Hunter and New England Local Health District v McKenna - [2014] HCA 44

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

Matter No S142/2014

HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT APPELLANT

AND

MERRYN ELIZABETH MCKENNA RESPONDENT

Matter No S143/2014

HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT APPELLANT

AND

SHEILA MARY SIMON & ANOR RESPONDENTS

Hunter and New England Local Health District v McKenna
Hunter and New England Local Health District v Simon
[2014] HCA 44
12 November 2014
S142/2014 & S143/2014

ORDER

Matter No S142/2014

1. *Appeal allowed.*

2. *Set aside paragraphs 2, 3 and 4 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 23 December 2013 and, in their place, order that the appeal to that Court be dismissed.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

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3. *The appellant pay the respondents' costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

R J Cheney SC with N E Chen for the appellant (instructed by TressCox Lawyers)

B M Toomey QC with G R Graham for the respondents (instructed by T D Kelly & Co)

CATCHWORDS

Hunter and New England Local Health District v McKenna
Hunter and New England Local Health District v Simon

Negligence – Duty of care – Statutory duties – *Mental Health Act* 1990 (NSW) provided for admission and detention of mentally ill persons in hospital – Act prohibited detention or continuation of detention of mentally ill person in hospital unless medical superintendent formed opinion that no other care of less restrictive kind appropriate and reasonably available – Alleged negligence of hospital and medical staff in discharging

mentally ill person – Whether hospital and medical staff owed common law duty of care to protect other persons against harm caused by mentally ill person upon discharge –– Whether duties under Act inconsistent with common law duty of care.

Words and phrases – "duty of care", "inconsistent duties", "mentally ill person".

Mental Health Act 1990 (NSW), Ch 4, Pt 2, Div 1 .

1. FRENCH CJ, HAYNE, BELL, GAGELER AND KEANE JJ. Phillip Pettigrove was from Echuca, Victoria. He had a long history of chronic paranoid schizophrenia and was being treated for his illness at Echuca. In July 2004, while in New South Wales with a friend, Mr Stephen Rose, Mr Pettigrove was involuntarily admitted to, and detained in, the Manning Base Hospital at Taree ("the Hospital") under Div 1 of Pt 2 of Ch 4 of the *Mental Health Act* 1990 (NSW) . Dr Warwick Coombes, a psychiatrist who saw Mr Pettigrove at the Hospital, recorded that he was of the opinion that Mr Pettigrove was a "mentally ill person" [1] . The medical superintendent of the Hospital, Dr Kay Wu, certified[2] that she was of the opinion that Mr Pettigrove was a "mentally ill person".

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[1] *Mental Health Act* 1990 (NSW), s 9 .

[2] s 29.

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2. On the day Mr Pettigrove was admitted to the Hospital, the Hospital obtained, and Dr Coombes read, Mr Pettigrove's medical records from the Echuca Community Mental Health Service. Dr Coombes spoke with Mr Pettigrove, Mr Pettigrove's mother and Mr Rose. All agreed that Mr Pettigrove would be kept in the Hospital overnight and that Mr Rose would then drive with Mr Pettigrove to his mother's home in Echuca, where he would receive continuing medical treatment.

3. As proposed, Mr Pettigrove was discharged from the Hospital on the following day. Mr Rose picked him up at the Hospital and they set off to travel by car to Echuca. In the course of that journey, Mr Pettigrove killed Mr Rose. He told police that he had acted on impulse, believing that Mr Rose had killed him in a past life. Mr Pettigrove later took his own life.

4. There was no dispute that the appellant ("the Health Authority") is responsible for the conduct of the Hospital and its medical staff. Did either or both of the Hospital and Dr Coombes owe Mr Rose, or his relatives, a duty of care that was breached by discharging Mr Pettigrove into the company of Mr Rose?

The course of proceedings

5. Two proceedings were brought in the District Court of New South Wales for damages for psychiatric injury allegedly suffered by relatives of Mr Rose as a result of his death: one proceeding brought by a sister of Mr Rose and a separate proceeding brought by the mother and another sister of Mr Rose. The claims made in the proceedings were not materially different and the two proceedings were tried together. Although there are separate appeals to this Court in each matter, it is convenient to deal with them together and to refer to the plaintiffs, together, as "the relatives".

6. In the District Court, the relatives alleged that Dr Coombes and the Hospital did not exercise reasonable professional care and skill in deciding that Mr Pettigrove could leave the Hospital with Mr Rose for the purpose of Mr Rose taking Mr Pettigrove back to the place in Victoria where he could be treated by his usual treating doctors. The trial judge, Elkaim DCJ, recorded that the relatives put their case on the basis that the discharging of Mr Pettigrove from the Hospital, of itself, was not negligent. Rather, their case was that placing Mr Pettigrove into Mr Rose's care for the road trip was the act of negligence. And the trial judge recorded that the real dispute between the parties was whether there was a breach of duty.

7. The trial judge found that there had been no breach of duty and entered judgment in both proceedings for the Health Authority. The trial judge based his conclusions about breach of duty on the application of the *Civil Liability Act* 2002 (NSW) ("the CLA"). His Honour held that s 5B(1) [3] of the CLA was engaged because it was not shown that "a reasonable person in Dr Coombes' position would have concluded that there was a not insignificant risk of Mr Pettigrove behaving as he did". His Honour further found that s 5O [4] of that Act also applied and that Dr Coombes had acted "in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice" [5].

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[3] "A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions."

[4] "(1) A person practising a profession (***a professional***) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted."

[5] s 5O(1) .

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8. The relatives appealed to the Court of Appeal of the Supreme Court of New South Wales. The Court of Appeal (Beazley P and Macfarlan JA, Garling J dissenting) allowed [6] t he relatives' appeals and ordered that there be judgments for the relatives.

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[6] *McKenna v Hunter and New England Local Health District* (2013) Aust Torts Reports ¶82158.

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9. Beazley P held [7] that the Health Authority owed Mr Rose "a duty of care not to release [Mr Pettigrove], who was a mentally ill person, into Mr Rose's care, or at least his sole care, for the purposes of conveying him to Victoria where it was intended or, at least, expected that he would undergo further psychiatric treatment". Macfarlan JA held [8] that "[t]he Hospital owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing physical harm to Mr Rose"; that Dr Coombes was negligent "in discharging Mr Pettigrove from the Hospital" when he did; that the Health Authority "is not entitled to the protection of s 5O " of the CLA [9] ; and that Dr Coombes' negligence was a cause of the injuries which Mr Rose, and therefore his mother and sisters, suffered.

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[7] (2013) Aust Torts Reports ¶82158 at 67,001 [2] .

[8] (2013) Aust Torts Reports ¶82158 at 67,002 [10] .

[9] Macfarlan JA also rejected arguments that two other provisions of the CLA (ss 43 and 43A), concerning the exercise of statutory powers by public or other authorities, were engaged: (2013) Aust Torts Reports ¶82158 at 67,002 [10] .

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10. By special leave, the Health Authority appeals to this Court in each matter. Each appeal should be allowed. Consistent with the terms on which special leave was granted, the Health Authority should pay the costs of each appeal and the costs orders made by the Court of Appeal should not be disturbed. Orders 2, 3 and 4 made by the Court of Appeal in each matter should be set aside and in their place there should be orders that each appeal to the Court of Appeal is dismissed.

Argument of the appeal

11. In this Court, the Health Authority alleged many grounds of appeal. It alleged that the Court of Appeal was wrong to hold that it (or, more accurately, the Hospital or Dr Coombes) owed a duty of care to Mr Rose and his relatives. It raised issues about the application of s 5B of the CLA and breach of duty, s 5O of the CLA and "competent professional practice", s 43 of the CLA and liability for breach of a statutory duty, and s 43A of the CLA and the "exercise of special statutory powers". The parties filed written submissions directed to all of these issues.

12. **Following paragraph cited by:**

Gould v South Western Sydney Local Health District (30 March 2017) (Judge Levy SC)

614. The effect of that provision is that a "*person*", as referred to in s 5O of the *CL Act*, should be taken to include an individual, a corporation, and a body corporate. The point was raised in passing in *Hunter and New England and Local Health District v McKenna* [2014] HCA 44, at [12] , but was not finally decided in that case, as ultimately, it was held the point did not fall for decision. For present purposes, I will therefore proceed on the basis that the health authority should be taken to have available to it for consideration, a defence pursuant to s 5O of the *CL Act*. The analysis which follows is in conformity with that approach.

Mules v Ferguson (06 February 2015) (Margaret McMurdo P, Applegarth and Boddice JJ,)

191. Section 22 of the Act provides a defence to a breach of duty if the medical practitioner establishes he or she acted in a way which was widely accepted by peer professional opinion by a significant number of professionals in that field. That defence requires an identification of the particular conduct, and the group of peer opinion supporting that conduct as being widely accepted practice. [106] The onus rests on the respondent to satisfy that defence. Whether the respondent met that onus required a consideration of the respondent's conduct in the context of the presenting symptoms as found by the trial judge.

via

[106] See generally, *Hunter and New England Local Health District v McKenna* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476; an appeal to the High Court [2014] HCA 44 [12] , expressly did not consider this aspect of the judgment.

At the hearing of the appeals, the Court required the parties to make oral submissions about only the question of duty of care. The other issues raised by the Health Authority do not fall for consideration if, as these reasons will show, the Hospital and Dr Coombes did not owe the

relatives a duty of care. Consideration of those other issues, about ss 5B, 5O, 43 and 43A of the CLA , should await a case in which it is necessary to examine them.

Duty to whom?

13. In the Court of Appeal, the Health Authority contended that judgment was properly entered in its favour in each proceeding because the Hospital and Dr Coombes owed no relevant duty of care. (It will be recalled that the trial judge decided the cases on the basis that there was no breach of duty.) The Health Authority argued that it owed no relevant duty of care to the relatives because the Hospital and Dr Coombes did not owe Mr Rose a duty to take reasonable care to avoid Mr Pettigrove inflicting physical injury on Mr Rose. In his reasons for judgment, Macfarlan JA recorded [10] that the Health Authority did *not* argue "that even if the Hospital owed a relevant duty of care to Mr Rose, it nevertheless did not owe such a duty to the [relatives], who were members of his family".

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[10] (2013) Aust Torts Reports ¶82158 at 67,022 [85] .

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14. Argument having taken this course in the Court of Appeal, there was no exploration in argument, in either that Court [11] or this, of how a finding that the Hospital or Dr Coombes owed a duty of care to Mr Rose bears upon whether it or he owed a duty of care to the relatives. The hypothesised duties are owed to different persons and are duties to take reasonable care to prevent a third party doing something that would cause different kinds of injury: in the case of Mr Rose, physical injury; in the case of the relatives, psychiatric injury.

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[11] cf (2013) Aust Torts Reports ¶82158 at 67,040 [206] per Garling J.

