H v BLACK*

I INTRODUCTION

H v Black[1] is an important and complex case which raises several interconnected legal and philosophical issues. The case is concerned with the question of the liability of public authorities in private negligence actions and the problematic issue of state immunities to such actions. It highlights the difficulties raised by such immunities when the public authority-defendant is a community welfare organisation faced with the frequently conflicting statutory objectives of child protection on the one hand, and the maintenance of the family unit on the other. Immunities in such cases appear problematic when serious injustices occur and there is no adequate remedy available to those who have suffered harm. However, this particular case is part of a category of tort action taking place against a background of political and social 'backlash', or reaction against progressive policies and legislation which have been perceived by some sections of the community as being overly sympathetic to issues of minority rights and feminism.[2]

II THE FACTS OF THE CASE

In early 1987, Mrs H became suspicious that her husband was sexually abusing her three year old daughter. She approached the South Australian Department of Community Welfare and the Sexual Assault Referral Centre at a hospital. Her daughter, R, was subsequently examined both by a psychiatrist and another specialist medical practitioner, whose findings were consistent with abuse having occurred. Mrs H moved out of the family home and applied for custody of R and her other child. The appellant in the case, Mr H, claimed that officers of the Department of Community Welfare and the two medical practitioners involved, were in breach of their duty of care to him, causing him to suffer mental distress due to the separation from his family. The trial judge found that the defendants owed no duty of care to the appellant and that, even if they had owed him such a duty, Mr H would not have been able to prove causation. Mr H subsequently appealed to the Full Court of the South Australian Supreme Court.[3]

III THE JUDGMENT

All three judges found that, in Australia, policy considerations should be taken into account when determining whether a relationship of proximity has been

* [1997] Aust Torts Reports 81-419. Supreme Court of South Australia, Matheson, Prior and Perry JJ, 17 December 1996.

1 Ibid.

2 See, eg, Susan Faludi, *Backlash: The Undeclared War Against Women* (1991).

3 *H v Black* [1997] Aust Torts Reports 81-419, 63,952.

established.[4] They found that no duty of care was owed to an alleged perpetrator of sexual abuse by officers of the Department of Community Welfare or by the doctors who had examined the child, because policy factors operated to deny a relationship of proximity between an alleged perpetrator and the investigative authorities.[5] The judges agreed that, although it is of course foreseeable that injury to a person accused can occur because of inadequate or careless investigation of sexual abuse allegations, the existence of a duty of care to the person accused would create a conflict of interest with the clear statutory duty for the welfare department to act in the best interests of the child and to regard the interests of the child as the paramount consideration.[6] The judges closely followed the approach taken in *M v Newham London Borough Council*[7] and *X v Bedfordshire County Council*,[8] that any common law duty of care must be influenced by the statutory framework within which the acts complained of occurred. If a duty of care would create an inconsistency with statutory duties, or if it would discourage the performance of those duties, then the existence of a duty should be denied.

In *H v Black,* it was clear from the provisions of the *Community Welfare Act* 1972 (SA) ('the Act') that the interests of the child were to be the paramount consideration. Whilst the objectives of the department under the Act included the 'promotion of 'the welfare of the community generally, and of individuals, families and groups within the community',[9] it is clear that the interests of the child should outweigh other factors. Section 25 of the Act provides that '[a]ny person dealing with a child under or by virtue of any of the provisions of this Part shall regard the interests of the child as the paramount consideration.'[10] Furthermore, s 91(5) of the Act states that '[w]here a person acts in good faith and in compliance with the provisions of this section, he [*sic*] incurs no civil liability in respect of that action.'

