children and are not responsible for children 24 hours a day. Moreover, '. . . the duties owed by a teacher at common law [are] . . . higher than the duties owed to invitees . . .'[21]

Unfortunately, terminology such as the '*reasonable, prudent parent*' perpetuates belief in a link between teachers and parents as this term has been used to describe the standard of care demanded of teachers.[22] In the present case, Legoe J. quotes Lord Reid in *Carmarthenshire County Council v.*

8 This non-existence can be gleaned from *Posthuma and Posthuma v. Campbell, supra.* Particularly, see the policy considerations expounded by Jacobs J., 329.

9 (1980) 29 A.L.R. 217, 221.

10 (1984) 37 S.A.S.R. 321.

11 *Ibid.* 330.

12 See *Anns v. Merton Borough Council* [1978] A.C 728, 751. The first stage of the test is to ask whether there was proximity and foreseeability. The second stage of the test is determining the existence of policy, precluding a duty of care.

13 (1985) 157 C.L.R. 424.

14 See the comments of Gibbs C.J, *ibid.* 440-441.

15 See *Jaensch v. Coffey* (1984) 155 C.L.R 549 and *Sutherland Shire Council v. Heyman, supra.* For English comment see *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210, particularly at 240.

16 Smith, J. C. and Burns, P. 'Donoghue v. Stevenson — The Not So Golden Anniversary' 46 *Modern Law Review* (1983) 147, 155-156.

17 [1932] A.C. 562.

18 *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 443.

19 *Ibid.* 507.

20 *Ibid.* 441.

21 Heffey, P. G. *op. cit.* 37.

22 See *Lyes v. Middlesex County Council* (1963) 61 L.G.R. 443 at 446 — 'a reasonably prudent parent'; *Rich and Another v. London County Council* [1953] 2 All E.R. 376 at 379 — 'a careful parent'; *Miller v. State of S.A and Baldock* (1980) 24 S.A.S.R. 416 at 417 — 'prudent parent'. In *Commonwealth v. Introvigne* (1982) 56 A.L.J.R. 749, 757 it was said that the standard for a teacher exceeded that for a parent. But what is the standard for a parent?

Lewis[23] — the standard of care for a teacher being that of a 'prudent or reasonable mother'.[24] Legoe J. unfortunately does not expressly reject this term; he only rejects the link between teacher and parent, when it was opportune to suggest that '. . . given the duty of parents to their own children has not been extensively examined or expansively interpreted by the Courts, the reference to *parental standards* [to determine teachers' standards] is not a particularly enlightening one . . .'[25] (emphasis added).

King C. J. explains that the impossibility of parents insuring against liability to their children was a reason why no duty existed. However, Legoe J, preferably, suggests that insurance is not a relevant factor as the erection of any duty of care is really a matter of law and thus any formulation of a duty should be based on questions of law.

Millhouse J. says '. . . the considerations of policy are decisive: there is no need to consider anything else . . .'[26] However, some considerations require further discussion, and it is submitted that certain important policy considerations were not mentioned.

That the law should not intrude into domestic relationships has been a view inherent in our legal system. Feminists would argue that this 'public/private dichotomy'[27] is unfair and they would welcome greater intervention into domestic relationships in order to hinder and prevent patriarchal abuse of power.

Other considerations propounded by the Court which also are highly questionable include the suggestion that both parents' assets and support of children from relatives and neighbours would be at risk if a duty was imposed. Such speculation firstly assumes that there would be a 'floodgate' of actions sufficient to deplete the assets of numerous parents and secondly, that relatives and neighbours would place financial security ahead of the care of children.[28] This primacy of economic soundness may not be subscribed to by all members of our community.

Then there is Legoe J.'s consideration that the different ages of children would create difficulties in imposing a duty. Herein lies an inconsistency of the Courts. In *McHale v. Watson*,[29] the High Court imposed a duty of care on a child to his neighbour, judging the standard to be of a child of the same 'age, intelligence and experience'.[30] Thus, it is clear that a Court is able to grapple with different ages of children, but obviously only willing to do so in certain circumstances.