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15. It is not necessary, however, to decide whether the two different duties are related [12] in the manner assumed in argument in the Court of Appeal. That is, it is not necessary to decide whether the Court of Appeal was right to conclude that, because the Hospital and Dr Coombes owed Mr Rose a duty to take reasonable care to prevent Mr Pettigrove inflicting physical harm on him, they also owed the relatives a duty to take reasonable care to prevent psychiatric injury sustained on learning that Mr Pettigrove had killed Mr Rose. Nothing in these reasons should be understood as deciding that point.

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[12] cf *Tame v New South Wales* (2002) 211 CLR 317 at 399400 [243][246]; [2002] HCA 35.

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16. It is also not necessary to consider the extent and potential indeterminacy of the liability which imposing the alleged duty of care would entail. If, as the relatives submitted, the Hospital and Dr Coombes owed Mr Rose and his relatives a duty of care, it is not easy to see why that duty did not extend to any and every person with whom Mr Pettigrove would come in contact after his release from the Hospital. The range of persons who might foreseeably suffer harm if Mr Pettigrove acted violently was extensive [13] .

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[13] cf *Sullivan v Moody* (2001) 207 CLR 562 at 582 [61]; [2001] HCA 59.

Difficulties in determining the existence of a duty

17. In *Sullivan v Moody* [14] this Court pointed out why determining the existence and nature and scope of a duty of care may be difficult. Four examples were given of classes of case in which particular difficulty may arise. The Court said [15] :

> "Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle." (footnotes omitted)

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[14] (2001) 207 CLR 562 .

[15] (2001) 207 CLR 562 at 579-580 [50] .

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18. **Following paragraph cited by:**

Tsiragakis v JobCo Employment Services & Anor (Ruling) (27 March 2024) (Clayton J)

> 46 A finding of duty in this case would potentially apply far beyond this case or other cases involving car accidents. A “knock on” effect would be that any person attending the aftermath of any event in which self-harm has occurred or been attempted would be owed a duty. Indeterminacy is an additional reason which militates against the imposition of a duty. [12]

via

[12] *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at paragraph [18]

Plaintiff S99/2016 v Minister for Immigration and Border Protection (06 May 2016) (Bromberg J)

> 210. It is recognised in the authorities that cases in which the defendant is a repository of a statutory power or discretion are in a special class of case (see, e.g., *Sullivan v Moody* (2001) 207 CLR 562 at [50] (the Court); *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [18] (the Court)). Liability in special cases is sometimes limited or negated, for reasons of policy (c.f. *D'OrtaEkenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [102] (McHugh J)).

The examples given in *Sullivan* were all based on particular decisions of this Court. It is useful to amplify the references given in *Sullivan* in the way Gummow J did in *Vairy v Wyong Shire Council* [16] . In *Sullivan* , the Court referred to *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [17] as an example of the first problem (nature of harm). It referred to *Crimmins v Stevedoring Industry Finance Committee* [18] and *Brodie v Singleton Shire Council* [19] (to which may be added *Graham Barclay Oysters Pty Ltd v Ryan* [20]) as examples of the second problem (statutory power). It referred to *Perre v Apand Pty Ltd* [21] (to which may be added *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [22]) as an example of the third problem (indeterminacy of class). It referred to *Hill v Van Erp* [23] (to which may be added *Koehler v Cerebos (Australia) Ltd* [24]) as an example of the fourth problem (coherence). Each of those decisions demonstrates that questions of duty of care may present difficult issues.

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[16] (2005) 223 CLR 422 at 448 [78]; [2005] HCA 62 .

[17] (2000) 205 CLR 254; [2000] HCA 61 .

[18] (1999) 200 CLR 1; [1999] HCA 59 .

[19] (2001) 206 CLR 512; [2001] HCA 29 .

[20] (2002) 211 CLR 540; [2002] HCA 54 .

[21] (1999) 198 CLR 180; [1999] HCA 36 .

[22] (2004) 216 CLR 515; [2004] HCA 16 .

[23] (1997) 188 CLR 159 at 231; [1997] HCA 9 .

[24] (2005) 222 CLR 44; [2005] HCA 15 .

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19. Every one of the four examples given in *Sullivan* was relevant in this matter. The relatives' claims presented issues about the nature of harm, about the exercise of statutory powers and discretions, about indeterminacy of class and about coherence. These reasons will show that the second of those considerations, statutory power, is determinative. But that conclusion should not be understood as suggesting that the other three considerations which have been mentioned (nature of harm, indeterminacy and coherence) are not relevant considerations bearing upon whether the Hospital or Dr Coombes owed the relatives a relevant duty of care.

20. **Following paragraph cited by:**

Sittrop v State of Victoria (Ruling) (23 April 2024) (Robertson J)

76 In Victoria, if the plaintiff's claim is not covered by any accepted category of liability, which in my view it is not, whether a claim based on negligence could succeed would depend on the plaintiff establishing a novel duty of care. If a duty of care were to arise which required one police officer to take reasonable care for another, it would be imposed because of the relationship between the parties and an analysis of the salient features of their relationship. This would include an examination of the obligations between the parties and any applicable statutory provisions, [46] such as the VPA and the PRA, [47] coherence of the law, control, foreseeability, degree of harm, vulnerability, and legal policy. The assessment requires consideration of the facts bearing on the relationship between the plaintiff, the other superior police officers and the Chief Commissioner, and analysis of the salient features of those relationships. [48]

via

[46] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at paragraphs [21]-[22] ; *Fahy* at paragraph [18]; *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270 at paragraphs [20] and [22]

State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)

49. More recently, a unanimous High Court in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [20] and [22] stated that identifying whether a duty of care exists and, if so, its nature and scope, required consideration of the applicable legislation, and in particular whether the duty would be consistent with the legislation.

Proper determination of whether there was a relevant duty of care and, if there was, of the nature and scope of that duty is not assisted by directing attention only to why the relatives suffered the injuries they did. The relatives sustained psychiatric injury on learning of Mr Rose's death at the hand of Mr Pettigrove. Their complaint was that Mr Pettigrove should

not have been allowed to leave the Hospital, or at least not in the company of Mr Rose because there was a risk that Mr Pettigrove would do (physical) injury to Mr Rose. And they alleged that Dr Coombes and the Hospital did not act with reasonable care and skill when deciding whether Mr Pettigrove could leave the Hospital to travel to Echuca with Mr Rose.

21. As will be recalled, the relatives submitted at trial that the relevant act of negligence was placing Mr Pettigrove into the care of Mr Rose. The relatives sought to distinguish that conduct from what was described as the decision to discharge Mr Pettigrove. It is greatly to be doubted that any distinction of the kind described can be made in this case. But whether or not that is so, specification of the respect or respects in which the relatives said that the Hospital or Dr Coombes did not act with reasonable care should not distract attention from the need to identify the duty which it is alleged was owed to the relatives: a duty to take reasonable care when deciding that the powers given by the *Mental Health Act* , which had been used to detain Mr Pettigrove, should no longer be used to prevent him leaving the Hospital.

22. Identifying whether there was such a duty (and if there was, its nature and scope) requires consideration of the *Mental Health Act* . Would a duty of care to the relatives be consistent with the provisions of the *Mental Health Act* ?

23. Consideration of this question must begin with an examination of the relevant provisions of the *Mental Health Act* .

Mental Health Act

24. Section 4(2)(b) of the *Mental Health Act* provided that "[i]t is the intention of Parliament" that the Act be interpreted, and "every function, discretion and jurisdiction conferred or imposed" by the Act be, as far as practicable, performed or exercised, so that (among other things) "any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and selfrespect are kept to the minimum necessary in the circumstances". Consistent with this general principle, the provisions of Div 1 of Pt 2 of Ch 4 of the Act (ss 2037A) limited the powers to detain a person in hospital.

25. **Following paragraph cited by:**

Block v Powercor Australia Ltd (06 February 2019) (John Dixon J)

196. The Court began by considering the legislative framework created by the Act, including the powers of detention of patients. Of particular importance was s 20 of the Act that ‘prohibited detention, or the continuation of detention, unless the medical superintendent of the hospital formed the opinion that no other less restrictive care was appropriate and reasonably available’. [77] The Court concluded

These features of the Act presented a medical superintendent of a hospital deciding whether a person should be, or should continue to be, involuntarily admitted and detained with two questions. First, is the person a mentally ill

person or a mentally disordered person? Secondly, if yes, is there *no* other care of a less restrictive kind which is appropriate and reasonably available to the person?

No doubt, each question required clinical assessment and judgment, and each had to be answered either yes or no. But if the person was judged to be a mentally ill person, the Act required not only that 'any restriction on the liberty [of that person] and any interference with their rights, dignity and self-respect [be] kept to the minimum necessary in the circumstances' (s 4(2)(b)), but also that, *unless* the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available, the person not be detained or further detained. Hence, determining that a person was a 'mentally ill person' did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital.

Inconsistent duties

The core of the relatives' complaint in this matter is that each was injured because a decision was made not to continue to detain a mentally ill person. But, as in *Sullivan* , those who made that decision had other duties. Particularly relevant was the obligation imposed by s 20 not to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come in contact when not detained. And, as explained in *Sullivan* , 'if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists'.

If a hospital or doctor were to owe to those with whom a mentally ill person may later come in contact a duty to take reasonable care to protect those others from risk of physical harm (or psychiatric injury caused by learning of physical harm) done by the mentally ill person, the hospital or doctor would be required to ask whether that risk is foreseeable and not insignificant and then take whatever steps a reasonable person would take in response to that risk. Foreseeable risks are those that are not far-fetched or fanciful.

If a person is a mentally ill person, the risk of that person acting irrationally will often not be insignificant, far-fetched or fanciful. And, in such cases, there will often be a risk that the irrational action will have adverse consequences. In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference

with the liberty of a mentally ill person. It required (s 20) that the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person. [78]

via

[78] Ibid 281–2 [27]–[31] (citations omitted).

Section 20 provided that:

> "A person must not be admitted to, or detained in or continue to be detained in, a hospital under this Part *unless the medical superintendent is of the opinion that no other care of a less restrictive kind is appropriate and reasonably available to the person*." (emphasis added)

That is, the *Mental Health Act* prohibited detention, or the continuation of detention, unless the medical superintendent of the hospital formed the opinion that *no* other less restrictive care was appropriate and reasonably available.

26. This prohibition was reinforced by other provisions of the *Mental Health Act* including, among others, ss 28, 29 and 35. Section 29 required prompt examination by the medical superintendent of a person detained in a hospital. Section 28 obliged the medical superintendent to refuse to detain a person unless the superintendent was of the opinion that the person was a mentally ill person or a mentally disordered person. Section 35(3) required that a person not be further detained in a hospital if the medical superintendent was of the opinion either that the person was not a mentally ill person or a mentally disordered person or that "other care of a less restrictive kind is appropriate and reasonably available to the person".

