THE HON JUSTICE R CAVANAGH
A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
2021 ST ALOYSIUS LAW LUNCH – 18 MARCH 2021

I was very pleased to be asked to speak at today's lunch although, of course, the lunch was deferred for a period of 12 months like most things that were scheduled to take place in 2020.

I was also a little embarrassed to be asked to present today. On the last three occasions at this lunch, I have had the pleasure of listening to Justice Gageler of the High Court, the then President of the Court of Appeal, now Governor Beazley and the Chief Justice of the Supreme Court of NSW, Tom Bathurst.

I do feel that you have gone a bit down market, Mark, although I do have one point of distinction. I suspect that I am the only one of the four who actually went to the school. Justice Gageler, had children here, Chief Justice Bathurst went to Riverview and as far as I am aware, the Governor did not go to Aloysius.

I thus do have an advantage over the other three in that I can reminisce about such Aloysian luminaries as Father Ross Jones, who taught me biology in Year 11 at a time when he had not even joined the Jesuits. I hasten to add, of course, that Father Ross was at that stage a very young man and it might have been perhaps his first teaching assignment.

Ross, although you have no doubt inspired thousands of young men, your teaching of biology did not inspire me to become a scientist, albeit, it had an indirect benefit because I ended up marrying a scientist.

Speaking of school days, I might also mention that by coincidence the Campion Lecture was this term delivered by our school captain of 1976, my good friend, Professor Rice. I watched it virtually – a very interesting talk on social justice (which he might say is not to be confused with legal justice).

I'm happy to take questions on any subject (within reason). I say that because I see a table of very experienced plaintiff's lawyers hosted by one of Sydney's longest serving solicitors, Kevin Emanuel. I also see there is a table of Henry Davis York alumni and I'd have some concern about any questions coming from that lot.

Anyway I should move onto the topic. Now I do understand that the Annual Aloysian Law Lunch serves many purposes. For some, it is a chance to get together and catch up with some old colleagues. Of course, it operates as a little bit of a fundraiser and for some lawyers in the group, it provides an opportunity to perhaps assist them in obtaining points for their CLE.

As such, of course, it is part of the tradition of the lunch that there be a presentation on some weighty legal subject. I note that the previous speakers have focussed pretty much on the relationship between religion and the law with topics on religious freedom, secularism and even a constitutional issue. As you will note from the brochure, I have decided to move away from the idea of religion on the law and focus on the parent child relationship and tort law.

Of course, children are protected by statute, particularly the criminal code and parental obligations are the subject of various international conventions. For example, Article 24 of *the International Covenant on Civil and Political Rights 1966* provides that every child shall have the right to protection from the child's family, society and the State.

Article 10 of the *International Covenant on Economic, Social and Cultural Rights 1966* specifies that I quote: "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children".

Article 18 of the *Convention on the Rights of the Child 1989* refers to "the principle that both parents have common responsibilities for the upbringing and development of the child".

Having mentioned those matters, I will now move on to discuss the potential tortious liability arising out of the parent and child relationship.

The first thing I should mention is that there is no doctrine of parental immunity in Australia.

The doctrine of parental immunity appears to be unique to the USA. It was first developed in the United States in the late 19th Century, perhaps as a follow-on from the acceptance of inter-spousal immunity.

Its rationale was very much based on the paramountcy of the family unit and the importance of family harmony. The doctrine of parental immunity was an answer even to claims by children in battery against their parents. Battery is an intentional tort, that is the tortfeasor intended to hurt or damage the child. Further, the doctrine has been expanded to include persons *in loco parentis* such as grandparents.

In any event there is neither a doctrine of parental immunity nor statutory immunity afforded to parents in Australia. The doctrine of parental immunity as part of the common law of Australia has been expressly rejected by the High Court in cases such has *Hahn v Conley*[1] and *Harriton v Stephens*.[2]

Although tort law was the subject to quite far reaching change with the introduction of the *Civil Liability Act* in NSW in 2002 there is no provision protecting parents from a tortious liability (unlike for example providers of recreational services or in some circumstances public authorities.