The policy considerations which are sound include the contention that parents differ immensely and therefore there is no readily recognizable standards for parental supervision. Certainly, a parent is unlike a teacher who '. . . will often be . . . a reasonable expert . . .'[31] Furthermore, many '. . . parents . . . do not know how to parent their children, no matter how much they love them . . .'[32]

Also of merit is the policy consideration of time — a parent cannot be expected to supervise fully a child for 24 hours a day. This 'unwarranted burden'[33] was mentioned by Legoe J. who perhaps could have also extended this line of argument to the contention that a child, even if given 24 hours supervision a day, will sometimes be responsible for his or her own experiences; '. . . there is no way for an adult to make sure the child will receive or accept his message because the individual child in part contributes to what he experiences . . .'[34]

23 [1955] A.C. 549.
24 *Ibid.* 566.
25 Heffey, P. G. *op. cit.* 7.
26 *Robertson & Anor. v. Swincer, supra.*
27 See O'Donovan, K., *Sexual Divisions in Law* (1985) 1-20. The private sphere is the domestic environment rarely intervened directly by the law.
28 The consideration that neighbours would not readily care for children if a duty was imposed also has its value undermined by *Bye v. Bates and Others* (1989) 51 S.A.S.R. 67. In this case a neighbour of a child assuming the care of the child was held liable in non-feasance in the circumstances.
29 (1966) 115 C.L.R. 199.
30 *Ibid.* 200.
31 Heffey, P. G. *op. cit.* 7.
32 Wilson, J. Q. and Loury, G. C. *From Children to Citizens* (1987) 186. See Chapter 8 generally, submitting the case for parent training, highlighting the immensely different standards of parental supervision and performance.
33 *Robertson & Anor. v. Swincer, supra*, 68, 886.
34 Mnookin, R. H. *Child, Family and State* (1978) 2, suggesting that parents cannot possibly fully supervise their children — '. . . the notion that adults somehow control the socialization of the next generation seems dubious . . .'

However, it is submitted that the most forceful policy consideration, albeit not mentioned by the Court, is that '. . . the fact that the parties are in such close relationship must render innocuous many acts and omissions that would usually be tortious . . .'[35]

The crux of this consideration is that if a duty was created, how would harm be classified? What is the standard of care demanded and where is the line drawn for classes of harm to establish negligence? According to normal negligence principles, any behaviour not reaching the level demanded constitutes negligence. However, parent behaviour not only varies, but *parental harm* also varies, thus requiring classification of harm.[36]

What then, will be constituted a breach of a duty? An 'immediately harmful' act when there is no intervention or an 'immediately harmful' act despite intervention or good luck? A 'cumulatively harmful' act performed once, three times or ten times?

It was mentioned by Legoe J. that a duty, if deemed desirable, should be established by Parliament. It is even more obvious that the Court cannot formulate such a duty due to the need to classify types of harm arising out of the unique relationship between parent and child.

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[35] McCurdy, W. E. 'Torts between Persons in Domestic Relation' (1929-30) 43 *Harvard Law Review* 1030, 1077.

[36] See Wilson, J. Q. and Loury, G. C. *op. cit.* 229-230, where it was suggested that harmful situations may be classified under two headings.

IMMEDIATELY HARMFUL SITUATIONS

the parent's behaviour could have caused an immediate injury but did not do so because of the intervention of an outside force, or good fortune. For example

— a parent beats a child but a relative intervenes
— a parent leaves a child in a hazardous environment, but the child is found before injury occurs
— a parent throws a child, but by luck, the child is not injured.

CUMULATIVELY HARMFUL SITUATIONS

the parent's behaviour will cause cumulatively serious harm to the child if it continues. For example

— a parent provides an inadequate diet; over time if continued, will cause health problems
— a parent inflicts minor assaults on the child; over time if continued, will make the child frustrated and violence-prone
— a parent provides inadequate emotional support; over time, if continued will lead to serious harm.

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