27. These features of the Act presented a medical superintendent of a hospital deciding whether a person should be, or should continue to be, involuntarily admitted and detained with two questions. First, is the person a mentally ill person or a mentally disordered person? Second, if yes, is there *no* other care of a less restrictive kind which is appropriate and reasonably available to the person?

28. **Following paragraph cited by:**

> Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)
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> > 45. As the High Court remarked in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [28] in relation to s 20, the predecessor provision in the *Mental Health Act 1990 (NSW)* (which was in similar but not identical terms to s 12 of the 2007 Act):

> … determining that a person was a “mentally ill person” did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital.

No doubt, each question required clinical assessment and judgment, and each had to be answered either yes or no. But if the person was judged to be a mentally ill person, the Act required not only that "any restriction on the liberty [of that person] and any interference with their rights, dignity and selfrespect [be] kept to the minimum necessary in the circumstances" [25] , but also that, *unless* the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available, the person not be detained or further detained. Hence, determining that a person was a "mentally ill person" did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital.

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[25] s 4(2)(b) .

Inconsistent duties

29. **Following paragraph cited by:**

Cullen v State of New South Wales (15 June 2023) (Elkaim AJ)

110. In my view the last quoted passage from *Sullivan* allows for the existence of a duty of care, provided that the duty is not irreconcilable with other duties, in particular statutory duties, imposed upon the alleged tortfeasor. My initial thought was that a common law duty of care might be excluded because of its inconsistency with the statutory powers given to the police by legislation like the *Police Act 1900* (NSW) or LEPRA . In *Hunter and New England Local Health District v McKenna* [2014] HCA 44, the High Court said at [29] :

> “The core of the relatives' complaint in this matter is that each was injured because a decision was made not to continue to detain a mentally ill person. But, as in Sullivan, those who made that decision had other duties. Particularly relevant was the obligation imposed by s 20 not to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person

> may come in contact when not detained. And, as explained in Sullivan, 'if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists.'"

Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

> 95. Such conflicting duties are irreconcilable: see eg *Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270 at [29] . Compliance with a duty to customers might put members of its staff at risk: see eg *Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45; 10 ACTLR 1 at [340] . The foreseeability of such a conflict occurring in the circumstances of an attempted armed robbery at Westpac premises was acknowledged by Dr Zalewski. Where a suggested duty of care would give rise to conflicting obligations that will ordinarily be a reason for denying that the duty exists: *Sullivan v Moody* at 582 [60] . This is such a case.
>
> ***Conclusion***

State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)

> 188. That is sufficient to reject this aspect of the notice of contention, but I would add that in any event, although the primary judge was critical of the insensitivity with which this testing was conducted, that falls short of establishing a breach of duty, as his Honour with respect correctly appreciated. It cannot be the case that there is a duty to avoid subjecting officers to indignity and stress in performing targeted testing for drugs of police officers (for example, notice of obtaining samples obviously cannot be given); that would contradict the statute: *Sullivan v Moody* (200 1) 207 CLR 562; [2001] HCA 59 at [60] ; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [29] .

The core of the relatives' complaint in this matter is that each was injured because a decision was made not to continue to detain a mentally ill person. But, as in *Sullivan* [26] , those who made that decision had other duties. Particularly relevant was the obligation imposed by s 20 n ot to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come in contact when not detained. And, as explained [27] in *Sullivan* , "if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists".

[26] (2001) 207 CLR 562 at 581 [55][56] .

[27] (2001) 207 CLR 562 at 582 [60] .

30. **Following paragraph cited by:**

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (27 May 2021) (Bromberg J)

187. That assessment can only be made prospectively by reference to the risk of the future harm alleged. Reasonable foreseeability of that harm will be established where, at the time of the Minister's approval, there exists a real risk of the harm occurring. A real risk is a risk which is not far-fetched or fanciful: *Shirt* at 48 (Mason J); *McKenna* at [30] (French CJ, Hayne, Bell, Gageler and Keane JJ) . The test of foreseeability has been described as "undemanding": *Shirt* at 44 (Mason J, citing Glass JA in *Shirt v Wyong Shire Council* at 641).

If a hospital or doctor were to owe to those with whom a mentally ill person may later come in contact a duty to take reasonable care to protect those others from risk of physical harm (or psychiatric injury caused by learning of physical harm) done by the mentally ill person, the hospital or doctor would be required to ask whether that risk is foreseeable and not insignificant and then take whatever steps a reasonable person would take in response to that risk. Foreseeable risks are those that are not farfetched or fanciful [28] .

[28] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 per Mason J; [1980] HCA 12 .

31. **Following paragraph cited by:**

Loulach Developments Pty Ltd v Roads and Maritime Services (18 April 2019) (Leeming JA)

71. On one view, the duty alleged by Loulach clashes directly with the purpose evidently designed to be effected by the mechanism in the Infrastructure SEPP applicable to traffic-generating developments: cf *Sullivan v Moody* at [62] and *Hunter Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [31] . On another view, the regime created by the Infrastructure SEPP, while falling short of a direct clash, sits very uneasily with a duty to take reasonable care to prevent pure economic loss

to the applicant for development consent: see *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; [2009] HCA 47 at [41], [52] and [55] and *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1; [2014] NSWCA 364 at [161] and [191]-[192] .

If a person is a mentally ill person, the risk of that person acting irrationally will often not be insignificant, farfetched or fanciful. And, in such cases, there will often be a risk [29] that the irrational action will have adverse consequences. In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference with the liberty of a mentally ill person. It required [30] t hat the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person.

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[29] Section 9 of the *Mental Health Act* defined a "mentally ill person" in terms that required (among other things) "reasonable grounds for believing that care, treatment or control of the person [was] necessary ... for the person's own protection from serious harm, or ... for the protection of others from serious harm".

[30] s 20 .

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32. Because s 20 of the *Mental Health Act* required that Mr Pettigrove be released from detention unless the medical superintendent formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to Mr Pettigrove, it is not to the point to decide whether, as the relatives alleged, the medical superintendent did not positively authorise his release from the Hospital (whether under s 35 of the *Mental Health Act* or otherwise).

33. The powers, duties and responsibilities of doctors and hospitals respecting the involuntary admission and detention of mentally ill persons were prescribed by the *Mental Health Act* . It is the provisions of that Act which identified the matters to which doctors and hospitals must have regard in exercising or not exercising those powers. Those provisions are inconsistent with finding the common law duty of care alleged by the relatives.

Conclusion

34. This being so, it is not necessary to consider the extent and potential indeterminacy of the liability which imposing a duty of care would entail. Nor is it necessary to consider the

difficulties presented in this case by the immediate cause of the harm suffered by the relatives being occasioned by the unlawful act of Mr Pettigrove. And, as already explained, the issues about the application of ss 5B, 5O, 43 and 43A of the CLA are not reached.

35. The Hospital and Dr Coombes did not owe the relatives a relevant duty of care. The appeals must be allowed and consequential orders made.

Cited by:

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

> 218. At common law, a risk of damage which is not farfetched or fanciful, is real and therefore foreseeable. A risk of damage that is remote, in the sense that the probability of the damage occurring is extremely unlikely, may nevertheless be a foreseeable risk. See ***Wyong Shire Council v Shirt*** ;[53] ***Hunter and New England Local Health District v McKenna*** . [54] The common law test is undemanding. See ***Koehler v Cerebos (Australia) Ltd*** ;[55] ***Vairy*** [213] (Calli nan & Heydon JJ).

via

[54] ***Hunter and New England Local Health District v McKenna*** [2014] HCA 44; (2014) 253 CLR 270 [30] (French CJ, Hayne, Bell, Gageler & Keane JJ).

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

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Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

> Hunter and New England Local Health District v McKenna [2014] HCA 44 ; (2014) 253 CLR 270

Sittrop v State of Victoria (Ruling) [2024] VCC 448 (23 April 2024) (Robertson J)

> 76 In Victoria, if the plaintiff's claim is not covered by any accepted category of liability, which in my view it is not, whether a claim based on negligence could succeed would depend on the plaintiff establishing a novel duty of care. If a duty of care were to arise which required one police officer to take reasonable care for another, it would be imposed because of the relationship between the parties and an analysis of the salient features of their relationship. This would include an examination of the obligations between the parties and any applicable statutory provisions, [46]

such as the VPA and the PRA, [47] coherence of the law, control, foreseeability, degree of harm, vulnerability, and legal policy. The assessment requires consideration of the facts bearing on the relationship between the plaintiff, the other superior police officers and the Chief Commissioner, and analysis of the salient features of those relationships. [48]

via

[46] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at paragraphs [21]-[22] ; *Fahy* at paragraph [18]; *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270 at paragraphs [20] and [22]

Sittrop v State of Victoria (Ruling) [2024] VCC 448 (23 April 2024) (Robertson J)

Cases Cited: *Ahamed v Coles Supermarkets Australia Pty Ltd* [2023] VSCA 239; *New South Wales v Fahy* (2007) 232 CLR 486; *Kozarov v State of Victoria* (2022) 273 CLR 115; *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580; *Hoh v Frosthollow Pty Ltd* [2014] VSC 77; *Trkulja v Google LLC* (2018) 263 CLR 149; *Wh eelahan v City of Casey (No 12)* [2013] VSC 316; *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2011] VSC 492; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Caridi v State of Victoria (Ruling)* [2023] VCC 1708; *Sullivan v Moody* (2001) 207 CLR 562; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225; *Gesah v Ross* [2013] VSC 165; *Smith v State of Victoria* (2018) 56 VR 332; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *Graham Barclay Oysters Pty Ltd v Ryan* (200 2) 211 CLR 540; *Zalewski v Turcarolo* [1995] 2 VR 562; *State of Victoria v Richards* (2010) 27 VR 343; *State of New South Wales v Briggs* (2016) 95 NSWLR 467; *Sills v State of New South Wales* [2019] NSWCA 4; *McDonald v State of New South Wales* [2001] NSWCA 303; *Enever v the King* (1906) 3 CLR 969; *Little v Commonwealth* (1947) 75 CLR 94; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; *Sheikh v Chief Constable of Greater Manchester Police* [1990] 1 QB 637; *Attorney-General for New South Wales v Perpetual Trustee Co (Limited) (* 1955) 92 CLR 113 ; *Koehler v Cerebos (Australia) Ltd* (2 005) 222 CLR 44; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 ; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Bird v DP (a pseudonym)* [2023] HCATrans 145 (20 October 2023)

Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 (27 March 2024) (Clayton J)

53 It is also instructive to examine the cases where a duty has not been imposed:

(a) Where the plaintiff has a close family relationship to a negligent driver who inflicts self-harm, but is not proximate to the accident; (*Hom*si)

(b) Where a person has failed to prevent another person committing self-harm that caused a psychiatric injury to the plaintiff; (*Kirkland-Veenstra*; *C.A.L*)