Matheson J, whilst agreeing with the other judges in finding no duty of care, took up an argument from *Newham* and *Bedfordshire* which is slightly problematic. This group of cases involved a very different fact situation from that in *H v Black.* In *Newham*, a mother and her daughter instituted a negligence action against a welfare body which conducted an allegedly negligent investigation, in which the wrong person was identified as the perpetrator of abuse, resulting in the unnecessary and forcible separation of mother and daughter. The action failed due to a number of policy factors which will be considered below, but also because the judge found that, as the erring social worker and doctor were engaged by the local authority, they did not assume any general professional duty of care to the plaintiff children. The judge drew an analogy with a doctor

4 *Jaensch v Coffey* (1984) 155 CLR 549, 584; *Bryan v Maloney* (1995) 182 CLR 609, 617; *Gala v Preston* (1991) 172 CLR 243, 253.
5 *H v Black* [1997] Aust Torts Reports 81-419, 63,961.
6 Ibid 63,974 (Perry J).
7 [1995] 2 AC 633 ('*Newham*').
8 [1995] 2 AC 633 ('*Bedfordshire*').
9 *Community Welfare Act* 1972 (SA) s 10(1).
10 Ibid s 25(a).

employed by an insurance company examining applicants for life insurance. The doctor would not owe any duty of care to the applicant, but only to the insurance company which engaged him or her.[11] This analogy with the insurance company doctor is problematic. Although the doctor is engaged by the authority, the object of the whole exercise is obviously the well-being of the child.[12] The advice can also be seen as a form of treatment.[13] The implication seems to be that if a psychiatrist carelessly concludes that no abuse is occurring and the child subsequently suffers further harm as a result, there is no possibility of redress through the tort system.[14]

Matheson J followed the analogy in *Bedfordshire* and found that the doctors were not retained to advise the appellant and did not assume a duty of care in respect of him: 'It was for R alone that they were invited to exercise their professional skill and judgment.'[15] Whilst useful in denying a duty of care to an alleged perpetrator in *H v Black*, Matheson J seems to be suggesting that there may be a duty owed to the child by the doctors. This contrasts with the situation in *Bedfordshire* and *Newham*, where similar reasoning was used to *deny* the existence of a duty to the child.[16] It is interesting to note that in the recent United Kingdom case of *Barrett v Enfield London Borough Council*,[17] similar statutory and policy factors operated against the extension of a duty of care to a child allegedly harmed by welfare department decisions. This is problematic when there is a very real possibility of error and subsequent injury to the child.[18]

IV COMMENTARY: A BACKLASH CASE?

H v Black is just one example of a type of tort claim which could be categorised as a 'backlash' case. Mr H's counsel raised a number of issues in the appeal. Counsel suggested that Mrs H had coached her daughter in what to say before the investigation, stressed that she had a psychiatric illness, and cast doubt on the

11 *Bedfordshire* [1995] 2 AC 633, 752.

12 See the discussion in W Rogers, 'Tort Law and Child Abuse: An Interim View from England' (1994) 2 *Torts Law Journal* 257, 268.

13 *E v Dorset County Council* [1994] 3 WLR 853, 885 where Evans LJ specifically rejected the analogy of the insurance company doctor with a specialist engaged by a local authority to assess a child's educational needs, and suggested that the advice is a form of treatment.

14 See generally Rogers, above n 12. This assumes of course that monetary redress through the tort system is a desirable and appropriate response to these types of harms.

15 *H v Black* [1997] Aust Torts Reports 81-419, 63,961.

16 Matheson J also found that the doctrine of witness immunity would attach to the doctors' investigations due to their 'immediacy' with possible proceedings in pursuance of a statutory duty. He also found that their investigations could not be made the basis of subsequent claims.

