Sullivan v Moody - [2001] HCA 59

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

THOMAS PATRICK SULLIVAN APPELLANT

AND

MARGARET CATHERINE MOODY & ORS RESPONDENTS

Sullivan v Moody
[2001] HCA 59
11 October 2001
A21/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

C J Kourakis QC with H M Heuzenroeder for the appellant (instructed by Margaret J Minney)

A J Besanko QC with D C Lovell for the first to fifth respondents (instructed by Fisher Jeffries)

B M Selway QC Solicitor-General for the State of South Australia with M W Mills for the sixth respondent (instructed by Crown Solicitor for South Australia)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

COLIN LESLIE THOMPSON APPELLANT

AND

AILEEN FORSYTH CONNON & ORS RESPONDENTS

Thompson v Connon
11 October 2001
A23/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

C J Kourakis QC with E M Boxall for the appellant (instructed by Norman Waterhouse)

A J Besanko QC with D C Lovell for the first to third respondents (instructed by Joanne Tracey)

B M Selway QC Solicitor-General for the State of South Australia with M W Mills for the fourth respondent (instructed by Crown Solicitor for South Australia)

CATCHWORDS

Sullivan v Moody
Thompson v Connon

Torts – Negligence – Duty of care – Appellants suspected of sexually abusing their children – Alleged negligence of respondents in investigating and reporting on allegations – Appellants claimed that they suffered shock, distress, psychiatric injury, and consequential personal and financial loss as a result of the accusations – Whether medical practitioners, social workers and departmental officers involved in investigating and reporting upon allegations of child sexual abuse owe a duty of care to suspects.

Torts – Negligence – Duty of care – Proximity – Inapplicability of the *Caparo* test in Australia.

Community Welfare Act 1972 (SA), ss 25, 91, 92, 235a.

1. GLEESON CJ, GAUDRON, McHUGH, HAYNE AND CALLINAN JJ. These two appeals were heard together. In each case the appellant's action for damages, commenced in the Supreme Court of South Australia, was struck out by a Master of the Court on the ground that the Statement of Claim failed to disclose a cause of action. In the case of *Thompson*, an appeal to the Full Court of the Supreme Court of South Australia was dismissed following fully reasoned judgments by the members of the Full Court (Doyle CJ, Duggan and Gray JJ)[1]. In the later appeal of *Sullivan* it was accepted, subject to one qualification, that the decision in *Thompson* meant that the appeal must fail, and it was dismissed [2]. The qualification concerns one defendant in the action, who was regarded as being in a position different from that of the other defendants. He is not a party to the appeal to this Court.

1 *CLT v Connon* (2000) 77 SASR 449.

[2] *Sullivan v Moody & Ors* [2000] SASC 340.

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2. The course that was taken in the Supreme Court of South Australia was influenced by the consideration that, in 1996, in a case that had gone to trial, the Full Court of the Supreme Court of South Australia had dismissed a plaintiff's appeal in circumstances that were conceded to be indistinguishable from those of *Thompson* and *Sullivan* . That case was *Hillman v Black* [3] . The Full Court decided in *Hillman v Black* that the defendants did not owe a duty of care to the plaintiff, upholding the decision of the trial judge. That decision meant that, if the present cases had gone to trial, failure at first instance was certain, and failure in the Full Court was very likely. In the light of authority binding him, the Master's decisions were inevitable. In *Thompson*, the appellant endeavoured to persuade the Full Court that, having regard to later authority, it should depart from *Hillman v Black* , but was unsuccessful.

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[3] (1996) 67 SASR 490 .

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3. The concession that *Hillman v Black* is indistinguishable means that the outcome of the present appeals does not turn upon questions as to the standard of persuasion which a defendant ordinarily needs to satisfy in a strike out application [4] . That case went to trial. The events in issue occurred at about the same time as the events in *Thompson* and *Sullivan* , the relevant statutory regime was the same, and, except for the identity of the doctors and social workers involved, and other matters of immaterial detail, the same allegations are made. If no duty of care was owed in *Hillman v Black* , none was owed in these two cases. For practical purposes, these appeals are challenges to the decision in *Hillman v Black* , and although they are to be decided by reference to the allegations in the pleadings, it is not argued that those allegations are relevantly different from what was alleged, and found, in the earlier case.

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[4] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

The facts in *Thompson*

4. The plaintiff is the father of three young boys. Each of the first and second defendants is a medical practitioner employed at the Sexual Assault Referral Centre at the Queen Elizabeth Hospital, Woodville, South Australia. The third defendant is the hospital. The fourth defendant, the State of South Australia, operates the Department of Community Welfare. The plaintiff is uncertain whether the first two defendants were employed by the third or the fourth defendant.

5. During 1986, the plaintiff's wife, on separate occasions, attended the Sexual Assault Referral Centre with the boys. Doyle CJ noted that it was common ground that the medical practitioners who examined the boys did so at the instigation of a person or persons employed by the Department of Community Welfare. One of the boys was examined by the first defendant. The other boys were examined by the second defendant. Both the first and second defendants concluded, and reported to the Department of Community Welfare, that the boys appeared to have been sexually abused.

6. Further investigations were carried out by officers of the Department of Community Welfare, who also concluded that there had probably been sexual abuse. They, in turn, referred the matter to the police. The police charged the plaintiff with sexual offences. Those charges were ultimately dropped, but, in consequence of the allegations and charges, the plaintiff suffered shock, distress and psychiatric harm, and consequential personal and financial loss.

7. The plaintiff alleges that each of the first and second defendants (the medical practitioners at the Sexual Assault Referral Centre) "owed a duty of care to the plaintiff to carry out her duties and responsibilities and in particular the examination and diagnoses of persons and in particular children suspected of having been sexually abused … with due care, skill, discretion and diligence." (The introduction of the concept of discretion was capable of causing some confusion, but it played no separate role in argument). In a number of respects, those defendants are said to have acted negligently in their examination, diagnosis, and reporting. The third and fourth defendants are claimed to be vicariously liable for the negligence of the medical practitioners.

8. The State of South Australia is also alleged to have owed the plaintiff a duty to carry out its responsibilities in relation to the investigation of sexual abuse of children with due care, skill, discretion and diligence, and the officers of the Department of Community Welfare who investigated the matters are alleged to have behaved negligently.

9. Doyle CJ summarised the case as follows:

> "In short, it is a case in which the plaintiff alleges that the first and second defendants carelessly reached a conclusion that the plaintiff's children had been or probably had been subjected to sexual abuse, and reported that conclusion to members of the Department, in circumstances in which the plaintiff would be regarded as the probable or possible perpetrator of that abuse.
>
> …
>
> > The State is also alleged to be liable on an independent basis. It is claimed that the employees of the Department owed the plaintiff a duty of care in the course of their employment.
>
> …
>
> It is alleged that employees … gathered and used information about possible sexual abuse of the children without making adequate inquiry as to those facts, without exercising proper care and without following appropriate procedures for such cases. … It is alleged that the employees of the Department failed to

establish appropriate protocols for the diagnosis of sexual abuse of children. It is alleged that they failed to establish proper procedures to validate diagnoses of sexual abuse … ."

The facts in *Sullivan*

10. The plaintiff is the father of a young daughter. The daughter said some things to her mother (the plaintiff's wife) and her grandmother, which led the mother to contact the Crisis Care branch of the Department of Community Welfare. She was referred by the Department to the Adelaide Children's Hospital, which in turn referred her to the Sexual Assault Referral Centre at the Queen Elizabeth Hospital.

11. The first defendant was a medical practitioner employed at the Sexual Assault Referral Centre. She examined the daughter and expressed the conclusion that the daughter had suffered sexual abuse. The second and third defendants are social workers who were employed at the Sexual Assault Referral Centre, and Adelaide Children's Hospital, respectively. The plaintiff is uncertain whether the employer of the first and second defendants was the Queen Elizabeth Hospital or the State of South Australia.

12. For presently relevant purposes, the medical practitioner, and the social workers, are alleged to have acted negligently in examining the child and investigating the possibility of sexual abuse. No criminal charges were laid; but the allegations were believed by the plaintiff's wife. They resulted in breakdown of the marriage, and were pursued in Family Court proceedings. They were resolved, in that Court, in favour of the plaintiff.

13. Each of the first, second and third defendants is alleged to have owed a duty to the plaintiff to exercise reasonable care in the conduct of the investigation of allegations of sexual abuse of the daughter. The Queen Elizabeth Hospital and the State of South Australia, in the alternative, are said to be vicariously liable for the negligence of the first and second defendants. The Adelaide Children's Hospital, or alternatively the State, is said to be vicariously liable for the negligence of the third defendant.

14. The State of South Australia is also alleged to have owed the plaintiff a duty of care to exercise reasonable care in the conduct of the investigation of the allegations of sexual abuse of the daughter. It is alleged, through the conduct of its employees and, in particular, officers of the Department of Community Welfare, to have been negligent, in the same manner as the officers in *Thompson* were said to have been negligent.

15. The plaintiff alleges that he suffered shock, distress, psychiatric injury, and consequential personal and financial loss.

16. Doyle CJ said that, in its essentials, the case pleaded in *Sullivan* appeared to be identical to the case pleaded in *Thompson*, and the matters were argued on that basis.

The facts in *Hillman v Black*

17. In that case the plaintiff was the father of a young daughter. His wife came to suspect him of sexually abusing the daughter. She raised her accusations with a social worker at Crisis Care, and was referred to the Sexual Assault Referral Centre at Queen Elizabeth Hospital. The daughter was examined there by a medical practitioner who formed, and expressed, the

opinion that there had been some form of molestation. This opinion was reported by the medical practitioner and a social worker to the police. A custody dispute in the Family Court followed. The defendants were a medical practitioner attached to the Sexual Assault Referral Centre, a psychiatrist at the Adelaide Children's Hospital, who assessed the child in connection with custody and access claims in the Family Court, and their employers. There was also a claim against the Department of Community Welfare. The allegations of negligence and damage were similar to those later made in *Thompson* and *Sullivan* .

The relevant legislation

18. In all three cases the statutory background was the same. There was a difference of opinion in the Full Court in *Thompson* as to whether it was conclusive, but it is plainly relevant.

19. The Department of Community Welfare functions pursuant to the *Community Welfare Act* 1972 (SA) ("the Act"). Section 10 of the Act provides that the objectives of the Department, and of the Minister of Community Welfare, include promoting the welfare and dignity of the community, and of individuals, families and groups within the community, by providing services designed to assist, amongst others, children to overcome disadvantages suffered by them.

