

43/93

SUPREME COURT OF VICTORIA

DIRECTOR-GENERAL of COMMUNITY SERVICES VICTORIA v BUCKLEY and ORS

O'Bryan J

11 December 1992

CHILDREN – PROTECTION APPLICATIONS – EMOTIONAL DEVELOPMENT IN JEOPARDY – "SIGNIFICANT DAMAGE" – MEANING OF: *CHILDREN AND YOUNG PERSONS ACT 1989*, S63(e).

Section 63(e) of the *Children and Young Persons Act 1989* ('Act') provides:

"The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type."

For damage to be significant for the purposes of s63(e) of the Act, it must be important or of consequence to the child's emotional or intellectual development. The section does not mean that the damage must be serious or permanent if untreated.

O'BRYAN J: [1] This is an appeal on a question of law from the Children's Court of Victoria pursuant to s117 of the *Children and Young Persons Act 1989* (the Act). The order appealed from is that of a Senior Magistrate of the Children's Court at Melbourne on 19th August 1992 wherein the Magistrate dismissed Protection Applications in respect of eight children (the thirdnamed respondents). The Protection Applications commenced on 13th March 1991 with the filing of documents in which the applicant (the applicant herein) asserted that the child named was in need of care and protection on the ground that: "1. Emotional Development is in Jeopardy". Reference is made in the application to s31(1)(a) of the *Community Welfare Services Act 1970*. Sub-section (1)(a) provides:

"Every child or young person under 17 years of age who is in need of care and protection by reason of any of the following may be admitted to the care of the Department, namely:

(a) The child or young person has been, is being or is likely to be ill-treated, exposed or neglected or his physical mental or emotional development is in jeopardy."

The applications before the Children's Court in their original form were, therefore, limited to one ground: "Emotional Development is in Jeopardy". When the hearing of the applications began in the Children's Court in November 1991 the Act, which commenced on 23 September 1991, applied to the applications. The Act was given a retrospective operation to pending applications. Schedule 3 of the Act provides in clause 7(2):-

"If before the commencement of s84 a person has made an application to a Children's Court that a child or young person should be adjudged to be a child or young person in need of care and (2) protection and at that commencement the application had not been determined, the application has effect from that commencement as a protection application within the meaning of this Act."

The learned Magistrate said in his reasons for judgment;

"It was agreed by all parties that the applications proceed pursuant to s63(d) and (e) of the Act. The evidence also raised the issue of possible physical abuse, a ground of abuse pursuant to s63(c) of the Act."

I do not understand why the scope of the application was widened to include the grounds specified in sub-clauses (c) and (d) of s63 without formal amendment of the notices of application and without particulars being provided. The original applications only relied upon the child's

"emotional development being in jeopardy". Sub-clause (e) of s63 is expressed in much wider terms:

"The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type."

Should this matter be returned to the Court below for further consideration the matter of amendment should be addressed. This appeal is concerned with the proper construction of sub-clause (e) of s63 and, in particular, with the expression "significantly damaged". The first question of law to be decided is: "What interpretation should be given to the words 'significant damage' in s63(e) of the *Children and Young Persons Act 1989*?" A second question raises for decision whether the learned Magistrate stated his reasons adequately. Clearly, [3] if the learned magistrate misconstrued sub-clause (e), the proceeding must return to the Court below to have the issues determined according to law.

It is convenient to proceed now to the reasons of the learned Magistrate. I shall cite three paragraphs which show the construction placed upon the expression "significant damage" in the Court below.

"I return to a consideration of s63(e). That section anticipated that a child can suffer some emotional or psychological harm but that harm may not be of a kind that may lead to the child's emotional or intellectual development being significantly damaged. I am satisfied that in this case the evidence demonstrates that children have suffered some emotional or psychological harm. That harm is most particularly derived from their social isolation, the lifestyle of the sect, the lack of opportunity in relation to education, the narrowness of that education, an inability to broaden and develop their experiences generally outside the sect and, as it follows, develop their full potential. The harm is also obviously derived from the circumstances which cause the children to have a poor relationship with their father.

I am however required to go further than make a finding that the children have suffered some emotional or psychological harm. The legislation requires the court to find on the balance of probabilities that the harm is of such a kind that the child's emotional or intellectual development is or is likely to be significantly damaged.