(c) Where a defendant has failed to prevent another person causing harm to the primary victim, which in turn caused psychiatric injury to the plaintiff. (*Hunter and New England District Hospital v McKenna [17] ;"Hunter")*

via

[17] *[2014] HCA 44*

Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 (27 March 2024) (Clayton J)

46 A finding of duty in this case would potentially apply far beyond this case or other cases involving car accidents. A "knock on" effect would be that any person attending the aftermath of any event in which self-harm has occurred or been attempted would be owed a

duty. Indeterminacy is an additional reason which militates against the imposition of a duty. [12]

via

[12] *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at paragraph [18]

Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 (27 March 2024) (Clayton J)

53 It is also instructive to examine the cases where a duty has not been imposed:

(a) Where the plaintiff has a close family relationship to a negligent driver who inflicts self-harm, but is not proximate to the accident; (*Homsi*)

(b) Where a person has failed to prevent another person committing self-harm that caused a psychiatric injury to the plaintiff; (*Kirkland-Veenstra*; *C.A.L*)

(c) Where a defendant has failed to prevent another person causing harm to the primary victim, which in turn caused psychiatric injury to the plaintiff. (*Hunter and New England District Hospital v McKenna [17] ;"Hunter")*

Cullen v State of New South Wales [2023] NSWSC 653 (15 June 2023) (Elkaim AJ)

110. In my view the last quoted passage from *Sullivan* allows for the existence of a duty of care, provided that the duty is not irreconcilable with other duties, in particular statutory duties, imposed upon the alleged tortfeasor. My initial thought was that a common law duty of care might be excluded because of its inconsistency with the statutory powers given to the police by legislation like the *Police Act 1900* (NSW) or LEPRA . In *Hunter and New England Local Health District v McKenna* [2014] HCA 44, the High Court said at [29] :

> "The core of the relatives' complaint in this matter is that each was injured because a decision was made not to continue to detain a mentally ill person. But, as in Sullivan, those who made that decision had other duties. Particularly relevant was the obligation imposed by s 20 not to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come in contact when not detained. And, as explained in Sullivan, 'if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists.'"

Dean v Pope [2022] NSWCA 260 (14 December 2022) (Ward P, Macfarlan, Meagher, White and Brereton JJA)

19. [2013] NSWCA 476 ("McKenna"); reversed on other grounds in Hunter and New England Local Health District v McKenna (2014) 253 CLR 270; [2014] HCA 44 .

Dean v Pope [2022] NSWCA 260 (14 December 2022) (Ward P, Macfarlan, Meagher, White and Brereton JJA)

21. Hunter and New England Local Health District v McKenna (2014) 253 CLR 270; [2014] HCA 44 at [34]-[35] .

Dean v Pope [2022] NSWCA 260 (14 December 2022) (Ward P, Macfarlan, Meagher, White and Brereton JJA)

208. The High Court unanimously allowed an appeal from this decision on the basis that the Hospital and the psychiatrist did not owe a duty of care. Accordingly, the issue of the application of s 5O was not reached (see *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [34]-[35]).

Sparks

De Roma v Inner West Council & Ausgrid [2022] NSWDC 425 (23 September 2022) (Judge Levy SC)

175. As a preliminary matter, Ausgrid's written submissions raised a criticism of the plaintiff's further amended statement of claim to argue that, fatally, it failed to specifically plead the requisite elements required by the *CL Act* , citing *Hunter and New England Local Health District v McKenna; Hunter and New England Local District Health Service v Simon* [2014] HCA 44 .

Knowles v Commonwealth of Australia [2022] FCA 741 (27 June 2022) (Mortimer J)

227. They submit there are three key features that preclude recognition of the duty of care alleged by the applicants:

(a) it seeks to impose liability for core policy-making functions of the government respondents, performed in a highly political context and involving quasi-legislative powers;

(b) ascertaining the duty of care would create incoherence in the law, as it would:

(i) be directly inconsistent with the statutory frameworks provided for in public health statutes in each of the respondent jurisdictions for the making of public health protection decisions (citing *Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270 at [20]-[22]), including by impermissibly forcing decision-makers to give disproportionate weight to the potential liability for any type of loss (including financial loss) that might result from the exercise of the relevant public health powers; and

(ii) impermissibly discourage repositories of powers from taking population level steps and measures, (citing *Roo Roofing Pty Ltd v Commonwealth* [2019] VSC 331); and

(c) it would be impossible to confine the class of persons to whom the alleged duty was owed within reasonable limits (citing *Sullivan v Moody* [2001] HCA 59; 207 CLR 562 at [50]), because:

(i) the duty would be owed to all persons potentially affected by the relevant statutory public health powers, which would include large parts of, if not all, of the population of Australia; and

(ii) the duty would require the duty holders to protect individuals and businesses from pure economic loss, and the applicants' case ignores the cautious and particular approach Australian courts have required before imposing a duty to protect others from suffering economic loss, especially in terms of

causation and reasonable foreseeability. They refer to *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 at [93], [232], [405] , and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; 216 CLR 515 at [21]-[22], [46]-[47] .

5 Boroughs NY Pty Ltd v State of Victoria [2021] VSC 785 (02 December 2021) (John Dixon J)

66. Examination of this issue commences with the relevant statutory context in which the defendants acted, because the existence and scope of the posited duty must be consistent with the exercise of both statutory and non-statutory executive powers. [73]

The legislative scheme

via

[73] *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270, 280 [22] (' ***Hunter*** ').

5 Boroughs NY Pty Ltd v State of Victoria [2021] VSC 785 (02 December 2021) (John Dixon J)

74. In addition, any measures limiting human rights (like quarantine) must be reasonable and demonstrably justifiable. [94] A private law duty in negligence to protect the commercial interests of a particular cohort (Victorian retailers) would distort that focus [95] and impose conflicting obligations. [96] For example, the private law duty might incentivise or require more stringent infection prevention methods like blanket prohibitions on overseas arrivals, or detention in facilities and not hotels, instead of reasonably and demonstrably justifiable limits to reduce serious risk to public health. The more stringent the process of quarantine is, the less likely that other public health measures such as contact tracing and lockdown orders may be needed. From another perspective, the economic interests of Victorian retailers may conflict with measures such as exercise or fresh air breaks or compassionate exemptions for quarantine detainees. [97]

via

[97] See *Hunter* (2014) 253 CLR 270, 281–2 [27]–[31] , which also concerned an alleged common law duty found to be inconsistent with a statutory regime on the basis that the statute required the minimum interference with the liberty of a mentally ill person in circumstances where the posited duty would have required continued detention. See similarly, *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, 308 [102]–[104] .

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

102. The High Court has repeatedly recognised the importance of the statutory context when assessing claims that a public authority has been negligent in the performance of its statutory powers and functions. Determination of the existence, nature and scope of the duty requires consideration of the provisions of the empowering statute at the outset. [104]

via

[104] ***Pyrenees Shire Council v Day*** [1998] HCA 3; (1998) 192 CLR 330 [126]; ***Crimmins v Stevedoring Industry Finance Committee*** [1999] HCA 59; (1999) 200 CLR 1 [159]; ***Graham Barclay Oysters Pty Ltd v***

Ryan [2002] HCA 54; (2002) 211 CLR 540 [78] - [79], [146] - [148]; ***Stuart v Kirkland-Veenstra*** [2009] HCA 15; (2009) 237 CLR 215 [52], [75]; ***Hunter and New England Local Health District v McKenna*** [2014] HCA 44; (2014) 253 CLR 270 [22] - [23].

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

Hunter and New England Local Health District v McKenna [2014] HCA 44 ; (2014) 253 CLR 270

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

318. Of the relevant High Court authorities to which I was referred, the most comprehensive discussion of 'coherence' is found in *Sullivan v Moody* . That reasoning has been variously endorsed or followed without apparent disagreement in each of the more recent judgments of the High Court dealing with the topic: *Graham Barclay Oysters* at [147] and [149] (Gummow and Hayne JJ); *Tame* at [24] and [28] (Gleeson CJ), at [57] and [58] (Gaudron J), at [123] (McHugh J), at [231] (Gummow and Kirby JJ), at [298] (Hayne J) and at [323] and [335]-[336] (Callinan J); *McKenna* at [29]-[33] (French CJ, Hayne, Bell, Gageler and Keane JJ) ; and *Stuart* at [113] (Gummow, Hayne and Heydon JJ).

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

102. It is recognised in the authorities that cases in which the defendant is a repository of a statutory power or discretion are in a special class of case (see, e.g., *Sullivan v Moody* at [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Hunter and New England Local Health District v* ***McKenna*** (2014) 253 CLR 270 at [17]-[18] (French CJ, Hayne, Bell, Gageler and Keane JJ)). Liability in special cases is sometimes limited or negated, for reasons of policy (c. f. *D'OrtaEkenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [102] (McHugh J)).

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

187. That assessment can only be made prospectively by reference to the risk of the future harm alleged. Reasonable foreseeability of that harm will be established where, at the time of the Minister's approval, there exists a real risk of the harm occurring. A real risk is a risk which is not far-fetched or fanciful: *Shirt* at 48 (Mason J); *McKenna* at [30] (French CJ, Hayne, Bell, Gageler and Keane JJ) . The test of foreseeability has been described as "undemanding": *Shirt* at 44 (Mason J, citing Glass JA in *Shirt v Wyong Shire Council* at 641).

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (27 May 2021) (Bromberg J)

109. In summary:

(1) The approach to determining whether a duty of care exists is multi-factorial (*Stavar* at [102]-[103] ; *Makawe* at [17], [92]–[94] ; *Hoffmann* at [31], [127] -[130] ; *Carey* at [313][317] ; *Brookfield* at [24]).

(2) The seventeen factors listed by Allsop P in *Stavar* are a valuable checklist as to the kinds of matters that may be relevant in a multi-factorial analysis (*Hoff mann* at [31] ; *Carey* at [316]). But they are not exhaustive, not all considerations will be relevant in each case, and the considerations that are relevant will be of various weights (*Carey* at [316] ; *Stavar* at [104]).

(3) The case where the respondent is a repository of statutory power or discretion is a special class of case, which raises its own problems (*Sullivan v Moody* at [50] ; *McKenna* at [17]-[18]). However, the correct approach remains multi-factorial (*Presland* at [7], [9]-[10] ; *Becker* at [19] and [82] ; *Stuart* at [131]-[133] .

(4) In such cases, however, certain factors listed in *Stavar* assume especial relevance. Coherence with the statutory scheme and policy considerations are of critical importance (*Stuart* at [113] ; *Presland* at [11] ; *Crimmins* at [93] ; *Graham Barclay Oysters* at [146]). So, too, may be control, reliance, vulnerability, and the assumption of responsibility (see, variously, *Stuart* at [133] ; *Graham Barclay Oysters* at [81], [149], [151] ; *Presland* at [11] ; *Sutherland Shire Council v* ***Heyman*** (1985) 157 CLR 424 at 486 (Brennan J) and 498 (Deane J); ***Pyrenees Shire Council*** *v Day* (19 98) 192 CLR 330 at [115] (McHugh J) and [168] (Gummow J); *Crimmins* at [93], [104], [108] (McHugh J)).