17 Court of Appeal (Civil Division), Lord Woolf MR, Evans and Schiemann LJJ, 25 March 1997.

18 See the discussion in Philip Swain, 'Social Workers and Professional Competence: A Last Goodbye to the Clapham Omnibus ?' (1996) 4 *Torts Law Journal* 42, 55. Social workers have been sued for failing to remove children from abusive environments, for failing to notify of the sexual abuse of children, for failing to investigate thoroughly or adequately monitor a risk situation, or for performing harmful and unnecessarily intrusive investigations. Note also the public outcry over the death of Daniel Valerio: Sue Hewitt, 'Father of Daniel to Sue Experts', *The Age* (Melbourne), 28 February 1993, 3; Gerard Ryle, 'Doctors Lack Confidence in Child Protection System', *The Age* (Melbourne), 24 February 1993, 10; and the unnecessary interventions in the Children of God situation: Alex Messina, 'Children of God May Sue', *The Age* (Melbourne), 23 April 1994, 1.

credibility of the child.[19] These themes are by now hackneyed and clichéd. They reflect the ways in which social and legal systems have operated in order to suppress the reality of domestic violence and to discredit the voices of women and children.[20] The rhetoric of the false memory syndrome lobby groups in the context of child sexual abuse cases is a more recent reworking of these processes of subjugation and social control.[21] Analogous to the *H v Black* case are the series of defamation tort claims in the United States, where men against whom allegations of rape were made subsequently instituted civil suits against their accusers for defamation and intentional infliction of emotional distress.[22] These suits are likely to provide a new and forcible deterrent to women wishing to file complaints of rape or sexual assault.[23] Had a duty of care been found to exist in *H v Black*, a similarly detrimental and devastating impact on the attempt to empower mothers and children and protect them from abusive environments could be expected.

V ACCOUNTABILITY OF PUBLIC AUTHORITIES

Although the decision to deny a duty of care in *H v Black* must be applauded, the problem of the accountability of public authorities of this kind remains due to the very specific nature of the case. Well-intentioned welfare authorities make errors of judgment resulting in harm to adults and children.[24] This raises the important problem of the provision of some kind of redress to those who have been harmed by the actions of welfare authorities. Whether compensation through the tort system is an adequate response to the harms suffered is a legitimate question. Given that many legal actions in this context may be brought for their symbolic rather than monetary value, the tort system may not be the most appropriate avenue for those who have suffered harm.[25]

19 *H v Black* [1997] Aust Torts Reports 81-419, 63,955.

20 See, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 281, 341; Carol O'Donnell and Jan Craney, 'Incest and the Reproduction of the Patricarchal Family' in Carol O'Donnell and Jan Craney (eds), *Family Violence in Australia* (1982) 155, 159.

21 On false memory syndrome lobby groups, see Bruce Feldthusen, 'The Canadian Experiment with the Civil Action in Sexual Battery' in Nicholas Mullaney (ed), *Torts in the Nineties* (1997) 274, 275.

22 Eric Cooperstein, 'Protecting Rape Victims from Civil Suits by their Attackers' (1989) 8 *Law and Inequality* 279. These types of suits portray women in all the classic patriarchal ways: they lie, are spiteful, vengeful or insane, and will make false allegations of rape to avenge a romantic slight or to obtain custody.

23 It has been suggested that already as many as 90% of women assaulted do not report sex crimes because they wish to avoid the ordeal of insensitive police procedures and of proceedings in a criminal justice system that seems to put the victim on trial as well as the alleged perpetrator. See, eg, ibid 280; Graycar and Morgan, above n 20; Jocelynne Scutt, *Women and the Law* (1990) 483. See also the discussion on the massive under-reporting of child sexual abuse and reasons for this in Jocelyn Lamm, 'Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discoverability Rule' (1991) 100 *Yale Law Journal* 2189, 2196.

24 See generally Swain, above n 18.

25 See, eg, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 ('*Hill*'). For a discussion of the use of tort for symbolic and therapeutic purposes but in a different context, see Bruce Feldthusen, 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence' (1993) 25 *Ottawa Law Review* 203.