This means that that any liability arising out of the parent child relationship (which would extend to persons *in loco parentis* such as grandparents who are caring for children) is based on ordinary tort law principles.

In order for a person to be found negligent, it is necessary that the claimant establish that the tortfeasor owed a duty of care, was in breach of the that duty, that the breach caused the loss and that there was actual loss.

I'm sure that you have all heard of the concept of duty of care. Indeed, we hear it regularly in the media where it is expressed as a "thing". When persons are asked why things happened or didn't happen, we often hear the response "it's duty of care". Well, it's not really a "thing". It is merely a shorthand way of expressing an obligation that the law may impose on a person with respect to other persons.

[1] (1971) 126 CLR 726; [1971] HCA 56.
[2] (2006) 226 CLR 52; [2006] HCA 15.

However, contrary to popular belief, not every person owes a legal duty, expressed as a duty of care, to everyone else. As has often been said by the High Court in cases such as *Roads and Traffic Authority of NSW v Dederer*[3] the existence of a duty of care is generally dependent upon a defined category of relationships, most commonly being employer and employee, hospital and patient, occupier and entrant, driver and pedestrian and even school and student.

In general terms you do not owe a duty to your neighbour to rescue him from harm (that is harm unrelated to you). Nor does a person normally owe a duty to take steps to prevent harm to a person arising from criminal conduct of a third person. A person does not generally owe a duty to protect a person from self-harm (although I'm not talking now about those such as hospitals and doctors who have assumed a responsibility to do so).

Whilst again we often hear suggestions that a person was negligent, a person cannot be negligent unless that person owed a duty of care to the person who suffered injury or loss as a result of the conduct. Further it is important to emphasise that all duties of care, not matter what their nature or scope may be discharged by the exercise of reasonable care.

Actions involving children and parents or persons *in loco parentis* generally involve issues relating to whether a duty of care was owed in the circumstances and then whether the tortfeasor failed to act with reasonable care in all the circumstances.

I should say at this stage that the common law does not allow a person to treat her or his own birth as actionable damage. Wrongful life claims are not permitted in Australia. By wrongful life claims I mean a child suing on the basis that he has suffered loss as result of being born (that is with disabilities).

In *Harriton v Stephens*[4] the High Court dismissed an appeal (coincidentally the trial judge was a judge of the common law division of the Supreme Court of New South Wales, Studdert J) in respect of an action for damages by a child who was born with

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[3] (2007) 234 CLR 330; [2007] HCA 42.
[4] (2006) 226 CLR 52; [2006] HCA 15.

severe disabilities against the doctor who had failed to diagnose the mother's rubella infection during pregnancy.

Whilst there were many arguments raised, critical to the outcome was that the plaintiff could not establish damage or loss. There can be no cause of action in negligence without loss.

Loss can only be established by comparison of the damage or loss caused by the negligent conduct with the plaintiff's circumstances absent the negligent conduct.

That is but for the negligence complained of what would the plaintiff's position have been. On the plaintiff's case, but for the conduct of the tortfeasor, she would not have been alive. It would have been necessary for the Court to find that non-existence was preferable to a life with disabilities.

As the Court recognised a comparison between a life with disabilities and nonexistence for the purpose of approving actual damage is impossible. The Court considered that there was no field of human learning including philosophy and theology which would allow a person access through experience to non-existence whether it is called pre-existence or afterlife.

On the other hand, so-called wrongful birth claims have been permitted for example in *Cattanach v Melchior.*[5] A wrongful birth claim is a claim by a parent in respect of the cost of raising a child in circumstances in which the mother became pregnant following negligent advice about a sterilisation procedure. Those types of claims perhaps relate more to the field of medical negligence so I won't dwell on that topic.

The next point I wish to emphasise is that parents are generally not vicariously liable for the conduct of their children. Vicarious liability is a concept which permits the shifting of responsibility from the person actually at fault to another person based on their relationship. For example, employers are vicariously liable for the conduct of their employees. Hospitals are vicariously liable for the conduct of nurses and principals, not necessarily the school-teaching type, may be liable for the conduct of their agents.

[5] (2003) 215 CLR 1; [2003] HCA 38.

In general terms, the child is an independent person and the parents are not vicariously liable for the child's conduct, unless the child is acting with the authority of the parents, for example, as an employee or driving a vehicle.

Further, although in some circumstances a parent may owe a duty to a third person to exercise control over a child, the Courts have generally found ways to avoid imposing a liability in direct negligence. In *Smith v Leurs*[6], the High Court did not accept that a parent was negligent in giving a 14 year old boy a slingshot which he used and which resulted in another boy losing an eye. Perhaps a parent could be liable for some form of positive creation of the danger or encouragement of the negligent conduct but it remains difficult to anticipate how a parent could be vicariously liable for the conduct of a child merely based on that blood relationship.

Moving now on to those cases where children have sued their parents or persons *in loco parentis* it must be said that the cases are not that common. In practical terms, this is because most plaintiffs only sue in cases involving a child and his or her relatives in the hope that an insurer might become involved.

It has often been said that the incidence of insurance is irrelevant to the nature and extent of any duty of care owed by a defendant to a plaintiff but, absent insurance, many tortious claims would not be pursued.

With apologies to all those insurance lawyers here, I am not sure whether everyone else would be aware that almost all home and contents policies contain liability extensions which will cover the insured home owner and persons living in the premises in respect of any liability arising out of the ownership or occupation of premises and, under a contents policy, any liability arising generally, albeit subject to numerous exceptions.

One such exception is that a homeowner would not be entitled to coverage in respect of any liability to a member of the family ordinarily residing with the homeowner, i.e. in the same premises.

It follows that leaving aside the statutory context of compulsory third party insurance, almost invariably, parents would have difficulty obtaining cover in respect of their

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[6] (1945) 70 CLR 256; [1945] HCA 27.

tortious liability to their children. However, as is evident from a number of claims, grandparents do not face the same difficulty as they generally do not live in the same home.

Of course perhaps, as recognised by no lesser legal identity than Chief Justice Gleeson in the case of *Cattanach v Melchior*[7], it might be said that it is difficult to reconcile the emphasis on the importance of the family unit in statutes and international conventions with the idea that the parent/child relationship could be something which the law would regard as giving rise actionable damage.

Having said that, Australian law does recognise that in some circumstances a parent or a person *in loco parentis* will owe a duty of care to a child. The circumstances in which a duty might be owed are probably best summarised as based on the distinction between omitting to do something and positive conduct which creates the danger.

I will now focus on a small number of cases which give some idea of both the principles that might be applied and the difficulties involved in this type of litigation.

The High Court case most referred to is that of *Hahn v Conley*[8], a 1971 case.

In that matter, a three year old child was knocked over by a motor vehicle on a public street. The driver of the motor vehicle was found to have been negligent but filed a cross-claim against the grandfather in whose control the child was at the time of the accident.

The child was in the front yard of the house when the grandfather wandered across the road to visit a neighbour. He heard the child call out and he simply answered "*I'm over here*" or "*Here I am*". On hearing his grandfather, the child simply walked across the road when she was struck by the motor vehicle.

Whilst the grandfather was ultimately held not to be liable, based on no breach, the case is generally referred to supporting the principle that parents or persons in the

[7] (2003) 215 CLR 1; [2003] HCA 38.
[8] (1971) 126 CLR 276; [1971] HCA 56.

position of a parent may become liable to a child if the child is led into danger by their actions.

As Chief Justice Barwick said, the moral duties of parenthood should not provide a child with any cause of action when such duties are badly performed or neglected. Yet, as his Honour observed, there may be particular situations in which, because of their circumstances, there will be a duty on the person in whose care the child is being placed and accepted to take reasonable care to protect the child against foreseeable danger.

In *St Mark's Orthodox Coptic College v Abraham*[9] the plaintiff, a nine-year-old boy, suffered injury whilst playing at school around 8.00am prior to the teachers formally being rostered on to supervise the children. Unfortunately, he fell over a second-floor balustrade and suffered significant injuries.

He succeeded against the school, largely because the school seemed to accept that it was aware that students would be dropped off before the commencement of the formal period of supervision by students. Critical to the plaintiff's success was the acceptance by the school that it had a rather informal system of supervision in place from a certain time which changed to a full supervision at a later time. Unfortunately, the accident occurred during that informal period of somewhat less than satisfactory supervision.

The school cross-claimed against the plaintiff's father. The Court of Appeal accepted that he may have owed a duty of care to the child, to not expose him to a risk of injury or lead him into danger. However, the Court accepted that the parent had not acted in breach of any duty of care. The Court accepted that the father thought it was in the child's best interests to spend a brief time before school with his friends and did not foresee that there was any risk to the child in dropping him off at the school a bit early.

As the Court said, the legal principles applicable to negligence must accommodate the practical realities of everyday living. Bringing up children cannot be made risk-free. It is inevitable that even children who live in the most careful and ordered

[9] [2007] NSWCA 185.

households will be exposed from time to time to a risk of harm. Such exposure does not necessarily lead to a finding that a parent acted in breach of any legal obligation to take care.

In *Boland v Hoffmann*[10] a baby, her mother and her grandmother (Reverend Hoffman) were staying in a two storey holiday house. In the middle of the night, the grandmother heard the baby crying and crept into the mother's room, removed the baby from the cot and carried the baby down the spiral staircase without turning the light on so as to not awake the mother. Unfortunately, she fell down the staircase and the baby hit her head suffering a severe brain injury. The baby, acting through her tutor, sued a number of defendants, including the builder of the property, the designer of the staircase and the grandmother. Of course, as you would expect, the case had some difficult moments, particularly when the grandmother gave evidence and was cross-examined on her conduct.

The trial judge accepted that the grandmother owed a duty of care to her granddaughter in the circumstances as she was in a position *in loco parentis*. The trial judge accepted that the grandmother had failed to take care in carrying the baby down the staircase in the way that she did.

The Court of Appeal disagreed[11], although it determined the matter on the basis of no breach of duty rather than whether the grandmother actually owed a duty of care to the child. The Court accepted that she was endeavouring to descend the staircase safely but there was no handrail. She was conscious that she needed to take care in the dark. Justice Sackville considered that it verged on the fanciful to suggest that she breached any duty of care she owed in circumstances in which she was assisting her family in a typical fraught domestic situation involving a restless infant. As often happens in these types of cases, the Court preferred to determine the matter on the question of breach rather than duty.

Again, it is important to emphasise that the Court will look at the precise conduct of the defendant in determining whether a duty of care was owed. The conduct that

[10] [2012] NSWSC 571.
[11] [2013] NSWCA 158.

most often leads to a finding of existence of a duty of care is a one-off type of act which leads the injured person into danger.

The final case on which I wish to touch on is a case which I had some involvement as the trial judge, which was then considered by the Court of Appeal being *Polglase v Coffs Harbour City Council & Ors*[12].

The plaintiff, a 5-year-old boy, had been taken by his mother to stay with his grandparents in Coffs Harbour. One morning, the grandparents decided to take the child for a walk along the Coffs Harbour Jetty. They thus were in the position of persons *in loco parentis* in that they had assumed the responsibility for his care.

The Coffs Harbour Jetty was formerly a large commercial wharf. It had long since fallen into disuse and disrepair. In the late 1990s, it was restored by the Department of Public Works for the purposes of creating a tourist attraction in Coffs Harbour. Its purpose was thus a walkway albeit, small boats were able to still tie up to the jetty.

On the day of his accident, the plaintiff was walking along the jetty with his grandparents. They went to look at the boats on the side of the jetty. It was low tide. The hard sand was approximately 5 metres below where they were standing.

The plaintiff was standing between his grandparents. They were not holding his hand. The grandfather turned to walk away and the grandmother followed, calling the plaintiff as she did so. They had only proceeded a few steps when they turned around to see that he was not there. He had fallen through the railing, either above or below the middle rail. He sustained a traumatic brain injury when he hit the sand. Of course, he was not able to say what occurred, but it must be that he fell underneath the top railing and either above or below the middle railing.