The search for the meaning of significant damage is a difficult one. There is no precedent that the Court can rely upon. Dictionary definitions (see *Oxford Concise* and *Funk and Wagnalls*) are not in my view particularly helpful. There is a very real difficulty with this as there is with the case in all its aspects – of the requirement to be objective while having to reach what inevitably will be seen as subjective findings. In the end I have formed the view that significant damage must mean some damage which may have some lasting or permanent effect unless resolved by the intervention of counselling and treatment."

[4] In a nutshell, Mr Nash submitted that this construction is too narrow and that the critical words "substantial damage" do not mean damage which, if not resolved by the intervention of counselling, will have a lasting or permanent effect. Mr Nash submitted that sub-clause (e) is directed not only to damage which will have some lasting or permanent effect but also to damage which is important or of consequence to a child but which may not be long term.

In my opinion, there is no warrant to read a temporal connotation into the expression "significant damage". The expression uses two ordinary English words neither of which, in their plain meaning, have any connection with something that is lasting or permanent unless resolved. In my opinion, in choosing the word "significant", the legislature intended that harm to the child's emotional or intellectual development will be more than trivial or insignificant but need not be as high as serious. The word "significant" means "important", "notable", "of consequence". Cf. *McVeigh v Willara Pty Ltd* [1984] FCA 379; (1984) 6 FCR 587; (1984) 57 ALR 344; 6 ALN N313; 16 ATR 127; *Oxford Dictionary*. The word "damage" means injury or harm that impairs value or usefulness. Had the legislature intended that to satisfy the requirements of grounds (e) damage must be serious and permanent if untreated, it would have chosen the word "serious" or the words "serious and permanent".

In my opinion, the learned Magistrate wrongly imported two qualities into the expression "significant [5] damage", a quality of seriousness and a quality of permanence if untreated. It is

irrelevant to the purposes of the Act that the damage could be treated. I accept, as Mr Morrish submitted, that the meaning of words must be found within the purposes of the statute in which the words are located. In this instance the critical words in sub-clause (e) are located in a statute, one of the main purposes of which is to provide for the protection of children and young persons. This point enforces the construction contended by Mr Nash. Accordingly, in my opinion, the learned Magistrate placed an erroneous construction upon the expression "significant damage" and his determination of the applications is vitiated.

In the first paragraph of the Magistrate's reasons earlier cited is a finding "that children have suffered some emotional or psychological harm". Whether the evidence proved "significant damage" must now be determined. For damage to be "significant" for the purposes of sub-clause (e) it must be "important", or "of consequence", to the child's emotional or intellectual development and it is irrelevant that the evidence may not prove some lasting or permanent effect or that the condition could be treated. The first question of law should be answered as follows: For the purposes of section 63(e) of the Act, 'significantly damaged' means that the child's emotional or intellectual development is, or is likely to be, damaged in some respect that is important or of consequence to the child's emotional or intellectual development.

[6] The second question of law does not require an answer, in my opinion. Reference was made to a number of authorities on the duty to state adequate reasons for decision. Cf. *Lock v Gordon* [1966] VicRp 23; [1966] VR 185; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Sun Alliance Insurance Ltd v Massoud* [1989] VicRp 2; [1989] VR 8. The learned Magistrate's reasons do not canvass the evidence and, in particular, do not advert to the expert evidence which, I was informed, was tendered by consent in documentary form. One might observe that before a finding could be made that a child has suffered or is likely to suffer emotional or psychological harm to the degree required by sub-clause (e) consideration would need to be given to the expert evidence before the Court. It would be very difficult to make a finding in favour of the applicant in the absence of credible expert evidence. As this matter must return to the Court below to be determined according to law, one might expect that the learned Magistrate will now state more fully his reasons for decision.

The Court will answer the first question of law as follows:

"For the purposes of s63(e) of the Act 'significantly damaged' means that the child's emotional or intellectual development is, or is likely to be, damaged in some respect that is important or of consequence to the child's emotional or intellectual development."

The Court will order that this matter be returned to the Children's Court at Melbourne to be determined in accordance with law. [7] The Court will refrain from answering the second question of law. In the circumstances that this appeal arose out of an error made by the Court itself, that the third respondent is an infant of tender years and that the affidavit material before the Court was unsatisfactory in that it was incomplete, no order will be made as to costs.

APPEARANCES: For the appellant Lynette Buckley: Mr G Nash QC with Mr I Freckleton, counsel. Victorian Government Solicitor. For the third-named respondent Daniel Buckley: Mr G Morrish QC with Mr I Himmelhoch, counsel. Legal Aid Commission Victoria.