20. Part IV of the Act is concerned with "Support Services for Children". Section 25, which states certain principles to be observed, provides that a person dealing with a child under the provisions of Pt IV:

> "…
>
> (a) shall regard the interests of the child as the paramount consideration;
>
> (b) shall seek to secure for the child care, guidance and support within a healthy and balanced family environment;
>
> (c) shall deal with the child in a caring and sensitive manner;
>
> (d) shall have regard to the rights of the child, and to the needs and wishes expressed by him;
>
> and
>
> (e) shall promote, where practicable, a satisfactory relationship between the child and other members of, or persons within, his family or domestic environment."

21. Division III of Pt IV, which is headed "The Protection of Children" provides for regional and local protection panels, and includes the following:

> "91(1) Where a person suspects on reasonable grounds that an offence under this Division has been committed against a child, that person –
>
> (a) if he is not obliged to comply with this section – may notify an officer of the Department of his suspicion;

or

(b) if he is obliged to comply with this section – shall notify an officer of the Department of his suspicion,

as soon as practicable after he forms the suspicion.

(2) The following persons are obliged to comply with this section –

(a) any legally qualified medical practitioner;

(b) any registered dentist;

(c) any registered or enrolled nurse;

(d) any registered psychologist;

(e) any pharmaceutical chemist;

(f) any registered teacher;

(g) any person employed in a school as a teacher aide;

(h) any person employed in a kindergarten;

(i) any member of the police force;

(j) any employee of an agency that provides health or welfare services to children;

(k) any social worker employed in a hospital, health centre or medical practice;

or

(l) any person of a class declared by regulation to be a class of persons to which this section applies.

…

(5) Where a person acts in good faith and in compliance with the provisions of this section, he incurs no civil liability in respect of that action.

…

92(1) Any person having the care, custody, control or charge of a child, who maltreats or neglects the child, or causes the child to be maltreated or neglected, in a manner likely to subject the child to physical or mental injury, shall be guilty of an offence and liable to a penalty not exceeding one thousand dollars or imprisonment for a period not exceeding twelve months."

22. There is also a general provision in the Act which provides:

> "235a(1) A person shall not incur any civil liability for any act or omission done by him in good faith in the exercise or discharge of his powers, functions, duties or responsibilities under this Act.
>
> (2) A liability that would, but for subsection (1), lie against a person shall lie against the Crown."

The argument for the appellants

23. **Following paragraph cited by:**

Weber v Greater Hume Shire Council (17 April 2019) (Basten and Gleeson JJA, Sackville AJA)

The appellants in the present appeals, like the appellant in *Hillman v Black* , had no personal dealings with the medical practitioners, social workers, departmental officers, or hospitals involved in investigating, and reporting upon, the allegations of child sexual abuse. They were family members who were actual or potential suspects in relation to such allegations. Each appellant contended that he had not abused his children and that he had been injured as a result of the respondents' negligence in reaching and reporting an opinion suggesting or asserting the contrary.

24. We are not directly concerned with any potential tortious liability to the children involved. The appellants did not seek advice, assistance, care or treatment for themselves or their children, from any of the respondents. The children were the objects of the immediate concern of the respondents, who were obliged, by s 25 of the Act, to regard the interests of the children as the paramount consideration.

25. **Following paragraph cited by:**

Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)

The appellants submit that it was reasonably foreseeable that they would suffer harm of the kind alleged in consequence of negligence on the part of the defendants in investigating and reporting upon the allegations. That is not disputed. But foreseeability of harm is not sufficient to give rise to a duty of care. Conscious of a number of difficulties, including indeterminacy of liability, the appellants disclaimed any suggestion that the fact that they were actual or potential suspects of itself gave rise to a duty owed to them by the defendants of a kind that would give rise to liability in negligence. They did not contend that such a duty would be owed to a neighbour, or a stranger, who was suspected of molesting the children. The parental relationship between the appellants and the children, it was said, distinguished these cases from the ordinary case of an investigation of a possible crime. The

appellants did not argue that public authorities or individuals who, in the course of their official or professional duties, or otherwise, investigate, and report upon, possible offences, normally owe a legal duty to take reasonable care not to cause harm to people who might be suspected of being offenders, even though it is obviously foreseeable that such people might be adversely affected by carelessness in investigation and reporting.

26. The appellants pointed out that the Act obliges people dealing with children to consider the familial as well as the personal interests of the child. (See, for example, s 25(e)). The relationship between a child and its parents is an aspect of the welfare of the child. It was argued that, if an opinion is negligently formed that a parent has abused a child, the likely disruption of the parent/child relationship is directly against the interests of the child. In that respect there was said to be a coincidence of interest between parent and child.

27. The appellants also sought to confine the extent of the duty for which they contended, by excluding expressions of opinions and communications about the precautions necessary to protect children. The duty claimed was limited to the acts of undertaking medical examinations and associated interviews, making and communicating diagnoses, and, in the case of the Department, conducting further review and investigations. This unconvincing distinction appears to have been made in an attempt to avoid the incongruity of a proposition that, in deciding what precautions should be taken to protect a child from apprehended sexual abuse, decision-makers owe a duty to take care to protect a suspected abuser from emotional distress and other forms of harm.

The decision of the Full Court in *Hillman v Black*

28. Matheson, Prior and Perry JJ all concluded that, on the facts found by the trial judge which, so far as they were material to the issue of duty of care, were not in dispute, and were as alleged by the plaintiff, the defendants owed no relevant duty of care to the plaintiff.

29. The case was decided at a time when proximity was commonly treated in Australian courts as what Deane J described in *Jaensch v Coffey* [5] as a "broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another". More will be said of that later. Matheson J reached the conclusion "that the necessary relationship of proximity was not proved" [6] .

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[5] (1984) 155 CLR 549 at 584.

[6] (1996) 67 SASR 490 at 501.

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30. **Following paragraph cited by:**

DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

As to the Department, Matheson J was strongly influenced by the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [7] and, in particular, by what Lord Browne-Wilkinson said about one of the cases which formed part of that litigation ("the *Newham* case") where the facts bore a striking similarity to the facts in *Hillman.* His Lordship said that a "common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties" [8] . He also said [9] :

> "… the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment … if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties. … If the authority is to be made liable in damages for a negligent decision … there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children."

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[7] [1995] 2 AC 633 .

[8] [1995] 2 AC 633 at 739.

[9] [1995] 2 AC 633 at 750.

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31. Reference was also made by his Lordship to the United Kingdom regulatory scheme which "involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare" [10] .

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[10] [1995] 2 AC 633 at 751.

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32. Matheson J considered that the same applied to the South Australian legislation.

33. As to the medical practitioners who examined the child, Matheson J said that they "were not retained to advise the appellant, and did not assume a duty of care to him. It was for [the child] alone that they were invited to exercise their professional skill and judgment. The appellant was not their patient." [11]

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[11] (1996) 67 SASR 490 at 502.

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34. Prior J reasoned to like effect in relation to the Department. As to the medical practitioners, he emphasised that in those cases there was a similar problem of potential conflict between the interests of the child and the interests of the plaintiff which, in turn, exposed the doctors to a conflict of duty and interest if they were subject to a common law duty of care to the plaintiff [12] .

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[12] (1996) 67 SASR 490 at 510.

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35. Perry J approached the case as one of statutory construction, the object being to determine whether the statutory provisions excluded tortious liability [13] . He concluded that they had that effect, not only in relation to the Department and its officers, but also in relation to the medical practitioners to whom the Department referred a child.

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[13] (1996) 67 SASR 490 at 515-516 .

The decision of the Full Court in *Thompson*

36. Unlike the other two members of the Full Court and Perry J in *Hillman* , Doyle CJ did not find in the Act any implied intention to exclude the imposition of a duty of care. That, however, did not resolve the issue; it merely left it open. He went on to consider factors tending for and against a conclusion that a duty existed.

37. Factors in favour of the plaintiff were: that the duty alleged related to a positive act, not a mere failure to act; that it would have been known to the defendants that carelessness on their part would result in harm to the plaintiff and loss of contact with the children; that, in the case of the medical practitioners, the duty suggested was a duty to act competently when exercising their professional skills; and that the plaintiff was vulnerable in that there was nothing he could do to protect himself against the consequences of the defendants' lack of care.

38. Factors against the plaintiff were: that the harm suffered by the plaintiff was not the direct result of the conduct of the individual defendants, and complex causation issues were involved; that the legal "relationship" between the plaintiff, the medical practitioners, and the employees of the Department, if there was one, was difficult to define, and not analogous to any existing relationship in which a similar duty of care was found to exist; that as a general rule, professionals such as doctors and social workers owe a duty to those for whom and to whom they make their services available, and in whose interest they act; that the plaintiff had a potentially adverse interest to the children, whose welfare was the primary concern of the defendants; and that there is a potential for indeterminate liability, there being no reason in principle to restrict any duty of care to family members.

39. As to the Department, and its employees, Doyle CJ, like Matheson J in the earlier case, was strongly influenced by the reasoning of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* .

40. As to the doctors, Doyle CJ considered that their primary duty was to the State which requested the examinations and to the child they were asked to examine. That did not necessarily exclude a duty to other people as well. But here there was no reliance on the doctors by the plaintiff, and no undertaking of responsibility to the plaintiff. He said, concerning the doctors:

> "The parents of the child, or at least the parent who was a potential suspect for a conclusion of sexual abuse to be reached, could hardly be regarded as a person whose interests they could be expected or required by law to consider."

41. Gray J, with whose reasons Duggan J agreed, considered the legislative scheme to be critical. The question was whether the provisions of that scheme were incompatible with there being a duty owed to the plaintiff. The statute imposed a duty upon the defendants to protect children, to investigate allegations of child abuse, and to make necessary reports. The interests of the child were to be the paramount consideration. If the Department or its officers owed a duty of care to an alleged abuser, this would discourage or inhibit the performance of their statutory duties. An adverse report would obviously be likely to cause family disruption, but to impose duties to an abuser would put children at risk. Medical practitioners, social workers and others were obliged by the State to report suspicions. From all this there was inferred a statutory intention "that the common law should be excluded in so far as the alleged perpetrator of abuse is concerned".

The supposed duty of care

42. **Following paragraph cited by:**

Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)
Perera v Genworth Financial Mortgage Insurance Pty Ltd (16 February 2017) (Macfarlan, Leeming and Simpson JJA)
Perera v Genworth Financial Mortgage Insurance Pty Ltd (16 February 2017) (Macfarlan, Leeming and Simpson JJA)
R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

Rankin v Gosford City Council (25 August 2015) (Basten, Macfarlan and Simpson JJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Woolworths Ltd v Ryder (16 July 2014) (Basten and Ward JJA, Sackville AJA)
Woolworths Ltd v Ryder (16 July 2014) (Basten and Ward JJA, Sackville AJA)
Leonard v Pollock (21 June 2012) (Newnes JA, Murphy JA)
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council (18 September 2009) (Giles and Campbell JJA, Preston CJ of LEC)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Alinta Gas Networks Pty Ltd v James (20 July 2007) (Wheeler JA)

> 16 A person is only liable in negligence for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff in circumstances where the law imposes a duty to take such care: ***Sullivan v Moody*** (2007) 207 CLR 562 at [42] . Asking whether there existed between two parties a relationship sufficiently proximate to give rise to a duty of care gives little practical guidance to determine whether the duty exists in cases not analogous to cases in which duty has been established: ***Sullivan v Moody*** (*supra*) at [48]. Foreseeability of harm, whilst an essential ingredient to a cause of action in negligence, is not sufficient to establish a duty of care in cases not involving physical harm done to the plaintiff by the defendant.