Aardwolf Industries LLC v Tayeh [2020] NSWCA 301 (20 November 2020) (Bell P, Macfarlan and Leeming JJA)

51. I note that her Honour was not asked to consider other reasons why, if leave were granted, the applicants might not succeed on their duty of care claim: for example, an argument that the posited duty was inconsistent with the liquidators' statutory and other duties to realise the assets of the company (compare *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 and *H unter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44) and an argument that breach of the duty of care could not in the circumstances of the present case be established.

Morris v St Vincent's Health Australia Ltd [2020] VSC 690 (21 October 2020) (John Dixon J)

37. Further examples of the application of the principle of coherence include *Hill v Van Erp*, [13] *K oehler v Cerebos (Australia) Ltd*, [14] and *Hunter and New England Local Health District v McKenna*. [15]

via

[15] (2014) 253 CLR 270 , 279 [18] , 281–3 [29]–[33] .

Skinner v Royal Children's Hospital [2020] VCC 1359 (03 September 2020) (His Honour Judge Pillay)

34 Nurse Darmanin made this point as well.[30] It would go too far to say a duty does not arise because of inconsistent duties, as in *McKenna* , [31] however the context of the setting of the alleged negligence bears upon the scope of the duty. [32] Here, a duty is admitted but the scope of the duty is limited by the principles of the *Mental Health Act* . It is also to be borne in mind that the imposition of the duty does require some assessment of the conflicting responsibilities that the imposition of the duty has on the duty holder. [33]

via

[31] (2014) 253 CLR 270 at 279 [18]

Skinner v Royal Children's Hospital [2020] VCC 1359 (03 September 2020) (His Honour Judge Pillay)

Cases Cited: *Czatyrko v Edith Cowan University* (2005) 214 ALR 349; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; *Erickson v Bagley* [2015] VSCA 220; *Jones v Dunkel* (1959) 101 CLR 298; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 ; *Strong v Woolworths Ltd* (2012) 246 CLR 182; *Borazio v State of Victoria* [2015] VSCA 131; *Sabatino v The State of New South Wales* [2001] NSWCA 380; *Sullivan v Moody* (2001) 207 CLR 562; *The Council of the Shire of Wyong v Shirt & Ors* (1980) 46 CLR 40

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34 Nurse Darmanin made this point as well.[30] It would go too far to say a duty does not arise because of inconsistent duties, as in *McKenna* , [31] however the context of the setting of the alleged negligence bears upon the scope of the duty. [32] Here, a duty is admitted but the scope of the duty is limited by the principles of the *Mental Health Act* . It is also to be borne in mind that the imposition of the duty does require some assessment of the conflicting responsibilities that the imposition of the duty has on the duty holder. [33]

Skinner v Royal Children's Hospital [2020] VCC 1359 (03 September 2020) (His Honour Judge Pillay)

33 Contextually, the LDU is a place that is meant to be similar to a school setting which is focused on being similar to a general ward for therapeutic reasons.[28] In keeping with the *Mental Health Act* , it is geared towards recovery and the least restrictive setting for care as is possible. The High Court has repeatedly made the point that at the intersection of the duty imposed on health practitioners treating mental health patients, significant weight must be given to the *Mental Health Act* and care in the least restrictive manner. [29]

via

[29] See *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 (" *McKenna*")

Jensen v Cultural Infusion (Int) Pty Ltd [2020] FCA 358 (19 March 2020) (Wheelahan J)

87. Basten JA then stated at [36]-[39] (*inter alia*) –

> 36 When the decision of an intermediate court of appeal is overturned by the High Court, the reasoning of the majority is no longer dispositive, even if the High Court does not directly reject it, as it did not with respect to the interpretation of s 5O [of the *Civil Liability Act 2002* (N SW)] in [*Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270], having determined the appeal on a different point.
>
> 37 There is some irony in the fact that the primary support for this conclusion is often sourced to a brief statement by Aickin J in dissent in *F ederal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* [(1981) 146 CLR 336 at 410] stating:
>
> > I should add that there is no basis on which one point in the judgment of a primary court should be regarded as authoritative where the judgment is reversed on other grounds.
>
> 38 Given that the reasons of the intermediate court in a case where the decision has been reversed are no longer dispositive, they are analogous to the reasoning of a dissenting judge. Allsop P explained in *H olmes (a court) v Papaconstuntinos* [[2011] NSWCA 59 at [3]] that

dissenting judgments "may contain valuable discussions of legal principle", but that is "a different thing to being taken as an exposition of the common law to be applied." The same proposition applies with respect to discussion of statutes.

39 The position would, of course, be quite different if the High Court, despite reversing the decision in this Court in *McKenna* , had approved the reasoning with respect to s 5O . The reasoning would not then form part of the ratio, but it would clearly obtain the authority of dicta of the High Court. ...

Jensen v Cultural Infusion (Int) Pty Ltd [2020] FCA 358 (19 March 2020) (Wheelahan J)

87. Basten JA then stated at [36]-[39] (*inter alia*) –

36 When the decision of an intermediate court of appeal is overturned by the High Court, the reasoning of the majority is no longer dispositive, even if the High Court does not directly reject it, as it did not with respect to the interpretation of s 5O [of the *Civil Liability Act 2002* (NSW)] in [*Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270], having determined the appeal on a different point.

37 There is some irony in the fact that the primary support for this conclusion is often sourced to a brief statement by Aickin J in dissent in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* [(1981) 146 CLR 336 at 410] stating:

> I should add that there is no basis on which one point in the judgment of a primary court should be regarded as authoritative where the judgment is reversed on other grounds.

38 Given that the reasons of the intermediate court in a case where the decision has been reversed are no longer dispositive, they are analogous to the reasoning of a dissenting judge. Allsop P explained in *Holmes (a court) v Papaconstuntinos* [[2011] NSWCA 59 at [3]] that dissenting judgments "may contain valuable discussions of legal principle", but that is "a different thing to being taken as an exposition of the common law to be applied." The same proposition applies with respect to discussion of statutes.

39 The position would, of course, be quite different if the High Court, despite reversing the decision in this Court in *McKenna* , had approved the reasoning with respect to s 5O . The reasoning would not then form part of the ratio, but it would clearly obtain the authority of dicta of the High Court. ...

Boxell v Peninsula Health [2019] VSC 830 (17 December 2019) (Keogh J)

23. In *Sparks* , McFarlan JA, referring to his earlier decision in *McKenna v Hunter and New England Health District* (' *McKenna* '), [17] said:

I then referred to the wide variety of circumstances that were relevant to the reasonableness of the defendant's conduct in that case, and continued:

> 165 In summary, the section is directed to something, namely a practice, that was in existence at the relevant time, here July 2004. Whilst at that time there were no doubt many practices in the medical profession concerning the manner in which operations

were performed, the types of treatments that were administered, the circumstances in which tests were ordered, the circumstances in which warnings were given and other matters, the evidence here did not identify any such practice that was relevant in the present case. In light of the wide variety of circumstances bearing upon the decision to discharge Mr Pettigrove, it would have been surprising if it had done so. It is unlikely, to say the least, that there would have occurred in or before 2004 a number of situations in which there were sufficient features in common with the present case to enable it to be said that there was a practice concerning how such a situation was to be dealt with by a competent medical practitioner.

These observations are applicable to the present case, which does not relate (at least so far as the issues of negligence on appeal are concerned) to any particular point of medical practice, such as the use of a particular drug, surgical technique or item of surgical equipment. Rather, as in *McKenna* , determination of the issue of negligence requires reference to a variety of factual considerations including:

- The significance of an elevated blood carbon dioxide level when oxygen and blood pressure readings were normal to high;
- The urgency of the operation, bearing in mind Mr Hobson' s pre-existing condition;
- The exhaustion of possibilities, short of termination of the operation, for remedying the carbon dioxide problem and its underlying cause, being the compression of blood vessels preventing blood fully perfusing the lungs.

Evidence from a number of witnesses highlighted the unusual nature of the operation. For example, Dr Barratt had never seen this type of surgery performed on a patient with Noonan Syndrome and Dr Forrest described the operation as involving "a very unusual and difficult anaesthetic challenge". It can be assumed that the particular events that occurred in the course of the operation rendered the situation even more unusual. [18]

via

[17] [2013] Aust Torts Reports 82-158 (note this decision was overturned by the High Court without considering s 50 : *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270).

Child and Adolescent Health Service v Mabior [2019] WASCA 151 (27 September 2019) (Quinlan CJ, Murphy JA, Pritchard JA)

353. The decision in ***McKenna*** was overturned by the High Court on grounds unrelated to s 50 . [329]

via

[329] ***New England & Hunter Local Health District v McKenna*** [2014] HCA 44; (2014) 253 CLR 270 .

Child and Adolescent Health Service v Mabior [2019] WASCA 151 (27 September 2019) (Quinlan CJ, Murphy JA, Pritchard JA)

New England & Hunter Local Health District v McKenna [2014] HCA 44 ; (2014) 253 CLR 270

Bevan v Coolahan [2019] NSWCA 217 (05 September 2019) (Basten, Leeming and McCallum JJA)

48. The position is thus conceptually distinct from cases where a statute speaks directly to the existence of a duty of care. Statutes which speak directly to a duty of care may do so expressly or impliedly. Section 5M of the *Civil Liability Act* in terms ("A person (the defendant) does not owe a duty of care to another person who engages in a recreational activity (the plaintiff)...") negates a duty of care where the risk of a recreational activity was the subject of a risk warning. On the other hand, statutory provisions (a) limiting the circumstances in which a mentally ill person could be detained, and (b) obliging the reporting of suspicions of child abuse, did not speak expressly to the existence of a duty of care, but nonetheless were found by implication to be inconsistent with duties to take reasonable care (a) before releasing a mentally ill person into the community and (b) before reporting a person suspected of child abuse: *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [30]-[31] and *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [62] .

Loulach Developments Pty Ltd v Roads and Maritime Services [2019] NSWSC 438 (18 April 2019) (Leeming JA)

71. On one view, the duty alleged by Loulach clashes directly with the purpose evidently designed to be effected by the mechanism in the Infrastructure SEPP applicable to traffic-generating developments: cf *Sullivan v Moody* at [62] and *Hunter Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [31] . On another view, the regime created by the Infrastructure SEPP, while falling short of a direct clash, sits very uneasily with a duty to take reasonable care to prevent pure economic loss to the applicant for development consent: see *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390; [2009] HCA 47 at [41], [52] and [55] and *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1; [2014] NSWCA 364 at [161] and [191]-[192] .

