

BOOK REVIEW

D Fairgrieve and S Green (eds), Child Abuse Tort Claims Against Public Bodies: A Comparative Law View (Ashgate Publishing 2004).

The text *Child Abuse Tort Claims Against Public Bodies: A Comparative Law View* was published through Ashgate in 2004 arising from an earlier conference on the same theme. The editors are D Fairgrieve and S Green.

Authors in 11 different common law and civil law jurisdictions of Ireland, England and Wales, Canada, France, Germany, Italy, USA, South Africa, New Zealand, Australia and the Netherlands comment on public bodies and liability in child abuse cases in their respective legal systems. Public authorities include social, welfare and health services, health boards, residential homes and schools and various government departments and agencies.

The book reads as a refresher in torts with specific application here and abroad. There are a number of possible claims and contexts:

- Vicarious liability of the public authority for assaults committed by its agents or servants;
- Negligence of the public authority in the supervision and operation of its institutions and services;
- Negligence of a local authority in respect of a child in foster care;
- Duties and role of health boards and other agencies in respect to parents, children;
- Negligence of the public authority in failing to provide suitable or adequate provision and protection for children placed in their care; and
- Vicarious liability of the local or governmental authority for the negligent acts of its social workers and other employers.

As is written in the foreword, the central theme is 'in what circumstances will, and should the law convert a general duty to abstain from inflicting harm on another to a positive duty to act to protect another from foreseeable harm.' That conversion requires government commitment, allocation of funds and resources, public policy and public debate and support. That is no mean feat particularly in countries where the family is sacrosanct and the duty of public authorities and welfare bodies is limited.

In Australia we have no separate human rights statute although we have ratified the *Convention on the Rights of the Child*¹ and the *Family Law Act 1975* (Cth) as amended contains a number of provisions protecting children from abuse within

1 Opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Australia 16 January 1991).

the family. Protection from abuse by authorities is not included in any federal legislation.

There have been a few cases in Australia involving claims or allegations that child abuse or neglect was either perpetrated or could have been prevented by those caring for or educating children in our community. Few cases reach the court room and even fewer reach the law reports. Some cases consider the liability of workers and the vicarious liability of their public body employers; some look at the common law duty of care in general and then specifically a proposed abused or neglected children and whether such a duty has been breached.

The pinnacle came in the 2003 case of *Lepore*² where each of the six High Court judges delivered six separate judgments, each with a different view of vicarious liability and on the nature of the non-delegable duty. The situation in Australia is therefore far from clear and the various chapters from different countries provide an insight into the analyses and judicial views worldwide.

The chapters on the position in England and Wales are the most interesting given that the House of Lords has considered the common law duty of a public authority to protect children from abuse several times since the 1990s and that England has the *Human Rights Act 1998* (UK) and is a signatory to the *European Convention on Human Rights*.³

What transpires in England is that there is no blanket immunity for public authorities in the area of social services or child care. In some cases there is a duty of care owed and in some of these instances the duty is found to have been breached.

The beauty of this text is that different experts in each jurisdiction outline the law providing an insight into local legal systems, comparative tort law, judicial views and the context of delivery of public services regarding children.

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2 *NSW v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511 ('*Lepore*').

3 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222, opened for signature 4 November 1950 (entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively).