

RICHARDS v. STATE OF VICTORIA<sup>1</sup>

*Negligence—Duty of care owed by a school teacher to pupil—Causation by Omission.*

The litigation in this case arose out of a claim for damages against the State of Victoria<sup>2</sup> for personal injury suffered by the plaintiff, Richards. The facts of the case were briefly, that on 4 October 1962 the plaintiff, who was sixteen years of age at the time, was severely injured in a fight with another student. The fight occurred in a classroom in the presence of the teacher (One Traill). There was evidence that Traill took no steps to quell the argument which preceded the fight, and did not intervene to stop the fighting. The plaintiff sued the State of Victoria as Traill's employer.<sup>3</sup> At first instance the plaintiff having been awarded substantial damages, the State of Victoria appealed alleging, *inter alia*, a misdirection by the trial judge to the jury. The Full Court allowed the appeal, ordering a new trial.<sup>4</sup> Its judgment proceeded along the lines of a methodical analysis of the concept of negligence and this case note will take the same approach.

The orthodox view of the tort of negligence is that it comprehends three integral elements; duty of care, breach of duty and resulting damage, which is not too remote. It is proposed to deal with each one under a separate head.

#### *Duty*

The concept of duty is used to delimit the area of negligence liability. A plaintiff must establish that the defendant has been careless in the breach of a specific legal duty to take care, and that this duty of care was owed to the plaintiff himself. The law does not recognize a duty in the air.<sup>5</sup> Usually the existence of a duty to take care is determined by the reasonable foreseeability of harm arising if care is not taken.<sup>6</sup> Involved with this concept is the notion of 'proximity' which is often expressed as the 'neighbour principle' enunciated by Lord Atkin in *Donoghue v. Stevenson*.<sup>7</sup> However, it may be that because of the very relationship between the parties, a duty of care arises. The Full Court adopted this approach. It was found that the relationship of school-master and pupil *per se* generated a duty to take care.<sup>8</sup> In such a relationship the duty of care did not depend so much on the reasonable foreseeability of harm arising from any particular conduct, but existed prior to and independently of the conduct alleged to constitute negligence. Hence it was clear that Traill did owe to the plaintiff a duty to take reasonable care in this case.

#### *Breach*

The duty concept comprehends a duty of care which is placed upon the defendant. The standard of care is usually expressed in terms of what a reason-

<sup>1</sup> [1969] V. R. 136. Full Court of the Supreme Court of Victoria; Winneke C.J., Adam and Little JJ. The joint judgment was read by Winneke C.J.

<sup>2</sup> The State of Victoria was sued pursuant to the Crown Proceedings Act 1958, s. 23(1)(f).

<sup>3</sup> It was not disputed that Traill was a servant of the Crown acting within the course of his employment at the relevant time. The liability of the Crown is vicarious only in the sense that liability arises if it is shown that there has been a breach by a servant of the Crown of a duty owed by that servant to the plaintiff: *Hall v. Whatmore* [1961] V.R. 225.

<sup>4</sup> The case was subsequently settled out of court.

<sup>5</sup> *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1; *Bourhill v. Young* [1943] A.C. 92.

<sup>6</sup> *Donoghue v. Stevenson* [1932] A.C. 562; *Heaven v. Pender* (1883) 11 Q.B.D. 503.

<sup>7</sup> [1932] A.C. 562.

<sup>8</sup> *Jury v. Commissioner for Railways* (N.S.W.) (1935) 53 C.L.R. 273, 290.

able man would do in all the circumstances.<sup>9</sup> Thus, the breach of this duty is usually conceived of as being the failure to take such reasonable care. The Full Court was therefore faced with the question of whether there was evidence that Traill's acts or omissions amounted to a failure to take reasonable care. This in turn was dependent upon what exactly was the standard of care incumbent on Traill as a teacher. Although it would be for a jury to say whether or not there was a breach of the duty of care owed by Traill to the plaintiff, the Full Court spelt out the standard of care by which a jury could measure Traill's conduct. The duty on Traill required him to take such steps as were reasonable in the circumstances to prevent physical injury to the plaintiff.<sup>10</sup>

The plaintiff relied on three acts that he alleged amounted to a failure to take reasonable care. Before writing these, it must be noted that the incident that ended so tragically for the plaintiff was comprised of three stages. Firstly, there was an argument between the plaintiff and the other student; next came some scuffling, and finally, an exchange of blows. The three acts relied on by the plaintiff were, firstly, that during the incident Traill encouraged the fight by saying, 'If you want to fight, go outside and do it'. Secondly, that because of prior failures by Traill to enforce class discipline, any demand by Traill would be ignored. Thirdly, that Traill allowed the incident to progress through the three stages without intervening and any reasonable man would have intervened because it was obvious that trouble was brewing.

As to the first ground, the Full Court said that if the evidence was correct, its real relevance was to the question of what steps, if any, Traill took to safeguard the plaintiff. But, stated as an independent ground for finding Traill liable, it obscured the basic question of what acts Traill should, in the exercise of reasonable care, have taken to terminate the encounter. As to the second ground, the Full Court seemed to imply that it might be possible to construe such prior failures to enforce class discipline as a breach of a duty of care but the matter was not discussed in depth. As to the last ground, the Full Court considered that it was open to the jury to find that Traill failed to take any steps to prevent the fight, and there was evidence on which a jury could find a breach by Traill of the duty of care he owed to the plaintiff. The Full Court made it clear that Traill's behaviour was to be judged on the objective standard and that the jury were to consider what steps Traill should, in the exercise of reasonable care for the safety of the plaintiff, have taken to prevent a fight occurring. However, the Full Court, even though it found sufficient evidence on which a jury could find a breach of duty by Traill, ordered a new trial on the ground of a misdirection on this point by the trial judge to the jury. The trial judge had directed the jury that Traill was liable if he failed to take reasonable steps to prevent the occurrence. This, the Full Court said, was a misdirection, for it was for the jury to determine whether Traill should, on the exercise of reasonable care, have taken any and what steps by way of intervention. As it was not known on which ground the jury had found the defendant liable, it was possible that the jury decided on this unsupportable ground, and so a new trial had to be ordered. Having ordered a retrial the damage question did not really have to be determined. However the following points were set out for guidance at the retrial.

#### *Damage*

The Full Court was careful to point out the difference between causation in fact and foreseeability. The test of causation was still whether there was a 'but for' causal link between the alleged negligent conduct and the damage. Fore-

<sup>9</sup> *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468; *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 784.

<sup>10</sup> *Richards v. State of Victoria* [1969] V.R. 136, 143.

seeability was not a test of causation; it set the limit on the damages for which the defendant was liable.<sup>11</sup>

The same three acts that were relied on by the plaintiff as constituting the breach of duty were also alleged to be sufficient evidence upon which a causal link between the breach of duty and the injury could be based. As to the first ground, the Full Court concluded that if it could amount to a breach of duty, then it was possible that it could be a cause of the injury.<sup>12</sup> As to the second ground, the Full Court said that the prior lack of class discipline could not amount to a cause of the incident on 4 October. To hold otherwise would impose a standard approaching perfection on a schoolteacher. The reasonable man is not expected to foresee everything which can conceivably happen. Hence the Full Court concluded that the trial judge was wrong in directing the jury that they could find Traill liable by reason only of his prior failures to maintain class discipline. As to the final head of causation the Full Court proceeded on the assumption that if the jury found that Traill did not become aware of the situation until the scuffle stage, then it would be doubtful whether Traill's failure to intervene could be said to be a cause of the injury. Attention was drawn to the subjective qualities of Traill, describing him a small man who was no match physically for either of the students involved in the fight. Then the Full Court seemed to imply that the jury could conclude that Traill, being a small man, no form of physical intervention was reasonably open to him, and therefore, failure to intervene could not be a cause of the injury. With respect it is suggested that the Full Court was wrong in this conclusion. The standard of negligence by which conduct is measured is objective. The Full Court laid down the standard of care incumbent on Traill as that of the reasonable schoolteacher when discussing duty and breach. But when it considered this part of the causation issue it introduced a subjective standard of negligence. The learned justices took into account Traill's personal characteristics and then asked what would have been reasonable for him to do. As there is no necessary connection between legal liability to make compensation and moral culpability, an entirely objective standard ought to be applied at all levels of negligence.<sup>13</sup>

There being sufficient evidence on which a causal link could be found, the Full Court, following *Hughes v. Lord Advocate*<sup>14</sup> and *Chapman v. Hearse*<sup>15</sup> found that the injuries were not too remote in law. It was stated that physical injuries resulting from an exchange of blows cannot be put into watertight compartments and that there was evidence that the injury suffered was of the same 'class' or 'type' as could reasonably have been foreseen.