Liprini v McIntyre [2019] NSWSC 355 (04 April 2019) (Simpson AJ)

176. The decision in *McKenna* was reversed on appeal to the High Court on other grounds and the construction of s 5 O did not arise: *Hunter & New England Local Health District v McKenna* (2004) 253 CLR 270; [2014] HCA 44 . It did arise for consideration in *Sparks* , but without final resolution. Macfarlan JA adhered to the views he had expressed in *McKenna* : [209]- [215]. Basten JA took a different view: see [30]- [40]. With reservations about the *McKenna* construction, I considered myself constrained by principle to follow that construction: see [332] ff. I maintain that view, particularly as I am sitting as a judge at first instance.

Cooper v State of New South Wales [2019] NSWDC 20 (22 February 2019) (Russell SC DCJ)

59. It is important to answer this question, because of a legal issue in the case. It is beyond doubt in this case that Senior Constable McVey was acting as a police officer seeking to discharge his public duty to execute an arrest warrant. The High Court has held that a common law duty of care cannot be imposed if such a duty might potentially be inconsistent with the

exercise of powers, duties and responsibilities prescribed by legislation: *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [29]-[33] ; *Tame v New South Wales* (2002) 211 CLR 317 at [58], [125], [298] ; *Sullivan v Moody* (2001) 207 CLR 572 at [50], [53] .

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

196. The Court began by considering the legislative framework created by the Act, including the powers of detention of patients. Of particular importance was s 20 of the Act that 'prohibited detention, or the continuation of detention, unless the medical superintendent of the hospital formed the opinion that no other less restrictive care was appropriate and reasonably available'. [77] The Court concluded

> These features of the Act presented a medical superintendent of a hospital deciding whether a person should be, or should continue to be, involuntarily admitted and detained with two questions. First, is the person a mentally ill person or a mentally disordered person? Secondly, if yes, is there *no* other care of a less restrictive kind which is appropriate and reasonably available to the person?
>
> No doubt, each question required clinical assessment and judgment, and each had to be answered either yes or no. But if the person was judged to be a mentally ill person, the Act required not only that 'any restriction on the liberty [of that person] and any interference with their rights, dignity and self-respect [be] kept to the minimum necessary in the circumstances' (s 4(2)(b)), but also that, *unless* the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available, the person not be detained or further detained. Hence, determining that a person was a 'mentally ill person' did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital.
>
> *Inconsistent duties*
>
> The core of the relatives' complaint in this matter is that each was injured because a decision was made not to continue to detain a mentally ill person. But, as in *Sullivan* , those who made that decision had other duties. Particularly relevant was the obligation imposed by s 20 not to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come in contact when not detained. And, as explained in *Sullivan* , 'if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists'.
>
> If a hospital or doctor were to owe to those with whom a mentally ill person may later come in contact a duty to take reasonable care to protect those others from risk of physical harm (or psychiatric injury caused by learning of physical harm) done by the mentally ill person, the hospital or doctor would be required to ask whether that risk is foreseeable and not insignificant and then take whatever steps a reasonable person would take in response to that risk. Foreseeable risks are those that are not far-fetched or fanciful.
>
> If a person is a mentally ill person, the risk of that person acting irrationally will often not be insignificant, far-fetched or fanciful. And, in such cases, there will often be a risk that the irrational action will have adverse consequences. In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical

consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference with the liberty of a mentally ill person. It required (s 20) that the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person. [78]

via

[77] Ibid 280–1 [25] (emphasis altered).

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

196. The Court began by considering the legislative framework created by the Act, including the powers of detention of patients. Of particular importance was s 20 of the Act that 'prohibited detention, or the continuation of detention, unless the medical superintendent of the hospital formed the opinion that no other less restrictive care was appropriate and reasonably available'. [77] The Court concluded

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via

[78] Ibid 281–2 [27]–[31] (citations omitted).

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

194. *Hunter and New England Local Health District v McKenna* ('*McKenna*') also concerned an alleged common law duty said to be inconsistent with a statutory regime. [76] In that case, a man was admitted to hospital in New South Wales and detained overnight under the *Mental Health Act*. The next day he was discharged, following a review of his records and discussions with the patient, his family, and a friend. The patient then began to travel back to Victoria with the friend, and on that trip killed his friend. The deceased's family alleged the hospital and the doctor who discharged the patient owed a duty of care to the patient's friend and were negligent in placing the patient into his friend's care.

via

[76] (2014) 253 CLR 270 (French CJ, Hayne, Bell, Gageler and Keane JJ) (' *McKenna*').

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

217. The issue of the extent and potential indeterminacy of liability also arose before the High Court in *McKenna* but the court did not find it necessary to consider that issue. [94]

via

[94] (2014) 253 CLR 270 .

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

104. In *Sullivan v Moody* ('*Sullivan*'), [28] the Court eschewed any attempt at formulating a general test for determining the existence or non-existence of a duty of care for the purposes of the law of negligence, an approach accepted by the court in subsequent cases. [29] The Court said:

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle. [30]

via

[30] (2001) 207 CLR 562, 579–80 [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (citations omitted), see also *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270, 279 [18] .

Block v Powercor Australia Ltd [2019] VSC 15 (06 February 2019) (John Dixon J)

217. The issue of the extent and potential indeterminacy of liability also arose before the High Court in *McKenna* but the court did not find it necessary to consider that issue. [94]

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 (23 November 2018) (Buss P; Murphy and Beech JJA)

54. Under the common law, a risk of injury which is not farfetched or fanciful, is real and therefore foreseeable. A risk of injury that is remote, in the sense that the probability of it occurring is extremely unlikely, may nevertheless constitute a foreseeable risk. [95] This test has been described as undemanding. [96]

via

[95] ***Wyong Shire Council v Shirt*** (48); ***Hunter and New England Local Health District v McKenna*** [2014] HCA 44; (2014) 253 CLR 270 [30].

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 (23 November 2018) (Buss P; Murphy and Beech JJA)

Hunter and New England Local Health District v McKenna [2014] HCA 44 ; (2014) 253 CLR 270

CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 (17 July 2018) (Martin CJ, Mitchell JA, Pritchard J)

Hunter Health District v McKenna [2014] HCA 44 ; (2014) 253 CLR 270

CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 (17 July 2018) (Martin CJ, Mitchell JA, Pritchard J)

59. In assessing this finding, the nature of the concept of foreseeability in the context of breach of duty must be kept in mind. To say that it was foreseeable that a dogman may go onto the roof is not to say that the prospect of him doing so was probable or even likely. As Mason J noted in a well-known passage of ***Wyong Shire Council v Shirt*** ; [75]

> A risk of injury which is quite unlikely to occur ... may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.

Later, Mason J observed that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. [76] The applicability of these observations when assessing whether there has been a breach of a duty of care is well established. [77]

via

[77] See, for example, ***Koehler v Cerebos (Aust) Ltd*** [2005] HCA 15; (2005) 222 CLR 44 [19], [33]; ***Hunter Health District v McKenna*** [2014] HCA 44; (2014) 253 CLR 270 [30].

South Western Sydney Local Health District v Gould [2018] NSWCA 69 (13 April 2018) (Basten, Meagher and Leeming JJA)

114. Different views have been expressed in this Court as to whether it is necessary to identify a particular "practice" in order to engage s 5O . The distinction was captured by Simpson JA in *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 at [332] , as to whether the reference to "practice" is a reference to the practice of the relevant profession, or more narrowly to a particular specific practice or method of providing the services. The latter was favoured in *Mc Kenna v Hunter & New England Local Health District* [2013] NSWCA 476; [2013] Aust Torts Rep 82-158, however, an appeal was allowed by the High Court on the anterior question of duty: *H unter & New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 . In *Spa rks v Hobson; Gray v Hobson* , Basten JA and Simpson JA favoured the former, while Macfarlan JA favoured the latter, with Basten and Simpson JJA expressing different views as to the precedential weight to be given to this Court's earlier decision. That divisive issue may be put entirely to one side for the purposes of this appeal. On any view, the practice of administering antibiotic prophylactic following an open fracture which was confined to flucloxacillin and cephazolin and did not extend to gentamicin – a practice which is set out in the fairly mechanical decision-tree in the *Therapeutic Guidelines – Antibiotic* – is a "practice" capable of engaging s 5O .

Corkhill v Commonwealth of Australia (No 3) [2018] ACTSC 87 (06 April 2018) (Refshauge J)
Hunter of New England Local Health District v McKenna [2014] HCA 44; 253 CLR 270
Innes v AAL Aviation Ltd

Corkhill v Commonwealth of Australia (No 3) [2018] ACTSC 87 (06 April 2018) (Refshauge J)

414. Recently, in *Hunter of New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270 at 278-9 ; [17]-[18], the High Court said:

Difficulties in determining the existence of a duty

17. In *Sullivan v Moody* this Court pointed out why determining the existence and nature and scope of a duty of care may be difficult. Four examples were given of classes of case in which particular difficulty may arise. The Court said http://classic.austlii.edu.au/au/cases/cth/HCA/2014/44.html - fn15:

> Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.

(Footnotes omitted)

18 The examples given in *Sullivan* were all based on particular decisions of this Court. It is useful to amplify the references given in *Sullivan* in the way Gummow J did in *Vairy v Wyong Shire Council*. In *Sullivan* , the Court referred to *Modbury Triangle Shopping Centre Pty Ltd v Anzil* as an example of the first problem (nature of harm). It referred to *Crimmins v Stevedoring Industry Finance Committee* and *Brodie v Singleton Shire Council* (to which may be added *Graham Barclay Oysters Pty Ltd v Ryan*) as examples of the second problem (statutory power). It referred to *Perre v Apand Pty Ltd* (to which may be added *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*) as an example of the third problem (indeterminacy of class). It referred to *Hill v Van Erp* (to which may be added *Koehler v Cerebos (Australia) Ltd*) as an example of the fourth problem (coherence). Each of those decisions demonstrates that questions of duty of care may present difficult issues.

(Footnotes omitted)

Sparks v Hobson [2018] NSWCA 29 (01 March 2018) (Basten, Macfarlan and Simpson JJA)

210. In *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476; (2013) Aust Torts Reports 82-158, with the concurrence of Beazley P, I concluded that s 5 O was inapplicable to exempt the defendant in that case from liability. The decision was reversed by the High Court on other grounds (*Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44), and the High Court did not consider s 5 O. The appellants submitted that this Court's decision in *McKenna* was wrong insofar as it dealt with s 5 O, and that s 5 O does not depend on the existence of a "practice" at the time the conduct occurred. This is incorrect for the following reasons.

Sparks v Hobson [2018] NSWCA 29 (01 March 2018) (Basten, Macfarlan and Simpson JJA)

331. An appeal to the High Court of Australia was successful on the ground that this Court erred in finding that the health authority owed the plaintiffs a duty of care; the High Court therefore did not find it necessary to address the construction of s 5 O: *Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon* (2014) 253 CLR 270; [2014] HCA 44 .