The policy reasons behind immunities include the danger of authorities becoming ineffective through overly defensive practices,[26] the possibility of opening the 'floodgates',[27] the diversion of resources away from the primary objective of child protection and the possibility of alternative remedies in preference to action through tort. The argument that fear of litigation may lead potential defendants to be unduly cautious in the performance of their duties and to take defensive measures in order to minimise the risk of litigation is often used in these types of cases.[28] This argument is problematic. Firstly, there is little reliable empirical evidence to show that liability creates defensive practices.[29] Too little is known about the impact of potential liability on public defendants and liability may not alter the behaviour of public defendants in the same way that we expect it to alter private behaviour.[30] Secondly, as Cane observes, the argument depends on 'attributing to potential defendants an ignorance of the requirements of the law (which does not expect the taking of "unnecessary precautions") and ... uses this ignorance as the basis for a legal rule.'[31] The 'floodgates' argument, that the finding of liability in a particular case will lead to an endless flood of claims, has been labelled an 'unrealistic' fear,[32] and loses much of its force when one considers the restricting principles concerning the liability of public authorities.[33] Most significantly, the fact that many claims may arise within the welfare context should not be taken to imply that those claims are any less strong or any less deserving of the attention of the courts.[34]

The decision in *H v Black,* in which a combination of statutory and policy factors operated to deny a duty to an alleged perpetrator, may appear admirable. It is important to note, however, that in cases such as *Barrett v Enfield London Borough Council*,[35] similar factors operated to deny a seemingly deserving plaintiff the opportunity to bring a claim. Alternative remedies such as complaints mechanisms within the authority itself or complaints to an ombudsman are less expensive but are often as ineffective as tort, and lack the symbolic value and accompanying publicity of a court action.[36] Public authorities ought to be

26 *H v Black* [1997] Aust Torts Reports 81-419, 63,952; *Hill* [1989] AC 53; *Bedfordshire* [1995] 2 AC 633; *Barrett v Enfield London Borough Council* (Court of Appeal (Civil Division), Lord Woolf MR, Evans and Schiemann LJJ, 25 March 1997).

27 This was a major policy factor influencing the decision in *Hill* [1989] AC 53 within the context of the liability of the police for alleged negligent investigations.

28 *Calverley v Chief Constable of Merseyside* [1989] AC 1228; *Bedfordshire* [1995] 2 AC 633; *Hill* [1989] AC 53; *Alexandrou v Oxford* [1993] 4 All ER 328; *Osman v Ferguson* [1993] 4 All ER 344; *Ancell v McDermott* [1993] 4 All ER 355; *H v Black* [1997] Aust Torts Reports 81-419, 63,961; *Barrett v Enfield London Borough Council* (Court of Appeal (Civil Division), Lord Woolf MR, Evans and Schiemann LJJ, 25 March 1997).

29 See generally Peter Cane, *Tort Law and Economic Interests* (2nd ed, 1996) 241.

30 Bruce Feldthusen, 'Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity' (1997) 5 *Tort Law Review* 17, 29.

31 Cane, above n 29, 241.

32 Ibid 456.

33 Eg, the statutory provisions limiting liability if the authority acts in good faith and the policy/operational dichotomy: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

34 Cane, above n 29, 456.

35 Court of Appeal (Civil Division), Lord Woolf MR, Evans and Schiemann LJJ, 25 March 1997.

36 Feldthusen, 'Therapeutic Jurisprudence', above n 25, 203.

accountable, but the use of tort law in this area has produced unsatisfactory and uneven results.[37]

PENNY MAROULIS*

[37] Feldthusen, 'Discretionary Public Benefits', above n 30, 28 notes: 'Throwing an ineffective remedy at the issue of unaccountable public discretion may be therapeutic at the time, but it only lulls us into believing that we are dealing with the problem'. See also the decision in *Elguzouli-Daf v Commissioner of Police; McBrearty v Ministry of Defence* [1995] QB 335, 349 which noted 'compelling considerations rooted in the welfare of the whole community which outweighed the dictates of individualised justice.' The decision in *Eland v Commonwealth of Australia* (1992) Aust Torts Reps 81-157 is an example of the failure of tort law in forcing some degree of public accountability.

* BA (Hons) (Melb); Student of Law, The University of Melbourne. I acknowledge the helpful comments of Ian Malkin.