The case raises the problem of the lack of judicial definition of the exact

<sup>11</sup> *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, 636. The Judicial Committee said 'It has now been established by the *Wagon Mound (No. 1)* and by *Hughes v. Lord Advocate* that in such cases [i.e., negligence] damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also an injury of a class or character foreseeable as a possible result of it'. *Chapman v. Hearse* (1961) 106 C.L.R. 112, 122.

<sup>12</sup> *Richards v. The State of Victoria* [1969] V.R. 136, 143. 'If they [the jury] thought that in order to discharge his duty of care he should have intervened at the "argument" stage, they could, we think, have concluded that a firm verbal assertion of his position and authority as the class teacher or a command to one of the boys to move to another desk or out of the room would, more probably than not, have terminated the incident and avoided the risk of a fight eventuating. In that event the jury could properly conclude that his [Traill's] negligence was a cause of the damage.'

<sup>13</sup> This view is supported by Menzies J. in his dissenting judgment in *McHale v. Watson* (1966) 115 C.L.R. 199, 216-26.

<sup>14</sup> [1963] A.C. 837, 845.

<sup>15</sup> (1961) 106 C.L.R. 112, 121.

scope and nature of the standard of care expected of a reasonable school-teacher. With the size of classes in State schools increasing and the pressure under which many teachers are forced to work becoming more intense, there is a pressing need for a clear exposition from the legislature or the judiciary of the duties of a schoolteacher in this context.

R. S. LANCY

### OLSSON v. DYSON<sup>1</sup>

#### *Chose in Action—Gift—Novation of Contract—Dillwyn v. Llewellyn<sup>2</sup>*

A Mr Dyson had lent money on interest to a company in 1961. He desired to make an inter vivos gift of the debt to his wife. To this end he told his wife: 'You can have the £2,000 I loaned to Tom' (Tom Francis being the manager of the debtor company). Dyson later told Francis, Mrs Dyson not being present at the conversation, that he had given the debt to his wife, and that the interest was to be paid to her in the future. The company altered its books accordingly and thereafter paid the interest to Mrs Dyson by cheques made out in her name. There was evidence of a pre-nuptial contract between Dyson and his wife, by which Dyson promised her an annuity of £20 a week. In a will executed soon after the marriage, but before the above transaction took place, Dyson left his wife only £780 a year.

Dyson died in 1962 and the debtor company continued to pay the interest to Mrs Dyson. In 1964 the executors of Dyson discovered the existence of the debt and started proceedings against the company to have the debt paid to them. The executors claimed that the debt was part of Dyson's estate at the date of his death, the attempt to give it to Mrs Dyson being ineffective. Mrs Dyson claimed that the debt was hers. The company paid the amount in question into court and the issue then arose between Mrs Dyson and the executors as to whom the debt should be paid. The case came before Chamberlain J. in the Supreme Court of South Australia, and His Honour found in favour of Mrs Dyson.<sup>3</sup> The executors appealed to the High Court. The respondent relied on several grounds to support her claim: on an effective equitable assignment of the debt; an equity to compel the executors to make good Dyson's attempted gift; an estoppel; and on a right to the debt arising from a novation of the contract between Dyson and the debtor company. The High Court, by a majority decision, allowed the appeal, dismissing all these claims. The majority decision was delivered by Kitto J. (Menzies and Taylor JJ. concurring), whilst Barwick C.J. and Windeyer J. delivered dissenting judgments.

#### *Assignment of the Debt in Equity*

It was not argued that there was an assignment of the debt at law. Section 15 of the Law of Property Act 1936 (S.A.)<sup>4</sup> demands of a legal assignment that there be a writing signed by the assignor, and a written notice given to the debtor; Dyson, however, had purported to assign his debt orally.

But could there be an oral *equitable* assignment of the debt? Yes, answered the trial judge. Both of the statutory requirements could be dispensed with, and equity might still consider the gift valid. No, corrected the High Court, unani-

<sup>1</sup> (1969) 43 A.L.J.R. 77. High Court of Australia; Barwick C.J., Kitto, Menzies, Taylor and Windeyer JJ.

<sup>2</sup> (1862) 4 De G.F. & J. 517.

<sup>3</sup> [1967] S.A.S.R. 343.

<sup>4</sup> Compare Property Law Act 1958, s. 134.