The plaintiff took proceedings for damages against the local council and reserve trust which had managed and been in control of the jetty since 2002. He also sued the State of New South Wales on the basis that the Department of Public Works had negligently modified and reconstructed the wharf in the sense that they had designed and installed a railing which was not safe. The plaintiff also sued his grandparents in negligence, alleging that they owed a duty of care to him and that duty of care

[12] [2019] NSWSC 1249.

required them to keep him under constant supervision and, indeed, take hold of his hand whilst he was standing adjacent to the railing, bearing in mind the distance he might fall and the gaps in the railing.

I found in favour of the plaintiff against the Council, but not as against the State of New South Wales or the grandparents. The matter involved a number of complex issues relating to the application of the *Civil Liability Act 2002* (NSW), risk warnings, acceptance of risk and the nature and scope of the duty of care owed by each of the defendants.

It is not the purpose of this talk to review the reasons why I found against the Council but, in simple terms there had been two similar accidents involving children and each of whom suffered very severe injuries. Suffice to say that after the first and second accidents, the Council had determined that it should be investigating how such accidents could be prevented but did not follow things up, despite suggestions and complaints from members of the community.

Whilst I did not find it necessary to determine the nature and extent of the duty of care owed by the grandparents, I did not accept that the grandparents acted in breach of any duty of care they might have owed. The boy was 5.

I did not accept (and the Court of Appeal agreed[13]) that the exercise of reasonable care on the part of the grandparents required them to take hold of the child's hand at all times or even never take their eyes off him for a second. There was evidence that he was generally an obedient and independent child.

I did not consider it necessary to make any finding on whether the grandparents actually owed a duty of care in the circumstances as I determined the outcome based on no breach.

For those interested, the Court of Appeal decision when combined with the original decision provides a summary of principles applicable to a range of different types of causes of action and negligence.

[13] [2020] NSWCA 265.

So, in conclusion, I can probably state a few principles or patterns.

Firstly, the Court is not interested in imposing some objective standard of supervision on parents.

Further the Court has shied away from imposing a liability based only on some omission rather than some positive conduct on the part of the parent or grandparent which leads the child into danger.

In reality, it is always easy to look backwards at how an accident occurred and identify ways in which it may have been prevented, but the question of breach of duty of care must be assessed prospectively, that is, having regard to the conduct of the defendant's information available to the defendant at the time, that is, prior to the accident.

As in all cases negligence is not to be determined merely with reference to what a person might have done to prevent the accident. Of course, for example in *Polglase* it might have been foreseeable on the part of the grandparents that if the child overbalanced and they were not holding onto him he might fall through the railing.

However, the ultimate question is always what a reasonable person would have done in the particular circumstances of the case. Of course, determining what a reasonable person would have done is necessarily an evaluative judgment. The Court must be careful not to impose a standard of care on parents, grandparents or other persons *in loco parentis* which does not reflect community standards or expectations.

Parents or grandparents do not have immunity from claims by their children but, in reality, most cases by children against parents or grandparents fail on the basis that the plaintiff is unable to establish a breach of any duty of care which might be owed. Indeed, the Court generally finds it convenient to dismiss the claim with reference to breach rather than dealing with the more complex issue of any scope of duty of care which might be owed.

However, having regard to *Hahn v Conley*[14] and subsequent cases, there will be circumstances in which parents may owe a duty of care to their child. Those circumstances are unlikely to include a failure to supervise or provide adequate discipline. But if a parent deliberately leads a child into danger, then it may be that the child would have an actionable claim against the parent in tort.

Finally, most of you are probably here to really find out whether your children might owe any duties to their parents in return for everything you do for them.

I just want to read from an English text, (Blackstone's Commentaries on the Laws of England) a passage which deals with the responsibility of children to their parents. I invite the younger generation to listen carefully:

> "The duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws."[15]

Unfortunately, this text was first published in the 1760s. Those were the days.

And on that note, I will finish.

[14] (1971) 126 CLR 276; [1971] HCA 56.
[15] Sir William Blackstone, *Commentaries on the Laws of England* (1765) Bk 1 at 441.