Sparks v Hobson [2018] NSWCA 29 (01 March 2018) (Basten, Macfarlan and Simpson JJA)

McKenna v Hunter & New England Local Health District [2013] NSWCA 476; (2013) Aust Torts Rep 82-158 considered. *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 referred to.

Sparks v Hobson [2018] NSWCA 29 (01 March 2018) (Basten, Macfarlan and Simpson JJA)

35. If that understanding is too restrictive and it is necessary to go further, I would not follow *Mc Kenna* . The decision in *McKenna* having been overturned in the High Court, [21] the reasoning of the majority in this Court is no longer binding. As Kirby J noted in *Garcia v National Australia Bank* : [22]

> "It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order. Thus, the opinions of judges in dissent are disregarded for this purpose, however valuable they may otherwise be."

via

21. Hunter and New England Local Health District v McKenna (2014) 253 CLR 270; [2014] HCA 44 (" Hunter Health District").

Smith v Australian Executor Trustees Ltd [2017] NSWSC 1406 (16 October 2017) (Ward CJ in Eq)

81. AET argues that there is an identity of interest (as between the trustee and the company or its members): in the company's accounts being accurate; in the audit being carried out competently and carefully; and in the auditor providing a frank and independent report on the company's accounts; and thus says that this is not a case where the posited duty of care would subject PwC to inconsistent obligations or duties (cf *Sullivan v Moody* at [60]-[62] ; *Tam e v State of NSW; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 at [26]). It submits that the imposition of a duty of care in this case is consistent with the statutory scheme (and in particular ss 313 and 318) under the *Corporations Act* because PwC has an obligation to provide the relevant information to AET and, on any view, PwC owes a duty to Provident to exercise reasonable care in conducting the audit (including the preparation of the information provided to AET) (contrasting the position in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15 at [112]-[113] ; *Hunter and New England Area Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [29]-[31]).

Monck v The Commonwealth of Australia [2017] NTSC 49 (27 June 2017) (Master Luppino)

18. More recently *Sullivan* was unanimously applied by the High Court in *Hunter and New England Local Health District v McKenna* [10] (" *Hunter*"). In that case, a local health authority with the responsibility to determine whether a mentally ill person should be involuntarily detained for treatment decided that involuntary detention was not necessary and discharged the patient to the care of a friend. The patient then killed that friend and the deceased's relatives sued the authority for damages. They alleged that the authority owed a duty of care. The Court said that the local health authority had an obligation pursuant to the relevant legislation not to detain, or continue to detain, a patient unless the authority's doctors were of the opinion that no other care of a less restrictive kind was appropriate and reasonably available. The Court held that the claimed duty of care was inconsistent with the obligations on the authority's doctors and, applying *Sullivan*, confirmed that would ordinarily be a reason for denying the existence of the claimed duty.

via

[10] (2014) 253 CLR 270 .

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Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 (31 May 2017) (Meagher, Gleeson and Payne JJA)

45. As the High Court remarked in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [28] in relation to s 20, the predecessor provision in the *Mental Health Act 1990* (NSW) (which was in similar but not identical terms to s 12 of the 2007 Act):

> ... determining that a person was a "mentally ill person" did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital.

Gould v South Western Sydney Local Health District [2017] NSWDC 67 (30 March 2017) (Judge Levy SC)

614. The effect of that provision is that a "*person*", as referred to in s 50 of the *CL Act*, should be taken to include an individual, a corporation, and a body corporate. The point was raised in passing in *Hunter and New England and Local Health District v McKenna* [2014] HCA 44, at [12] , but was not finally decided in that case, as ultimately, it was held the point did not fall for decision. For present purposes, I will therefore proceed on the basis that the health authority should be taken to have available to it for consideration, a defence pursuant to s 50 of the *CL Act*. The analysis which follows is in conformity with that approach.

SZVCP v Minister for Immigration & Ors (No 3) [2016] FCCA 3328 (20 December 2016) (Judge Street)

130. I take into account what was said in the High Court of Australia in *Hunter and New England Local Health District v McKenna* [2014] HCA 44 at [17] – [18] and [29]- [33] . I have taken into account the object, structure, content and powers conferred on the Minister under the Act . These statutory considerations are material in determining whether the salient features give rise to relationship whereby a duty of care is owed by the Minister, as well as informing the nature and scope of any such duty.

SZVCP v Minister for Immigration & Ors (No 3) [2016] FCCA 3328 (20 December 2016) (Judge Street)
Hunter and New England Local Health District v McKenna [2014] HCA 44
Minister for Immigration and Border Protection v SZSSJ

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

Hunter and New England Local Health District v McKenna [2014] HCA 44; 253 CLR 270
Karatjas v Deakin University

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

95. Such conflicting duties are irreconcilable: see eg *Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270 at [29] . Compliance with a duty to customers might put members of its staff at risk: see eg *Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45; 10 ACTLR 1 at [340] . The foreseeability of such a conflict occurring in the circumstances of an attempted armed robbery at Westpac premises was acknowledged by Dr Zalewski. Where a suggested duty of care would give rise to conflicting obligations that will ordinarily be a reason for denying that the duty exists: *Sullivan v Moody* at 582 [60] . This is such a case.

Conclusion

State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15; *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; *New South Wales v Fahy* (2007) 232 CLR 486; [2007] HCA 20; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 , applied

State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

188. That is sufficient to reject this aspect of the notice of contention, but I would add that in any event, although the primary judge was critical of the insensitivity with which this testing was conducted, that falls short of establishing a breach of duty, as his Honour with respect correctly appreciated. It cannot be the case that there is a duty to avoid subjecting officers to indignity and stress in performing targeted testing for drugs of police officers (for example, notice of obtaining samples obviously cannot be given); that would contradict the statute: *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [60] ; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [29] .

State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

49. More recently, a unanimous High Court in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 at [20] and [22] stated that identifying whether a duty of care exists and, if so, its nature and scope, required consideration of the applicable legislation, and in particular whether the duty would be consistent with the legislation.

State of New South Wales v Roberson [2016] NSWCA 151 (29 June 2016) (Beazley P, Basten and Macfarlan JJA)

21. (2014) 253 CLR 270; [2014] HCA 44 .

State of New South Wales v Roberson [2016] NSWCA 151 (29 June 2016) (Beazley P, Basten and Macfarlan JJA)

> *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44 , discussed.

State of New South Wales v Roberson [2016] NSWCA 151 (29 June 2016) (Beazley P, Basten and Macfarlan JJA)

46. Finally, reference should be made to the decision of the High Court in *Hunter and New England Local Health District v McKenna* . [21] That case involved an alleged breach of a general law duty of care owed to the respondents. A person suffering from paranoid schizophrenia was admitted to a hospital in New South Wales as an involuntary patient and was detained overnight. The following day the authorised medical officer released the person so that he could be driven by a friend to his home in Victoria, where he could obtain further treatment. On the trip, he stabbed and killed the friend. The friend's family sued the Health District alleging negligence on its part in placing the patient into the care of his friend. The Court held that the powers, duties and responsibilities conferred and imposed by the *Mental Health Act* were inconsistent with the existence of the common law duty of care relied on by the relatives. In the course of reaching that conclusion, the Court said that "determining that a person was a 'mentally ill person' did not entail that the person must be, or must continue to be, involuntarily admitted to and detained in a hospital." [22]

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483 (06 May 2016) (Bromberg J)

210. It is recognised in the authorities that cases in which the defendant is a repository of a statutory power or discretion are in a special class of case (see, e.g., *Sullivan v Moody* (2001) 207 CLR 562 at [50] (the Court); *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at [18] (the Court)). Liability in special cases is sometimes limited or negated, for reasons of policy (c.f. *D'OrtaEkenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [102] (McHugh J)).

Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483 (06 May 2016) (Bromberg J)

271. The Minister's submissions primarily relied upon *McKenna* (2014) 253 CLR 270 . That was a case in which the recognition of the putative duty of care would have given rise to inconsistent obligations. It would have created a clash as between the duties and obligations imposed upon doctors by the *Mental Health Act 1990* (NSW) in relation to involuntary detention and the putative duty of care: see at [29]–[33]. There is no clash of duties between any duty or obligation required or imposed by Subdivision B and the putative duty of care here in question. Nor is there inconsistency between the putative duty of care and any policy manifested by the statutory scheme pursuant to which the discretion reposed in the Minister by s 198AHA is to be exercised. Unlike *MM Constructions (Aust) Pty Ltd v Port Stephens Council* [2012] NSWCA 417, which was relied upon by the Minister, Subdivision B does not "[lay] down the balance of interests to be assessed" in the exercise of the powers conferred by s 198AHA . There are two factors which point, although perhaps only faintly, to consistency rather than inconsistency. First, both the putative duty and s 198AHA are directed at providing assistance to a transitory person. Second, s 198AHA(3) suggests an intent that the powers and discretion conferred by s 198AHA(2) be exercised consistently with law.

Beer v State of Queensland [2016] QDC 14 (17 February 2016) (McGill SC DCJ)

5. Under s 31(2)(b) of the Act one of the things that must appear to the court before an order can be made for the extension of the limitation period is that there is evidence to establish the

right of action apart from a defence founded on the expiration of a period of limitation. During the hearing I raised the question of whether the plaintiff had in the material anything to satisfy this requirement, and invited further submissions in writing on this point, including specifically, in relation to the question of whether there was negligence in failing to remove the plaintiff from her parents, and the issues considered by the High Court in *Hunter New England Local Health District v McKenna* (2014) 89 ALJR 39 . In supplementary submissions provided on behalf of the plaintiff on 18 January 2016, these issues of negligence were addressed, but the material fact of a decisive nature was said to be the fact of the occurrence of negligence or breach of duty on which the right of action was based, which was said to be not within the means of knowledge of the applicant prior to her consultation with her solicitors on 19 December 2013. This, it seems to me, put what is relied on as the material fact of a decisive character on an entirely different basis. As a result the defendant was allowed the opportunity to put in supplementary written submissions in response.

Di v Chief Executive of Department of Disability, Housing and Community Services [2015] ACTSC 418 (10 December 2015) (Mossop AsJ)

23. As to the first issue, while the written submissions of the defendant ranged across the general authorities relating to breach of duty and, in particular, breach of duty by statutory authorities summarised in *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 , the three particular authorities relied upon by the plaintiffs, *Barrett v Enfield London Borough Council* [2001] 2 AC 550, *SB v New South Wales* [2004] VSC 514 and *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, demonstrate, in my view, that the claims made by the plaintiffs cannot at this stage be said to be so manifestly hopeless as to warrant them being struck out: see in particular *Trevorrow* at [1012]-[1070] and *SB* at [291]-[308] . Unusually, notwithstanding that by letter dated 16 June 2015 the plaintiffs had notified the defendant of their reliance upon each of *Barrett* , *SB* and *Trevorrow* , the defendant's lengthy written submissions in chief make no reference to those authorities. While I accept the defendant's submission that the cases are merely illustrations in particular factual and statutory contexts of the existence of duties of care between statutory authorities and persons in positions analogous to that of the plaintiffs, the occasion on which to consider on a final basis whether or not such a duty exists in the present case is at the conclusion of the trial rather than on the basis of a summary review of documentary material and factual allegations which have not been agreed.