Fitzpatrick v Job t/as Jobs Engineering (20 March 2007) (Steytler P)
Harriton v Stephens (29 April 2004) (Spigelman CJ, Mason P and Ipp JA)
Proprietors of Strata Plan 17226 v Drakulic (27 November 2002) (Mason P, Heydon and Hodgson JJA)
Rundle v State Rail Authority of New South Wales (23 October 2002) (Heydon JA, Young CJ in Eq and Foster AJA)
South Tweed Heads Rugby League Football Club Ltd v Cole (12 July 2002) (Heydon and Santow JJA, Ipp AJA)

> 3 In *Sullivan v Moody* (2001) 183 ALR 404 at [42] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ said:
>
> > "the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden

> of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

The argument was conducted upon the basis that it was foreseeable that harm of the kind allegedly suffered by the appellants might result from want of care on the part of those who investigated the possibility that the children had been sexually abused. But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

43. In *Donoghue v Stevenson* [14] , the House of Lords, by a majority of three to two, held that such a duty was owed by the manufacturer of a beverage to a consumer of the beverage where the manufacturer sold the product to a distributor and it was ultimately sold to the consumer in circumstances such that the consumer could not discover a defect in the beverage by inspection. It was established that it was not necessary for a plaintiff to show that a case was covered by, or closely analogous to, existing precedent, and that there were general principles by reference to which a claim in negligence fell to be decided. The first principle was that, in order to support an action for damages for negligence, a plaintiff must "show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury" [15] .

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[14] [1932] AC 562 .

[15] [1932] AC 562 at 579 per Lord Atkin.

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44. Lord Atkin, noting how difficult it was to find in the authorities statements of general application defining the relations between parties that gave rise to that duty, and pointing out that there must be some element common to all the particular relations which had been held to involve a duty, said [16] :

> "To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett MR in *Heaven v Pender*, in a definition to which I will later refer. As

framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide".

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[16] [1932] AC 562 at 580.

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45. In *Heaven v Pender*, Brett MR, addressing the question what is the proper definition of the relation between two persons which imposes on one of them a duty to observe, with regard to the person or property of the other, care to prevent injury, said [17] :

> "… whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

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[17] (1883) 11 QBD 503 at 509.

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46. Ten years later, in *Le Lievre v Gould* [18] A L Smith LJ described that as a statement of principle "that a duty to take due care [arose] when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other". That statement appears to refer to a limited form of proximity: proximity of person or property. But Lord Atkin said that it was not to be understood as limited to physical proximity. It was intended "to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act" [19] . Even so, his Lordship was speaking of "close and direct relations". He went on to acknowledge that there will no doubt be "cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises" [20] .

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[18] [1893] 1 QB 491 at 504.

[19] [1932] AC 562 at 581.

[20] [1932] AC 562 at 582.

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47. **Following paragraph cited by:**

DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)

> 68. It is also convenient in this context to note the principles adopted by the High Court in *Sullivan v Moody* , [47] a case involving a claim for damages brought by a father who had been mistakenly accused of sexual abuse of his child, alleging that the medical practitioner and social worker, who had formed the opinions that the child had been abused, acted negligently. That case involved the exercise of a power of notification (indeed an obligation to notify) pursuant to the *Community Welfare Act 1972* (SA), being a provision analogous to s 148B of the *Child Welfare Act* . The facts, in one sense, were the reverse of the present case. That was significant because the Court, in rejecting the existence of a duty of care, relied upon the fact that a duty of care owed to an alleged abuser "would give rise to inconsistent obligations", namely obligations inconsistent with the duty of the professional to the child in whose interest the professional is supposed to act. [48] The Court further noted that "the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable." [49]

Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

The references to "relations", and to the problem of deciding which relations are sufficiently proximate to give rise to a duty of care, in part reflects the previous history of the law of negligence, the focus of attention often being particular categories of relationship. The search was for a unifying principle which informed the decisions in respect to those categories. The actual conclusion in *Donoghue v Stevenson* was that, at least in certain circumstances, the manufacturer of a product intended for human consumption stood in a sufficiently proximate relation to an ultimate consumer of the product to attract a duty of care. But Lord Atkin, in his formulation of principle, was seeking to find "a valuable practical guide", and warned against "the danger of stating propositions of law in wider terms than is necessary" [21] . Cons istently with his reasoning, he might also have warned against the danger of stating such propositions in more categorical terms than is appropriate.

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[21] [1932] AC 562 at 583-584 .

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48. **Following paragraph cited by:**

Swan & Baker Pty Limited v Marando (24 July 2013) (McColl and Leeming JJA, Sackville AJA)
North Shore City Council v Attorney-General (27 June 2012)

Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Transfield Services (Australia) v Hall (10 November 2008) (Beazley JA ; Campbell JA ; McClellan CJ at CL)
Twynam Pastoral Co Pty Ltd v Bennett (23 September 2002)

As Professor Fleming said[22], "no one has ever succeeded in capturing in any precise formula" a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. The formula is not "proximity". Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality [23] , it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established [24] . It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity between the medical practitioners who examined the children, and the fathers who were suspected of abusing the children, might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue.

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[22] Fleming, *The Law of Torts*, 9th ed, (1998) at 151.

[23] eg *Jaensch v Coffey* (1984) 155 CLR 549 especially at 584-585 per Deane J; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52 per Deane J.

[24] *Hawkins v Clayton* (1988) 164 CLR 539 at 555-556 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 210 per McHugh J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 96-97 [270]-[274] per Hayne J.

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49. **Following paragraph cited by:**

Mallonland Pty Ltd v Advanta Seeds Pty Ltd (28 February 2023) (Morrison and Bond JJA; Williams J)
Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)
Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)
Perera v Genworth Financial Mortgage Insurance Pty Ltd (16 February 2017) (Macfarlan, Leeming and Simpson JJA)

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Hoffmann v Boland (06 June 2013) (Basten and Barrett JJA, Sackville AJA)
North Shore City Council v Attorney-General (27 June 2012)

154. It comes as no surprise to find Kirby J of the High Court of Australia affirming the view of observers that the Canadian approach looks remarkably familiar to that "re-adopted" in House of Lords cases such as *Caparo* . [209] Nevertheless, disagreeing with Kirby J, the High Court has rejected both *Anns* and *Caparo* in favour of an unstructured assessment of what have been called "salient features". The concern of the Court expressed in *Sullivan v Moody* [210] is that if the *Caparo* three-stage approach is followed, judges and practitioners, confronted by a novel problem, will seek to give the methodology a utility beyond that claimed for it by Lord Bridge. There is said also to be a danger that, the matter of foreseeability having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, just and reasonable as an outcome in the particular case. Proximity is said to give little practical guidance in cases which are not analogous to those in which a duty has been established; [211] and what is fair, just and reasonable is said to be capable of being misunderstood as an invitation to formulate policy rather than to search for a principle. [212]

via

[212] *Sullivan v Moody* at [49] .

Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)
Toll Pty Ltd v Dakic (28 March 2006) (Giles and Santow JJA, Brownie AJA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)
Van der Sluice v Display Craft Pty ltd (09 July 2002) (Meagher and Heydon JJA, Foster AJA)
TC v State of New South Wales (31 October 2001)

Finally, his Honour considered whether it was fair, just and reasonable that the common law should impose a duty of care. (See now ***Sullivan v Moody*** [2001] HCA 59 at [49] .) In this context Studdert J addressed the policy considerations said to negative a duty of care in the ***Bedfordshire County Council Case*** at 749-51 (Lord Browne-Wilkinson), ***Hillman v Black*** (1996) 67 SASR 490 (Full Court of Supreme Court of South Australia) and other cases; as well as those pointing in the opposite direction in ***Attorney-General v Prince and Gardiner*** [1998] 1 NZLR 262 (New Zealand Court of Appeal).

What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [25] does not represent the law in Australia [26] . Lord Bridge himself said that concepts of proximity and fairness lack the necessary precision to give them utility as practical tests, and "amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope" [27] . There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* approach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

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[25] [1990] 2 AC 605 at 617-618 .

[26] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [9] per Gleeson CJ, 210-212 [77]-[82] per McHugh J, 302 [333]-[334] per Hayne J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at 182 [101] per Hayne J; 176 ALR 411 at 436.

[27] [1990] 2 AC 605 at 617-618 .

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50. **Following paragraph cited by:**

Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA (15 April 2025) (Bell CJ, Leeming and Ball JJA)

7. Just as the evaluative inquiry involved in applications for a stay of proceedings in such cases has been described as “unique and highly fact-sensitive” (*Willmot* at [17]), so too may be the question of the existence of a duty of care and the content of any such duty, if found to exist. As the High Court observed in *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [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)

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)
FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Fuller-Wilson v State of New South Wales (03 October 2018) (Basten and White JJA, Emmett AJA)
Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd (28 November 2017) (Gilmour, Nicholas and Moshinsky JJ)
Ku-ring-gai Council v Chan (07 September 2017) (McColl and Meagher JJA, Sackville AJA)

68. It is now not controversial that a claim by a subsequent owner to recover the cost of repairing latent structural defects in a building is one for pure economic loss: *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 at [20] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 at [47] (Hayne and Kiefel JJ). Those damages are not recoverable "if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable": *Woolcock* at [21] . Rather, in a case where a novel duty of care to avoid such loss is propounded, it is necessary to focus, as the primary judge did, on the presence and absence of features or factors which in earlier cases have assisted in determining whether that duty should be imposed: *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) ; *Brookfield* at [24]–[25] (French CJ); *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258 at [102]–[103] (Allso p P). These features sometimes overlap and assume different significance depending on the circumstances in which the duty is said to arise. In this case, the relevant features are the foreseeability of harm, reliance and assumption of responsibility, and vulnerability.

James v The Owners - Strata Plan No 11478 (10 July 2017) (McColl and Basten JJA)
Perera v Genworth Financial Mortgage Insurance Pty Limited (22 March 2016) (McColl and Leeming JJA)

> 14. Sullivan v Moody [2001] HCA 59 ; (2001) 207 CLR 562 (at [50] , [55]) per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; see also Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; (2009) 75 NSWLR 649.

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Dowse v New South Wales (19 October 2012) (McColl, Basten and Hoeben JJA)
SAS Trustee Corporation v Cox (20 December 2011) (McColl and Campbell JJA, Sackville AJA)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

> 198 One may infer (the matter was not greatly clarified by the discussion) that the reference to *Sullivan* at [50] was to the identification of a problem which can arise in some circumstances in determining the existence, nature and scope of a duty of care, namely "the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits". Reference was made in that context to the decision in *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180, a case involving circumstances far removed from the present. At no stage was the supposed "need" for the Tribunal to define the class more broadly explained by reference to legal principle.

New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
Sutherland Shire Council v Becker (12 December 2006) (Mason P; Giles JA; Bryson JA)
Moyne Shire Council v Pearce (22 December 2004) (Batt and Chernov, Jj.A and Gillard, A.J.A)
Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

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 [28] . Sometimes they may arise because the defendant is the repository of a statutory power or discretion [29] . Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits [30] . 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 [31] . 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. In *Donoghue v Stevenson* , for example, Lord Buckmaster, in dissent, was concerned that, if the manufacturer in that case was liable, apart from contract or statute, to a consumer, then a person who negligently built a house

might be liable, at any future time, to any person who suffered injury in consequence; a concern which later cases showed to have been far from fanciful [32] . The problem which has caused so much difficulty in relation to the extent of tortious liability in respect of negligently constructed buildings was not only foreseeable, but foreseen, in the seminal case on the law of negligence [33] .

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[28] eg *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164; 176 ALR 411.

[29] eg *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992; 180 ALR 145.

[30] eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

[31] eg *Hill v Van Erp* (1997) 188 CLR 159 at 231 per Gummow J.

[32] [1932] AC 562 at 577.

[33] cf *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Bryan v Maloney* (1995) 182 CLR 609 .

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51. In *Dorset Yacht Co Ltd v Home Office* [34] , Lord Diplock said:

> "…[T]he judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care".

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[34] [1970] AC 1004 at 1058.

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52. Conversely, conduct and relationships may have been held not to give rise to a duty of care, and the reasons for that holding may provide an important guide to the solution of the problem in a new case.

53. **Following paragraph cited by:**

Groom v State of SA (01 May 2017) (Kourakis CJ; Nicholson and Hinton JJ)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)
Daly v D a Manufacturing Co P/L (04 July 2003) (Williams and Jerrard JJA and Fryberg J,)

Developments in the law of negligence over the last 30 or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is "fair" or "unfair". There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.

54. **Following paragraph cited by:**

Stewart v Ronalds (04 September 2009) (Allsop P, Hodgson JA and Handley AJA)

The present cases can be seen as focusing as much upon the communication of information by the respondents to the appellants and to third parties as upon the competence with which examinations or other procedures were conducted. The core of the complaint by each appellant is that he was injured as a result of what he, and others, were told. At once, then, it can be seen that there is an intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis [35] . It would allow recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.

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[35] cf *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

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55. **Following paragraph cited by:**

DHI22 v Qatar Airways Group QCSC (No 1) (24 July 2025) (Mortimer CJ; Stewart and Stellios JJ)
Calvert v Badenach (24 July 2015) (Tennent, Porter and Estcourt JJ)
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (04 April 2012) (McLure P, Pullin JA, Buss JA)

More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the

report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed.

56. **Following paragraph cited by:**

Rockdale City Council v Simmons (17 April 2015) (Beazley P, McColl and Barrett JJA)

125. As submissions made by the Club emphasise, a duty of care can exist only if rationally related to the functions, powers and responsibilities of the person said to owe the duty: *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562 at [56] . The functions, powers and responsibilities of the Club in relation to the gate were to open it each morning and to close it each night, with 5am and 11pm specified as indicative times. They were indicative because, under the arrangement between the Council and the Club, there was an overriding discretion of the Club as to timing.

How may a duty of the kind for which the appellants contend rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty? A similar problem has arisen in other cases. The response to the problem in those cases, although not determinative, is instructive.

57. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
Fuller-Wilson v State of New South Wales (03 October 2018) (Basten and White JJA, Emmett AJA)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)

281. The decision in *Hill* was cited with approval by the High Court in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [132] per McHugh J and at [221] and [231]-[232] per Kirby J; *Sullivan v Moody* (2001) 207 CLR 562 (" *Sullivan v Moody* ") at [57] .

In *Hill v Chief Constable of West Yorkshire* [36] , the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out [37] that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate.

[36] [1989] AC 53 .

[37] [1989] AC 53 at 63.

58. **Following paragraph cited by:**

State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)

Earlier, in *Yuen Kun Yeu v Attorney-General of Hong Kong* [38] , the Privy Council held that a regulatory authority did not owe a duty of care to corporate depositors. Their Lordships pointed to the responsibilities and discretions of the authority, and concluded that there was no intention on the part of the legislature that, in considering whether to register or deregister a company, there should be a common law duty of care superimposed upon the statutory framework.

[38] [1988] AC 175 .

59. **Following paragraph cited by:**

Milonas v Monash Health (08 April 2024) (Beach and Kennedy JJA; J Forrest AJA)

Reference has already been made to the reasoning of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [39] .

[39] [1995] 2 AC 633 .

60. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)
State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)
Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)
R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
State of New South Wales v McMaster (10 August 2015) (Beazley P, McColl and Meagher JJA)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Body v Mount Isa Mines Ltd (29 August 2014) (Margaret McMurdo P and Holmes JA and Martin J)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)
Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

28. The passages from *Sullivan* upon which the appellants must rely do not in my opinion preclude the existence of the duty pleaded by the plaintiff. The passages from the joint judgment are in these terms:

> Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations [43] …..
>
> The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to the latter, *the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable.* [44]

via

[43] *Sullivan v Moody* (2001) 207 CLR 562, [60] .

Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Precision Products (NSW) Pty Ltd v Hawkesbury City Council (31 October 2008) (Allsop P; Beazley JA ; McColl JA)
Commonwealth of Australia v Griffiths (14 December 2007) (Mason P at 1; Beazley JA at 2; Young CJ in Eq at 144)
New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)
State of New South Wales v Karen Therese Stevens (15 October 2003) (Mason P, Santow JA and Davies AJA)
State of New South Wales v Paige (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.

61. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

> 734. The need to avoid indeterminacy has also explained the now rejected control mechanisms of “sudden shock” and “direct perception” (see *Tame* at [192] per Gummow and Kirby JJ) in psychiatric injury cases, but replacements may be unnecessary if the element of a sufficient closeness and directness embraces factual issues relating to “sudden shock” and “direct perception”. In *Sullivan* at [61] , the court also explained that indeterminacy could arise in relation to potential liability flowing from misdiagnosis or mistreatment.

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)

There is also a question as to the extent, and potential indeterminacy, of liability. In the case of a medical practitioner, the range of people who might foreseeably (in the sense earlier mentioned) suffer some kind of harm, as a consequence of careless diagnosis or treatment of a patient, is extensive.

62. **Following paragraph cited by:**

Bevan v Coolahan (05 September 2019) (Basten, Leeming and McCallum JJA)
Hogno v Racing Queensland Ltd (31 May 2013) (Muir and White JJA and Ann Lyons J)
Stewart v Ronalds (04 September 2009) (Allsop P, Hodgson JA and Handley AJA)

The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to the latter, the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable. That they are irreconcilable is evident when regard is had to the case in which examination of a child alleged to be a victim of abuse does not allow the examiner to form a definite opinion about whether the child has been abused, only a suspicion that it *may* have happened. The interests of the child, in such a case, would favour reporting that the suspicion of abuse has not been dispelled; the interests of a person suspected of the abuse would be to the opposite effect.

63. **Following paragraph cited by:**

New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)

Furthermore, the attempt by the appellants to avoid the problem of the extent of potential duty and liability is unconvincing. They sought to limit it to parents. But, if it exists, why should it be so limited? If the suspected child abuser were a relative other than a parent, or a schoolteacher, or a neighbour, or a total stranger, why should that person be in a position different from that of a parent? The logical consequence of the appellants' argument must be that a duty of care is owed to anyone who is, or who might become, a suspect.

64. A final point should be noted. The appellants do not contend that any legal right was infringed. And, once one rejects the distinction between parents and everybody else, they can point to no relationship, association, or connection, between themselves and the respondents, other than that which arises from the fact that, if the children had been abused, the appellants were the prime suspects. But that is merely the particular circumstance that gave rise to the risk that carelessness on the part of the respondents might cause them harm. Ultimately, their case rests on foreseeability; and that is not sufficient.

Conclusion

65. **Following paragraph cited by:**

Scott v Pedler (26 March 2004) (Gyles, Conti and Allsop JJ)

The duty of care for which the appellants contend does not exist.

66. The appeals should be dismissed with costs.

Cited by:

Kain v R&B Investments Pty Ltd; Ernst & Young (a firm) v R&B Investments Pty Ltd; Shand v R&B Investments Pty Ltd [2025] HCA 28 -
DHI22 v Qatar Airways Group QCSC (No 1) [2025] FCAFC 91 -
Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA [2025] NSWCA 72 (15 April 2025) (Bell CJ, Leeming and Ball JJA)

7. Just as the evaluative inquiry involved in applications for a stay of proceedings in such cases has been described as "unique and highly fact-sensitive" (*Willmot* at [17]), so too may be the question of the existence of a duty of care and the content of any such duty, if found to exist. As the High Court observed in *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [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)

Shari v State of Victoria [2025] VSCA 55 (03 April 2025) (Beach and Kennedy JJA)

40. There are a number of difficulties with this claim, including:

- notwithstanding the views of John Dixon J in *Smith*,[33] we consider that it would be highly unlikely that any duty of care would be imposed in this case. Any such duty would be inconsistent with a police officer's duty to properly and effectively discharge his responsibilities in investigating whether a charge ought to be laid; [34]

- a claim in malicious prosecution might be available. However, while the original statement of claim included reference to malicious prosecution (at [49]), this paragraph was deleted in the ASOC. The judge was therefore correct to find that no such claim was pleaded;

- it is unclear to us that the result in the Magistrates' Court was overturned by reason of any failure to investigate. Rather, the result appears to have turned on a simple process of construction of the emails and the PSIOs;

- the applicant did not make clear to the judge the basis for his allegation that there was a failure to investigate, which appears to have developed following the hearing of the appeal in the County Court. Rather, before the judge he appeared to focus on a failure to investigate his complaints about his co-worker. In this context, the judge found there to be no causal connection with the harm he suffered, which finding was not challenged by the applicant.

via

[34] *Sullivan v Moody* (2001) 207 CLR 562, 581 [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); [2001] HCA 59 .