Di v Chief Executive of Department of Disability, Housing and Community Services [2015] ACTSC 418 (10 December 2015) (Mossop AsJ)

Hunter and New England Local Health District v McKenna (2014) 253 CLR 270

SB v New South Wales

TB v State of New South Wales and Quinn; DC v State of New South Wales and Quinn [2015] NSWSC 575 (22 May 2015) (Campbell J)

23. In a frequently cited passage from *Sullivan v Moody* , the Court said at 579 [50] :

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle. (Footnotes omitted)

See *Hunter & New England Local Health District v McKenna; v Simon* [2014] HCA 44; 89 ALJR 39 at 43 [17] – [19] .

TB v State of New South Wales and Quinn; DC v State of New South Wales and Quinn [2015] NSWSC 575 (22 May 2015) (Campbell J)

36. Section 5B(1)(a) and (b) imposes statutory conditions which must be satisfied before a finding of negligence can be made. They are, first, that the relevant risk of harm, as correctly identified, is foreseeable in the sense of being a risk of which the Department knew or ought to have known. A risk is foreseeable if it is neither fanciful nor far-fetched: *McKenna* and *Simon* at 45 , [30] . The second condition is that "the risk was not insignificant". This condition requires a focus on the potential magnitude of the harm and its probability of occurrence, important considerations which require further evaluation when assessing whether a reasonable authority in the position of the Department would have taken the suggested precaution: s 5B(1)(c) . A foreseeable risk of trivial injury which is extremely unlikely to occur would be insignificant for the purpose of s 5B(1)(b) . However, a risk of appreciable injury, even one having a relatively low probability of occurrence, would satisfy the statutory criterion of "not insignificant".

Berg v Director of Public Prosecutions (Qld) [2015] QCA 59 (17 April 2015) (Holmes JA)

I understand that there are other arguments made by the applicant about her Honour's construction, but so far as her application of the common law is concerned, as I have indicated, I do not think that *McKenna* assists his case and I do not consider that the result was any more limited a construction of the definition than would otherwise have been the case.

Berg v Director of Public Prosecutions (Qld) [2015] QCA 59 (17 April 2015) (Holmes JA)

The applicant here said, through Mr Berg Junior, that matters had changed since Muir JA's hearing because a committal hearing has been set down for May 4 and his desire to have the charges dealt with one by one has not been met. He also asserts that the High Court's decision in *Hunter and New England Local Health v McKenna* (2014) 314 ALR 505 has improved his prospects of success on appeal, because it is said to support his argument that the trial judge erred in having regard to the common law in construing the *Mental Health Act* .

Lee v State of Queensland [2015] QDC 83 (16 April 2015) (McGill SC DCJ)

62. In addition, the Court was influenced by the decision of the High Court in *Sullivan v Moody* (2001) 207 CLR 562. In that case there was a police investigation into suspected sexual abuse of children by the appellants, which ultimately did not lead to any charges being brought, let alone succeeding. The plaintiffs claimed that they had suffered psychiatric injury as a result, but the High Court held that there was no duty of care owed by persons conducting investigations into such matters, on the basis that such a duty would be incompatible with other duties that the respondents owed, and there was the prospect that such a duty of care would give rise to inconsistent obligations on the part of officers and public authorities in such a context. [68] *Sullivan* was distinguishable on the basis that there was no relevant relationship between those plaintiffs and the authorities conducting the investigation, whereas in *Paige* there was an employer-employee relationship which would give rise to a duty of care to avoid psychiatric injury, but the New South Wales Court of Appeal essentially treated the considerations of inconsistent obligations, and coherence of the law, as excluding the existence of a duty of care in such a context.

via

[68] See also *Hunter and New England Local Health District v McKenna* [2014] HCA 44 where it was held that no duty of care could exist which would be inconsistent with a statutory obligation : [33].

Palmer & Ors v State of Queensland [2015] QDC 63 (27 March 2015) (McGill DCJ)

Hunter and New England Local Health District v McKenna [2014] HCA 44 – cited.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; 75 NSWLR 649; *Hoffman v Boland* [2013] NSWCA 158; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512; *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; *Hunter & New England Local Health District v McKenna* [2014] HCA 44 .

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

106. Leighton next contended that the law denies the existence of a duty of care in circumstances where its imposition would subject the defendant to conflicting, incompatible duties: *Sullivan v Moody* [2001] HCA 59; 207 CLR 562 at [55]-[60] ; *Hunter & New England Local Health District v McKenna* [2014] HCA 44 at [17]-[23] . Leighton submitted that in this case the imposition of a duty of care to an individual police officer conflicted with its incompatible duty to close the northbound tunnel. It submitted that this overarching duty was imposed by direction from the police as part of the special security event.

Palmer & Ors v State of Queensland [2015] QDC 63 (27 March 2015) (McGill DCJ)

86. In addition, the Court was influenced by the decision of the High Court in *Sullivan v Moody* (2001) 207 CLR 562. In that case there was a police investigation into suspected sexual abuse of children by the appellants, which ultimately did not lead to any charges being brought, let alone succeeding. The plaintiffs claimed that they had suffered psychiatric injury as a result, but the High Court held that there was no duty of care owed by persons conducting investigations into such matters, on the basis that such a duty would be incompatible with other duties that the respondents owed, and there was the prospect that such a duty of care would give rise to inconsistent obligations on the part of officers and public authorities in such a context. [91] *Sullivan* was distinguishable on the basis that there was no relevant relationship between those plaintiffs and the authorities conducting the investigation, whereas in *Paige* there was an employer-employee relationship which would give rise to a duty of care to avoid psychiatric injury, but the New South Wales Court of Appeal essentially treated the considerations of inconsistent obligations, and coherence of the law, as excluding the existence of a duty of care in such a context.

via

[91] See also *Hunter and New England Local Health District v McKenna* [2014] HCA 44 where it was held that no duty of care could exist which would be inconsistent with a statutory obligation : [33].

Mules v Ferguson [2015] QCA 5 (06 February 2015) (Margaret McMurdo P, Applegarth and Boddice JJ,)

191. Section 22 of the Act provides a defence to a breach of duty if the medical practitioner establishes he or she acted in a way which was widely accepted by peer professional opinion by a significant number of professionals in that field. That defence requires an identification of the particular conduct, and the group of peer opinion supporting that conduct as being widely accepted practice. [106] The onus rests on the respondent to satisfy that defence. Whether the respondent met that onus required a consideration of the respondent's conduct in the context of the presenting symptoms as found by the trial judge.

via

[106] See generally, *Hunter and New England Local Health District v McKenna* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476; an appeal to the High Court [2014] HCA 44 [12], expressly did not consider this aspect of the judgment.

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014) (McDonald J)

131. At paras 31 to 33 of *Hunter* the High Court stated:

> ... In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference with the liberty of a mentally ill person. It required that the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person.
>
> Because s 20 of the *Mental Health Act* required that Mr Pettigrove be released from detention unless the medical superintendent formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to Mr Pettigrove, it is not to the point to decide whether, as the relatives alleged, the medical superintendent did not positively authorise his release from the Hospital (whether under s 35 of the *Mental Health Act* or otherwise).
>
> The powers, duties and responsibilities of doctors and hospitals respecting the involuntary admission and detention of mentally ill persons were prescribed by the *Mental Health Ac*. It is the provisions of that Act which identified the matters to which doctors and hospitals must have regard in exercising or not exercising those powers. Those provisions are inconsistent with finding the common law duty of care alleged by the relatives. [84]

via

[84] *Hunter* [2014] HCA 44 (12 November 2014) (citations omitted, emphasis in original).

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014) (McDonald J)

133. The reasoning of the High Court in *Hunter* raises the question of whether, in considering whether to make a recommendation for an ITO, the first defendant was precluded by the Act from having any regard to concerns for the welfare of the plaintiff's children. If the Act precluded the first defendant from having regard to the welfare of the plaintiff's children, the plaintiff may be entitled to a declaration that the recommendation was unlawful.

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014) (McDonald J)

131. At paras 31 to 33 of *Hunter* the High Court stated:

> ... In some cases, there will be a risk that the mentally ill person will engage in conduct that may have adverse physical consequences for others, whether because the conduct is directed at another or because it otherwise causes adverse physical consequences. In some cases, perhaps many, the reasonable person in the position of the hospital or doctor would respond to those risks by continuing to detain the patient for so long as he or she remains a mentally ill person, thus avoiding the possibility that the risk of harm to others will eventuate. But that is not what the *Mental Health Act* required. It required the *minimum* interference with the liberty of a mentally ill person. It required that the person be released from detention unless the medical superintendent of the hospital formed the opinion that no other care of a less restrictive kind was appropriate and reasonably available to that person.
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> The powers, duties and responsibilities of doctors and hospitals respecting the involuntary admission and detention of mentally ill persons were prescribed by the *Mental Health Ac*. It is the provisions of that Act which identified the matters to which doctors and hospitals must have regard in exercising or not exercising those powers. Those provisions are inconsistent with finding the common law duty of care alleged by the relatives. [84]

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014) (McDonald J)

129. On 18 November 2014 the High Court of Australia delivered judgment in *Hunter and New England Local Health District v McKenna [83]*. The judgment was drawn to my attention by the plaintiff's legal representatives. The parties availed themselves of the opportunity to file written submissions regarding the potential impact of the judgment on the issues for determination in the present proceedings. The judgment dealt with the question of whether a hospital and medical staff owed a common law duty of care to protect persons against harm caused by a mentally ill person upon discharge. The respondent to the appeal was the relative of a person who was killed whilst transporting a former patient. The respondent had claimed damages for psychiatric injury sustained upon hearing that her relative had been killed.

via

[83] [2014] HCA 44 (12 November 2014) ('*Hunter*').

XX v WW and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014) (McDonald J)

129. On 18 November 2014 the High Court of Australia delivered judgment in *Hunter and New England Local Health District v McKenna [83]*. The judgment was drawn to my attention by the plaintiff's legal representatives. The parties availed themselves of the opportunity to file written submissions regarding the potential impact of the judgment on the issues for determination in the present proceedings. The judgment dealt with the question of whether a hospital and medical staff owed a common law duty of care to protect persons against harm caused by a mentally ill person upon discharge. The respondent to the appeal was the relative of a person who was killed whilst transporting a former patient. The respondent had claimed damages for psychiatric injury sustained upon hearing that her relative had been killed.