Shari v State of Victoria [2025] VSCA 55 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 (28 March 2025) (Kirk, Adamson and Ball JJA)

160. In *Sullivan v Moody* , the question for the respondents posed by the statute was whether they suspected on reasonable grounds that a child *had been* sexually abused, which necessarily amounted to criminal conduct. If so, the matter was required to be reported because otherwise the child, whose interests are paramount, could not be protected.

Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 (28 March 2025) (Kirk, Adamson and Ball JJA)

159. It is also relevant that, in the legislative context addressed in *Sullivan v Moody* , there was a similar feature in that an examiner may not be able "to form a definite opinion about whether the child has been abused, only a *suspicion* that it may have happened" ([62]) (emphasis added). The Court continued:

> [62] ... The interests of the child, in such a case, would favour reporting that the suspicion of abuse has not been dispelled; the interests of a person suspected of the abuse would be to the opposite effect.

Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -

Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
State of New South Wales v Cullen [2024] NSWCA 310 (20 December 2024) (Gleeson, White and Kirk JJA)

Albert v Lavin [1982] AC 546 Aubin, Ex parte; Re Munday (1930) 30 SR (NSW) 169 Australian Capital Territory v Crowley (2012) 7 ACTLR 142 ; [2012] ACTCA 52 Bales v Parmeter (1935) 35 SR (NSW) 182 Bennett v Minister of Community Welfare (1992) 176 CLR 408 ; [1992] HCA 27 Board of Fire Commissioners of New South Wales v Ardouin (1961) 109 CLR 105 ; [1961] HCA 71 Bolton, Re; Ex parte Beane (1987) 162 CLR 514 ; [1987] HCA 12 Capital & Counties plc v Hampshire County Council [1997] QB 1004 Chapman v Hearse (1961) 106 CLR 112 ; [1961] HCA 46 Coleman v Power (2004) 220 CLR 1 ; [2004] HCA 39 Collins v Insurance Australia Ltd (2022) 109 NSWLR 240 ; [2022] NSWCA 135 Corkery v Black (Court of Appeal (NSW), Gleeson CJ, Priestley and Clarke JJA, 2 August 1989, unrep) Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424 ; [1985] HCA 41 Cran v State of New South Wales (2004) 62 NSWLR 95 ; [2004] NSWCA 92 Croucher v Cachia (2016) 95 NSWLR 117 ; [2016] NSWCA 132 Cullen v State of New South Wales [2023] NSWSC 653 Curtis v Harden Shire Council (2014) 88 NSWLR 10 ; [2014] NSWCA 314 Della Franca v Lorenzato (2021) 250 LGERA 136 ; [2021] NSWCA 321 Fede v Gray (2018) 98 NSWLR 1149 ; [2018] NSWCA 316 Fuller-Wilson v State of New South Wales (2018) Aust Torts Rep 82413 ; [2018] NSWCA 218 Gales Holdings Pty Ltd v Tweed Shire Council (2013) 85 NSWLR 514 ; [2013] NSWCA 382 Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 ; [2002] HCA 54 Hill v Chief Constable of West Yorkshire [1989] AC 53 Home Office v Dorset Yacht Co Ltd [1970] AC 1004 Jennings v Police (2019) 133 SASR 520 ; [2019] SASCFC 93 Knightley v Johns [1982] 1 WLR 349 Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522 ; [1985] HCA 37 March v E & MH Stramare Pty Ltd (1991) 171 CLR 506 ; [1991] HCA 12 Marshall v Osmond [1983] QB 1034 McIntosh v Webster (1980) 43 FLR 112 NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277 ; [2003] HCA 35 Paul v Cooke (2013) 85 NSWLR 167 ; [2013] NSWCA 311 Precision Products (NSW) Pty Ltd v Hawkesbury City Council (2008) 74 NSWLR 102 ; [2008] NSWCA 278 Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd (2021) 393 ALR 162 ; [2021] NSWCA 206 R v Howell [1982] QB 416 Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd (2009) 77 NSWLR 360 ; [2009] NSWCA 263 Robinson v Chief Constable of West Yorkshire Police [2018] AC 736 ; [2018] UKSC 4 Robinson v State of New South Wales (2018) 100 NSWLR 782 ; [2018] NSWCA 231 State of New South Wales v McMaster (2015) 91 NSWLR 666 ; [2015] NSWCA 228 State of New South Wales v Ouhammi (2019) 101 NSWLR 160 ; [2019] NSWCA 225 State of New South Wales v Tyszyk [2008] NSWCA 107 Sullivan v Moody (2001) 207 CLR 562 ; [2001] HCA 59 Tame v State of New South Wales (2002) 211 CLR 317 ; [2002] HCA 35 Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (2022) 273 CLR 454 ; [2022] HCA 11 Thompson v Vincent (2005) 153 A Crim R 577 ; [2005] NSWCA 219 Transport for NSW v Hunt Leather Pty Ltd (2024) 115 NSWLR 489 ; [2024] NSWCA 227 Uniting Church in Australia Property Trust (NSW) v Miller (2015) 91 NSWLR 752 ; [2015] NSWCA 320 Wallace v Kam (2013) 250 CLR 375 ; [2013] HCA 19 Woodley v Boyd [2001] NSWCA 35 X (Minors) v Bedfordshire County Council [1995] 2 AC 633

State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
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Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -

Elisha v Vision Australia Limited [2024] HCA 50 (11 December 2024) (Gageler CJ; Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)

95. In *Sullivan v Moody* [119] the issue was whether certain medical practitioners, amongst others, owed a duty of care. It was alleged that these practitioners had negligently diagnosed certain children as having been sexually abused. This led, generally speaking, to each person accused of abuse suffering "shock, distress and psychiatric harm". [120] Each child was diagnosed against the background of a statutory scheme, established by the *Community Welfare Act 1972* (SA), for the promotion of the welfare of the community, including children. The scheme required certain individuals, including medical practitioners, to report a suspicion, held on reasonable grounds, that an offence had been committed against a child. It also provided that where such reporting had taken place in good faith, the practitioner incurred no civil liability. This Court held that no duty of care was owed to each person accused of abuse. It said: [121]

> "The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm."

via

[120] (2001) 207 CLR 562 at 568 [6] .

Elisha v Vision Australia Limited [2024] HCA 50 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
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Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
Milonas v Monash Health [2024] VSCA 57 (08 April 2024) (Beach and Kennedy JJA; J Forrest AJA)

NEGLIGENCE – Whether employer owed duty of care to employee in relation to investigation and determination of employee's alleged misconduct – No such duty of care owed – No breach of duty of care found – *State of NSW v Paige* (2002) 60 NSWLR 371, *Shaw v State of NSW* [2012] NSWCA 102, *Govier v The Uniting Church in Australia Property Trust (Q)* [2017] QCA 12, *Irving & Ors v Kleinman* [2005] NSWCA 116, *Sullivan v Moody* (2001) 207 CLR 562 , *Potter v Gympie Regional Council* [2022] QCA 255,

Farah Construction Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, *Briginshaw v Briginshaw* (1938) 60 CLR 336, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, *MH6 v Mental Health Review Board* (2009) 25 VR 382, *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, *White v Ryde Municipal Council* [1977] 2 NSWLR 909, *Health Services Act 1988* , pt 3.2 *Fair Work Act 2009* (Cth), O 56 *Supreme Court (General Civil Procedure) Rules 2015* , referred to – Application for leave to appeal refused.

Milonas v Monash Health [2024] VSCA 57 -
Milonas v Monash Health [2024] VSCA 57 -
Milonas v Monash Health [2024] VSCA 57 -
Vision Australia Ltd v Elisha [2023] VSCA 265 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

Sutherland Shire Council v Heyman (1985) 157 CLR 424; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62; *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 ; *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16, referred to.

Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
John XXIII College v SMA [2022] ACTCA 32 (29 June 2022) (Murrell CJ; Loukas-Karlsson J; McWilliam AJ)

Sullivan v Moody [2001] HCA 59; 207 CLR 562
The Australian Capital Territory v Crowley

John XXIII College v SMA [2022] ACTCA 32 -
John XXIII College v SMA [2022] ACTCA 32 -
Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

734. The need to avoid indeterminacy has also explained the now rejected control mechanisms of "sudden shock" and "direct perception" (see *Tame* at [192] per Gummow and Kirby JJ) in psychiatric injury cases, but replacements may be unnecessary if the element of a sufficient closeness and directness embraces factual issues relating to "sudden shock" and "direct perception". In *Sullivan* at [61] , the court also explained that indeterminacy could arise in relation to potential liability flowing from misdiagnosis or mistreatment.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

157. The primary judge concluded that the posited duty of care, which is concerned with the avoidance of personal injury to, and death of, the Children, is consonant with the purpose of the EPBC Act , and is a relevant consideration which *must* be taken into account by the Minister when exercising her power under ss 130 and 133 of that Act: J[397]. This, it was said, was because an expectation that a "statutory power will not be used without care being taken to avoid killing or injuring persons will almost always cut across the exercise … [of] a broad discretionary power": J[398]. This, the primary judge said, was likely sufficient to negate concerns of incoherence. His Honour found (without any reference to authority) that unless the legislation clearly identifies considerations which take priority over human safety,

Parliament may be taken to have intended that priority be given to such safety (J[399]). *Sullivan v Moody* and *X v South Australia* are examples of an exception to this: where various fundamental liberties and rights collide: J[400]–[401].

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
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Minister for the Environment v Sharma [2022] FCAFC 35 -
Mohareb v State of New South Wales [2021] NSWCA 278 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 (02 July 2021) (Buss P, Murphy JA, Mitchell JA)

Sullivan v Moody [2001] HCA 59 ; (2001) 207 CLR 562

Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
State of Tasmania v MFC [2021] TASFC 6 (31 March 2021) (Blow CJ, Wood J, Martin AJ)

13. Estcourt J summarised the decision of Holt AsJ:

"12 His Honour then observed at [9]:

'[9] The defendant says that the tort of misfeasance in public office necessarily contains the element of malice so that liability cannot attach to the State under the Act, s 111 . As to the claim in negligence, the defendant says that a person conducting a risk assessment for the care and protection of children can owe no duty of care to an alleged perpetrator of abuse, as a duty of care owed to a child is irreconcilable with the existence of a duty of care also being owed to an alleged perpetrator of child abuse. It was submitted that the High Court case of *Sullivan v Moody* [2001] HCA 59, 207 CLR 562 is directly in point and stands in the path of the plaintiff's negligence claim so that that claim must inevitably be dismissed.'

13 His Honour then held as follows at [11]-[14]:

'[11] As indicated earlier in these reasons, the plaintiff's claim for damages for misfeasance in public office includes a component of reckless disregard by the officer of the extent of her power. In particular the pleading includes the following:

"23.2.1 Being recklessly indifferent to whether she was empowered to make the finding of guilt and disseminate it ..."

[12] Recklessness, as opposed to carelessness, on the part of an officer may be sufficient, when combined with the likelihood of resultant harm and the fact of harm, to make good the claim. In *Northern Territory v Mengel* (1995) 185 CLR 307 the majority said at 347 :

> "If misfeasance in public office is viewed as a counterpart to the torts imposing liability on private individuals for the intentional infliction of harm, there is much to be said for the view that, just as with the tort of inducing a breach of contract, misfeasance in public office is not confined to actual knowledge but extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power."

> [13] *Mengel* leaves open the possibility that a public officer, albeit in a misguided way, who has engaged in reckless conduct but has been motivated by considerations of public benefit, rather than personal gain or vindictiveness, may be liable for the tort. In such circumstances it may be that, notwithstanding the misfeasance, the action was undertaken in 'good faith' within the meaning of the phrase in s 111 . It follows that the claim against the State cannot be summarily dismissed.
>
> [14] In any event, the power to strike-out a claim is discretionary. Pleadings may alter as further information comes to light during the course of a proceeding. In this regard, it is relevant to note that if the officer acted with de facto authority, for example in accordance with departmental protocols or under supervision, the State could be potentially liable on that basis. In *Mengel* the majority said at 347 :
>
> > "So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is a de facto authority, there will ordinarily only be personal liability".

14 His Honour noted at [15] that:

> '[15] Because of the way in which the interlocutory application has been framed and in light of my finding that the claim against the State in respect of misfeasance in public office cannot be struck out, I do not need to consider the question of whether or not the claim in negligence is untenable. The assessment of that claim will have to await the trial'."

Basis of appeal

State of Tasmania v MFC [2021] TASFC 6 (31 March 2021) (Blow CJ, Wood J, Martin AJ)

51. I agree with Estcourt J that the appellant's argument based on *Sullivan v Moody* is strong, but I also agree with his Honour that, bearing in mind that the categories of duty are not closed, "a novel 'piggy back' duty relating to economic loss caused by complaints of child sexual abuse in the particular factual circumstances of this case is at least arguable".

Independent duty

State of Tasmania v MFC [2021] TASFC 6 -
State of Tasmania v MFC [2021] TASFC 6 -
State of Tasmania v MFC [2021] TASFC 6 -

State of Tasmania v MFC [2021] TASFC 6 -
State of Tasmania v MFC [2021] TASFC 6 -
State of Tasmania v MFC [2021] TASFC 6 -
Aardwolf Industries LLC v Tayeh [2020] NSWCA 301 -
Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52 -
Ezekiel-Hart v Reis [2019] ACTCA 31 -
Burton v Office of the Director of Public Prosecutions [2019] NSWCA 245 -
Mann v Paterson Constructions Pty Ltd [2019] HCA 32 -
Wyzenbeek v Australasian Marine Imports Pty Ltd (in Liq) [2019] FCAFC 167 -
Bevan v Coolahan [2019] NSWCA 217 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 (03 October 2018) (Basten and White JJA, Emmett AJA)

> *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69, applied; *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 , discussed; *Caltex Refineries (Qld) v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258; *Cran v State of New South Wales* (2004) 62 NSWLR 95; [2004] NSWCA 92; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *State of New South Wales v Spearpoint* [2009] NSWCA 233, considered.

Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Central Highlands Regional Council v Geju Pty Ltd [2018] QCA 38 -
Monck v Commonwealth of Australia [2018] NTCA 1 (26 February 2018) (Grant CJ, Southwood J and Mildren AJ)

5. The Child Support Agency has a public and statutory responsibility to conduct its investigations and exercise its powers for the assessment and collection of child support levies in the public interest. That responsibility is not concomitant with a parallel common law duty of care to avoid causing nervous shock to persons who may be subject to that assessment and collection, for the reasons detailed by the High Court in *Sullivan v Moody* (2001) 207 CLR 562 in relation to a different legislative scheme.

Monck v Commonwealth of Australia [2018] NTCA 1 -
Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd [2017] FCAFC 190 -
AB v CD [2017] VSCA 338 -
Ku-ring-gai Council v Chan [2017] NSWCA 226 (07 September 2017) (McColl and Meagher JJA, Sackville AJA)

68. It is now not controversial that a claim by a subsequent owner to recover the cost of repairing latent structural defects in a building is one for pure economic loss: *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 at [20] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 at [47] (Hayne and Kiefel JJ). Those damages are not recoverable "if all that is shown is that the defendant's negligence was a cause of the loss and the loss was reasonably foreseeable": *Woolcock* at [21] . Rather, in a case where a novel duty of care to avoid such loss is propounded, it is necessary to focus, as the primary judge did, on the presence and absence of features or factors which in earlier cases have assisted in determining whether that duty should be imposed: *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59 at [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) ; *Brookfield* at [24]–[25] (French CJ); *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258 at [102]–[103] (Allsop P). These features sometimes overlap and assume different significance depending on the circumstances in which the duty is said to arise. In this case, the relevant features are the foreseeability of harm, reliance and assumption of responsibility, and vulnerability.

James v The Owners - Strata Plan No 11478 [2017] NSWCA 166 -
Groom v State of SA [2017] SASCFC 35 -
Groom v State of SA [2017] SASCFC 35 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Gore v Australian Securities and Investments Commission [2017] FCAFC 13 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
State of New South Wales v Briggs [2016] NSWCA 344 -
State of New South Wales v Briggs [2016] NSWCA 344 -
State of New South Wales v Briggs [2016] NSWCA 344 -
Prince Alfred College Inc v ADC [2016] HCA 37 -
Prince Alfred College Inc v ADC [2016] HCA 37 -
Ship "Sam Hawk" v Reiter Petroleum Ltd [2016] FCAFC 26 -
Ship "Sam Hawk" v Reiter Petroleum Ltd [2016] FCAFC 26 -
Gunns Limited v State of Tasmania [2016] TASFC 7 -
Gunns Limited v State of Tasmania [2016] TASFC 7 -
Gunns Limited v State of Tasmania [2016] TASFC 7 -
Danthanarayana v Commonwealth of Australia [2016] FCAFC 114 -
DC v State of New South Wales [2016] NSWCA 198 (10 August 2016) (Basten and Ward JJA, Sackville AJA)

68. It is also convenient in this context to note the principles adopted by the High Court in *Sullivan v Moody* , [47] a case involving a claim for damages brought by a father who had been mistakenly accused of sexual abuse of his child, alleging that the medical practitioner and social worker, who had formed the opinions that the child had been abused, acted negligently. That case involved the exercise of a power of notification (indeed an obligation to notify) pursuant to the *Community Welfare Act 1972* (SA), being a provision analogous to s 14 8B of the *Child Welfare Act* . The facts, in one sense, were the reverse of the present case. That was significant because the Court, in rejecting the existence of a duty of care, relied upon the fact that a duty of care owed to an alleged abuser "would give rise to inconsistent obligations", namely obligations inconsistent with the duty of the professional to the child in whose interest the professional is supposed to act. [48] The Court further noted that "the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable." [49]

DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
Hayes v State of Queensland [2016] QCA 191 (29 July 2016) (Margaret McMurdo P and Mullins and Dalton JJ,)

118. So far as investigation was concerned, the case of *Sullivan v Moody* [142] had established that investigators exercising statutory powers owed no duty to the person being investigated, for that duty would be inconsistent with a proper and effective discharge of the responsibilities under statute. In investigating Mr Paige, officers of the Department were acting pursuant to statute, and were they to owe a duty to Mr Paige, the subject of their investigation, that would be in tension with, and perhaps in conflict with, their statutory duty – [101]. The incompatibility was not so great as that dealt with in *Sullivan v Moody* , for in that case the legislation made it plain that the interests of the child were to take precedence. Spigelman CJ did not consider that the incompatibility between the statutory duty to investigate and the proposed duty of care was sufficient alone to determine the issue against Mr Paige – [131]. In combination with the incompatibility with common law however, he came to the view that there could be no duty.

Hayes v State of Queensland [2016] QCA 191 (29 July 2016) (Margaret McMurdo P and Mullins and Dalton JJ,)

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Hayes v State of Queensland [2016] QCA 191 -
Hayes v State of Queensland [2016] QCA 191 -
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Hayes v State of Queensland [2016] QCA 191 -
Hayes v State of Queensland [2016] QCA 191 -
Badenach v Calvert [2016] HCA 18 -

Perera v Genworth Financial Mortgage Insurance Pty Limited [2016] NSWCA 53 (22 March 2016) (McColl and Leeming JJA)

> 14. Sullivan v Moody [2001] HCA 59 ; (2001) 207 CLR 562 (at [50] , [55]) per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; see also Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; (2009) 75 NSWLR 649.

R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
Rankin v Gosford City Council [2015] NSWCA 249 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Calvert v Badenach [2015] TASFC 8 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

> 80. This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail [110] . *Jaensch v Coffey* [111] , *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* [112] all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch* [113] , the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care [114] is no longer considered determinative, it nonetheless "gives focus to the inquiry" [115] . It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a conclusion" [116] that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame* [117]) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases" [118] . Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards" [119] , and the "totality of the relationship[s] between the parties" [120] must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" [121] according to which the question of when a duty arises in a particular category of case may be comprehensively answered.

via

> [118] *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] .

King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
and Mohamed Zahidul Haque v State of Victoria [2015] VSCA 83 -
and Mohamed Zahidul Haque v State of Victoria [2015] VSCA 83 -
Rockdale City Council v Simmons [2015] NSWCA 102 (17 April 2015) (Beazley P, McColl and Barrett JJA)

125. As submissions made by the Club emphasise, a duty of care can exist only if rationally related to the functions, powers and responsibilities of the person said to owe the duty: *Sulliv an v Moody* [2001] HCA 59; (2001) 207 CLR 562 at [56] . The functions, powers and responsibilities of the Club in relation to the gate were to open it each morning and to close it each night, with 5am and 11pm specified as indicative times. They were indicative because, under the arrangement between the Council and the Club, there was an overriding discretion of the Club as to timing.

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.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
CPCF v Minister for Immigration and Border Protection [2015] HCA 1 -
CPCF v Minister for Immigration and Border Protection [2015] HCA 1 -
CPCF v Minister for Immigration and Border Protection [2015] HCA 1 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 (12 November 2014) (French CJ, Hayne, Bell, Gageler and Keane JJ)

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 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 [27] in *Sulli van* , "if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists".

via

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

Hunter and New England Local Health District v McKenna [2014] HCA 44 (12 November 2014) (French CJ, Hayne, Bell, Gageler and Keane JJ)

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)

Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
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Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
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Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 (27 October 2014) (Macfarlan, Meagher and Leeming JJA)

Sullivan v Moody [2001] HCA 59; 207 CLR 562 , applied.

Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
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Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

25. Much legal reasoning in relation to novel cases can proceed by way of analogy, as McHugh J pointed out in *Crimmins v Stevedoring Industry Finance Committee* [60] . The advantage of the analogical approach appears from an observation by Professor Cass Sunstein quoted by McHugh J [61] :

> "[A]nalogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work. Thus judges who disagree on a great deal can work together far more easily if they think analogically and by reference to agreed-upon fixed points."

Reasoning by analogy should be conducive to coherence in the development of the law. Concerns about coherence may also inform the determination of the existence or non-

existence of a duty of care in particular classes of case. As the Court said in *Sullivan v Moody* , the problems in determining the duty of care [62] :

> "may [sometimes] concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".

via

[62] (2001) 207 CLR 562 at 579–580 [50] .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

19. The existence of a relevant duty of care is a necessary condition of liability in negligence. As this Court said in *Sullivan v Moody* [41] :

> "A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care."

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

24. This Court in *Sullivan v Moody* 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. As the Court said, different classes of case raise different problems, requiring "a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle" [58] . The development of the law of negligence had revealed "the difficulty of identifying unifying principles that would allow ready solution of novel problems" [59] .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

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via

[41] (2001) 207 CLR 562 at 576 [42] ; [2001] HCA 59 .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

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matter of principle" [58] . The development of the law of negligence had revealed "the difficulty of identifying unifying principles that would allow ready solution of novel problems" [59] .

via

[59] (2001) 207 CLR 562 at 580 [53] .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (08 October 2014) (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ)

21. An extended concept of proximity was adopted in this Court as a criterion of the existence of a duty of care in the 1980s and until the beginning of this century [46] . It was used to identify categories of cases in which a duty of care arose under the common law of negligence, rather than as a test for determining whether the circumstances of a particular case brought it within such a category [47] . It was invoked in 1995 in *Bryan v Maloney* [48] , in which the Court held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for economic loss. Thereafter it became a metaphor under threat. McHugh J in *Perre v Apand Pty Ltd* [49] regarded it as already despatched [50] . In *Sullivan v Moody* , it was put to rest by the whole Court, which observed that despite its centrality for more than a century [51] :

> "it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".

That was not to say, and the Court did not say, that its application in previous cases such as *Bryan v Maloney* , which was of a classificatory and conclusionary character, falsified the underlying judgments that the circumstances said to be indicative of "proximity" gave rise to a duty of care. As Basten JA observed in the Court of Appeal, "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care ... remain relevant" [52] .

via

[51] (2001) 207 CLR 562 at 578 [48] .

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Body v Mount Isa Mines Ltd [2014] QCA 214 -
Body v Mount Isa Mines Ltd [2014] QCA 214 -
Studorp Limited v Robinson [2014] QCA 174 -
Studorp Limited v Robinson [2014] QCA 174 -
Studorp Limited v Robinson [2014] QCA 174 -
Woolworths Ltd v Ryder [2014] NSWCA 223 -
Woolworths Ltd v Ryder [2014] NSWCA 223 -
Woolworths Ltd v Ryder [2014] NSWCA 223 -
McColley v Commonwealth of Australia [2014] ACTCA 21 (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)

44. In *Sullivan* , the statutory scheme that underpinned the activities of the respondents was a scheme for the protection of children that required the respondents to treat the interests of

children as paramount. The Court determined that the duty of care for which the appellants contended could not be reconciled satisfactorily with the nature of the functions exercised by the respondents or with their statutory obligation to treat the interests of the children as paramount : [62].

McColley v Commonwealth of Australia [2014] ACTCA 21 (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)

40. In *Australian Capital Territory v Crowley* (2012) 7 ACTLR 142, the Court of Appeal found that police "immunity" covered a situation where, in the course of trying to apprehend a mentally ill man who was armed, the police shot him, rendering him quadriplegic. The Court stated that the principle in *Hill* was a principle of general application that was not peculiar to the facts under consideration in that case (asserted carelessness in relation to the apprehension of a dangerous criminal), and that the principle applied generally to operational policing, where quick decisions have to be made in difficult circumstances: [286]–[287]. Further, applying *Sullivan v Moody* (2001) 207 CLR 562 *(Sullivan)* and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (*Stuart*), the Court determined that the imposition of a duty of care would conflict with common law and statutory obligations owed by police to prevent crime and protect the public: [270]–[272] and [287]. The Court considered the matter to be a "classic case for the application of the core principle in *Hill* and the principle identified in *Sullivan v Moody* ": [304]. At [273] the Court noted that:

> the duties of the police to the community must prevail. That is not to say that a police officer can never owe a duty of care to a suspected criminal, victim or bystander. There will be circumstances where a police officer can discharge the statutory and common law public duties without risk of injury to a suspected criminal, victim or bystander, and in these circumstances, it may be that the police officer will be found to owe a duty of care to any of those classes of person.

McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
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McColley v Commonwealth of Australia [2014] ACTCA 21 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
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ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Swan & Baker Pty Limited v Marando [2013] NSWCA 233 -
Hoffmann v Boland [2013] NSWCA 158 -
Hogno v Racing Queensland Ltd [2013] QCA 139 -
Hogno v Racing Queensland Ltd [2013] QCA 139 -
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -

Australian Capital Territory v Crowley [2012] ACTCA 52 (17 December 2012) (Lander, Besanko and Katzmann JJ)

281. The decision in *Hill* was cited with approval by the High Court in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [132] per McHugh J and at [221] and [231]-[232] per Kirby J; *Sullivan v Moody* (2001) 207 CLR 562 (" *Sullivan v Moody* ") at [57] .

Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
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Australian Capital Territory v Crowley [2012] ACTCA 52 -
Dowse v New South Wales [2012] NSWCA 337 -
Dowse v New South Wales [2012] NSWCA 337 -
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 -
Polar Aviation Pty Ltd v Civil Aviation Safety Authority [2012] FCAFC 97 -
Polar Aviation Pty Ltd v Civil Aviation Safety Authority [2012] FCAFC 97 -
Polar Aviation Pty Ltd v Civil Aviation Safety Authority [2012] FCAFC 97 -
North Shore City Council v Attorney-General [2012] NZSC 49 (27 June 2012)

154. It comes as no surprise to find Kirby J of the High Court of Australia affirming the view of observers that the Canadian approach looks remarkably familiar to that "re-adopted" in House of Lords cases such as *Caparo* . [209] Nevertheless, disagreeing with Kirby J, the High Court has rejected both *Anns* and *Caparo* in favour of an unstructured assessment of what have been called "salient features". The concern of the Court expressed in *Sullivan v Moody* [210] is that if the *Caparo* three-stage approach is followed, judges and practitioners, confronted by a novel problem, will seek to give the methodology a utility beyond that claimed for it by Lord Bridge. There is said also to be a danger that, the matter of foreseeability having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, just and reasonable as an outcome in the particular case. Proximity is said to give little practical guidance in cases which are not analogous to those in which a duty has been established; [211] and what is fair, just and reasonable is said to be capable of being misunderstood as an invitation to formulate policy rather than to search for a principle. [212]

via

[212] *Sullivan v Moody* at [49] .

North Shore City Council v Attorney-General [2012] NZSC 49 -
North Shore City Council v Attorney-General [2012] NZSC 49 -
North Shore City Council v Attorney-General [2012] NZSC 49 -
Leonard v Pollock [2012] WASCA 108 (21 June 2012) (Newnes JA, Murphy JA)
Sullivan v Moody [2001] HCA 59 ; (2001) 207 CLR 562
Tame v New South Wales

Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
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Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Karatjas v Deakin University [2012] VSCA 53 -
Amaca Pty Ltd v King [2011] VSCA 447 -
SAS Trustee Corporation v Cox [2011] NSWCA 408 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

7. Since *Perre* , the High Court in *Sullivan v Moody* [9] has questioned the helpfulness of proximity in determining the question of duty of care. [10] Insofar as it is relevant, the close relationship between the chief executive who must, under the *Liquor Act* , grant or refuse the appellants' applications to renew their permits, and the direct impact on the appellants' businesses of the chief executive's grant or refusal to renew is consistent with the existence of a duty.

Meshlawn P/L v State of Qld [2010] QCA 181 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

10. The appellants contend that the duty to take reasonable care to avoid causing the plaintiff injury is inconsistent with the general duty of the police to enforce the criminal law, and in particular, to apprehend the suspect offender. Such a conclusion, it is said, is dictated by the High Court decisions in *Sullivan v Moody* [5] and *Tame v New South Wales.* [6] The appellants submit that the imposition of such inconsistent duties would produce 'incoherence' in the law such that we should find that the duty alleged by the plaintiff is wholly unarguable. While the appellants conceded that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his actions or omissions [7] they submit that in the circumstances identified in *Sullivan* and *Tame* the law will not recognise the existence of a duty of care. The appellants further contend that no duty should be found to exist because it would be difficult to formulate the scope and content of the duty.

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

28. The passages from *Sullivan* upon which the appellants must rely do not in my opinion preclude the existence of the duty pleaded by the plaintiff. The passages from the joint judgment are in these terms:

> Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations [43] .....
>
> The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse

consequences for people in the position of the appellants or legal liability to such persons. As to the latter, *the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable.* [44]

via

[43] *Sullivan v Moody* (2001) 207 CLR 562, [60] .

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

TORT – Negligence – Police officer deploying capsicum spray to restrain offender –Whether duty of care owed to bystander – *Sullivan v Moody* (2001) 207 CLR 562 , *Tame v New South Wales* (2002) 211 CLR 317 and *Zalewski v Turcarolo* [1995] 2 VR 562 considered – Appeal against refusal to strike out cause of action – Appeal dismissed.

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

13. As in *Sullivan* the court was influenced by the need to preserve 'legal coherence,' many of the considerations under defamation law being rendered irrelevant if the law of negligence applied. [10]

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

10. The appellants contend that the duty to take reasonable care to avoid causing the plaintiff injury is inconsistent with the general duty of the police to enforce the criminal law, and in particular, to apprehend the suspect offender. Such a conclusion, it is said, is dictated by the High Court decisions in *Sullivan v Moody* [5] and *Tame v New South Wales.* [6] The appellants submit that the imposition of such inconsistent duties would produce 'incoherence' in the law such that we should find that the duty alleged by the plaintiff is wholly unarguable. While the appellants conceded that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his actions or omissions [7] they submit that in the circumstances identified in *Sullivan* and *Tame* the law will not recognise the existence of a duty of care. The appellants further contend that no duty should be found to exist because it would be difficult to formulate the scope and content of the duty.

via

[5] (2001) 207 CLR 562 .

Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
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Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Tabet v Gett [2010] HCA 12 -
DC v State of New South Wales [2010] NSWCA 15 -

DC v State of New South Wales [2010] NSWCA 15 -
Commissioner of Police v Mohamed [2009] NSWCA 432 (23 December 2009) (Spigelman CJ, Basten JA and Handley AJA)

> 48 However one characterises the cause of action under the *Anti-Discrimination Act* , it does not involve the creation of a general law duty of care, of the kind discussed in *Hill*, *Tame* and *Sullivan* . Nor does it give rise to the kind of policy questions which affect the scope of such a duty. Rather, its scope is to be identified as a matter of statutory interpretation. If the Parliament seeks to subject the Police Force to statutory prohibitions, with civil remedies for breach, the courts must apply the statute, which is not in any sense contingent upon the existence of a general law duty of care, nor on matters of legal principle which underlie the existence or absence of such a duty. Accordingly, submissions based on these authorities should be rejected.

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
Miller v Miller [2009] WASCA 199 -
Miller v Miller [2009] WASCA 199 -
Miller v Miller [2009] WASCA 199 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -
Stewart v Ronalds [2009] NSWCA 277 -
Stewart v Ronalds [2009] NSWCA 277 -
Stewart v Ronalds [2009] NSWCA 277 -
Stewart v Ronalds [2009] NSWCA 277 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

> 198 One may infer (the matter was not greatly clarified by the discussion) that the reference to *Sulliv an* at [50] was to the identification of a problem which can arise in some circumstances in determining the existence, nature and scope of a duty of care, namely "the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits". Reference was made in that context to the decision in *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180, a case involving circumstances far removed from the present. At no stage was the supposed "need" for the Tribunal to define the class more broadly explained by reference to legal principle.

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
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Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Visnic v Sywak [2009] NSWCA 173 -
Visnic v Sywak [2009] NSWCA 173 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Coastal Hire Pty Ltd v Ewers [2009] WASCA 36 -
Coastal Hire Pty Ltd v Ewers [2009] WASCA 36 -
Coastal Hire Pty Ltd v Ewers [2009] WASCA 36 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

Sullivan v Moody (2001) 207 CLR 562

D'Orta-Ekenaike v Victoria Legal Aid

New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27 -
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27 -
State of NSW v Tyszyk [2008] NSWCA 107 -
State of NSW v Tyszyk [2008] NSWCA 107 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
New South Wales v Rogerson [2007] NSWCA 346 -
New South Wales v Rogerson [2007] NSWCA 346 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 (14 December 2007) (Mason P at 1; Beazley JA at 2; Young CJ in Eq at 144)

> 72 His Lordship added that the question of immunity should not be confused with the question whether in particular circumstances a duty of care was owed by, for example, police or prosecutors. This latter question is, of course, discussed by the High Court in *Sullivan v Moody* , a matter to which it will be necessary to return.

Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -

Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 (14 September 2007) (Mason P; Santow JA ; Basten JA)

Sullivan v Moody (2001) 207 CLR 562

Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 (30 August 2007) (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ)

44. Regarding the first point, a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs). Sometimes, the determination of that legal obligation is more complicated than it was at the time Lord Atkin announced his "neighbour" principle in 1932 [46] . The law now recognises types of loss and kinds of relationships which are different from those of earlier days. Five members of this Court observed in their joint judgment in *Sullivan v Moody* [47] :

> "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." (citations omitted)

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 (10 August 2007) (Mason P; Hodgson JA; Santow JA)

Sullivan v Moody (2001) 207 CLR 562
Sutherland v Hatton, Barber v Somerset County Council

CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 (20 July 2007) (Wheeler JA)

16 A person is only liable in negligence for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff in circumstances where the law imposes a duty to take such care: ***Sullivan v Moody*** (2007) 207 CLR 562 at [42] . Asking whether there existed between two parties a relationship sufficiently proximate to give rise to a duty of care gives little practical guidance to determine whether the duty exists in cases not analogous to cases in which duty has been established: ***Sullivan v Moody*** (*supra*) at [48]. Foreseeability of harm, whilst an essential ingredient to a cause of action in negligence, is not sufficient to establish a duty of care in cases not involving physical harm done to the plaintiff by the defendant.

Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 (20 July 2007) (Wheeler JA)

> 16 A person is only liable in negligence for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff in circumstances where the law imposes a duty to take such care: ***Sullivan v Moody*** (2007) 207 CLR 562 at [42] . Asking whether there existed between two parties a relationship sufficiently proximate to give rise to a duty of care gives little practical guidance to determine whether the duty exists in cases not analogous to cases in which duty has been established: ***Sullivan v Moody*** (*supra*) at [48]. Foreseeability of harm, whilst an essential ingredient to a cause of action in negligence, is not sufficient to establish a duty of care in cases not involving physical harm done to the plaintiff by the defendant.

Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Shire of Toodyay v Walton [2007] WASCA 76 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 (20 March 2007) (Steytler P)

> Sullivan v Moody (2001) 207 CLR 562

Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Sutherland Shire Council v Becker [2006] NSWCA 344 (12 December 2006) (Mason P; Giles JA; Bryson JA)

> 97 The Trial Judge discussed the existence of a duty of care in terms of whether proximity was established; see (Red 49). With the benefit of observations of the High Court in *Sullivan v Moody & Ors* (2001) 207 CLR 562 at 578-579 it can be seen that it is no longer appropriate to use proximity as an explanation of the process of reasoning leading to a conclusion of duty of care. It can be seen that proximity expresses the nature of what is in issue, but it is authoritatively established that it no longer is acceptable as an explanation of the process of reasoning. Notwithstanding its centrality in negligence law for more than a century, and its ready use to explain decisions for many decades, referred to in *Sullivan v Moody* , the limits of its utility should now be respected. Neither "proximity" nor any other formulation is readily available in exposition of the basis of decision on duty of care.

Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
State of New South Wales v Klein [2006] NSWCA 295 -
State of New South Wales v Klein [2006] NSWCA 295 -
Graham v Hall [2006] NSWCA 208 (13 September 2006) (Giles JA at 1; Ipp JA at 2; McColl JA at 117)

> Sullivan v Moody (2001) 207 CLR 562
> Westpac Banking Corporation v Samson

Graham v Hall [2006] NSWCA 208 -
Graham v Hall [2006] NSWCA 208 -
Graham v Hall [2006] NSWCA 208 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Harriton v Stephens [2006] HCA 15 (09 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

> 64. Furthermore, instruction on the duty issue can be secured from several "salient features" [130] that have been identified as potentially relevant to the existence of a duty. In *Sullivan v*

Moody [131] three particular considerations were identified which will often point against the existence of a duty. These were (1) that finding a duty of care would cut across or undermine other legal rules [132] ; (2) that the duty asserted would be incompatible with another duty [133] ; and (3) that to recognise a duty would expose the defendant to indeterminate liability [134] .

via

[132] (2001) 207 CLR 562 at 580-581 [53]-[54] .

Harriton v Stephens [2006] HCA 15 (09 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

68. The appellant does indeed need to prove the matters to which Ipp JA refers in order to succeed in her action. However, these are not matters directly relevant to the issue of the existence of a duty of care, but to the issue of causation [142] . Needless to say, the question of causation cannot be entirely quarantined from the duty of care element. None of the definitional elements of the tort of negligence stand alone [143] . This is particularly so in relation to the duty of care, which is intimately bound to the other elements constituting the integrated tort of negligence. Thus, it is relevant, in deciding whether a duty of care exists, to ask (among other things) how the postulated duty might be discharged [144] and the type of damage to which it relates [145] . But this does not alter the fact that it is a mistake to fragment duty categories in an artificial fashion.

via

[145] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 ; *Sullivan* (2001) 207 CLR 562 at 579 [50] .

Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
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Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Toll Pty Ltd v Dakic [2006] NSWCA 58 -
Toll Pty Ltd v Dakic [2006] NSWCA 58 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
The Beach Club Port Douglas Pty Ltd v Page [2005] QCA 475 -
The Beach Club Port Douglas Pty Ltd v Page [2005] QCA 475 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

268 The principle derived from *Sullivan v Moody* also lies within a different area. Indeed, to describe the case as involving an application of the 'principle of coherence' may not be entirely

helpful. The reference to coherence makes better sense in the context of the general law, as noted by the reference at [50] to the judgment of Gummow J in *Hill v Van Erp* (1995-97) 188 CLR 159 at 231. T he thrust of *Sullivan* was that, in circumstances where legislation imposed an obligation on State officers to identify and take steps to protect children at risk of harm, it would not be conducive to the proper exercise of such statutory powers to impose a duty of care to avoid harm to possible abusers. That required consideration not merely of the foreseeability of harm, if care were not taken, but the question of policy involved in the imposition of the duty. As the Court noted, in discussing the reasons of the Full Court of the Supreme Court of South Australia, at [41]:

> "The question was whether the provisions of that scheme were incompatible with there being a duty owed to the plaintiff. The statute imposed a duty upon the defendants to protect children, to investigate allegations of child abuse, and to make necessary reports. The interests of the child were to be the paramount consideration. ... From all this there was inferred a statutory intention 'that the common law should be excluded in so far as the alleged perpetrator of the abuse is concerned'."

Their Honours accepted that approach, concluding that no duty was owed. The judgment proceeded at [42]:

> "If it were otherwise, at least two consequences would follow."

At [55] the Court held:

> "More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed."

State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

Sullivan v Moody (2001) 207 CLR 562

Tame v New South Wales

State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
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Travel Compensation Fund v Tambree [2005] HCA 69 -
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Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

66. This Court has insisted that a defendant will be liable in negligence for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff only if the law imposes a duty to take such care [67] . Nor has this Court adopted the requirement, also associated with *Caparo* [68] , that the court consider it "fair, just and reasonable" that the law impose a duty of care of a given scope [69] . In addition, the case law in this Court [70] charts the rise, followed in the decade since *Nagle* by the decline, in the use of "proximity" as a distinct and general limitation upon the test of reasonable foreseeability, and as a necessary relationship between plaintiff and defendant before a relevant duty of care can arise. The quietus was delivered by McHugh J in *Tame v New South Wales* [71] . The same fate befell the fiction of "general reliance" [72] .

via

[69] *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] .

Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Wynne v Pilbeam [2005] WASCA 200 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Ruddock v Taylor [2005] HCA 48 -
Ruddock v Taylor [2005] HCA 48 -
Thompson v Vincent [2005] NSWCA 219 -
Thompson v Vincent [2005] NSWCA 219 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

29. I also do not overlook that foreseeability is not a sufficient basis for the

imposition of a duty to guard against a particular risk - it is plain that it is not [15] - and that there is also some uncertainty as to whether *Saroukas* would be decided today as it was thirteen years ago. The course of authority has not been consistent:

1) In the passage from Gleeson, C.J.'s judgment in *Saroukas* which is set out above, there is reference to "the necessary relationship and proximity". It resonates with the centrality which the High Court at the time accorded to the concept of proximity. [16]

2) Later, in *Sullivan v Moody,* the majority of the High Court said that:

"...Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity ... might be a

convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue." [17]

3) In *Pyrenees Shire Council v Day* [18] Kirby, J. proposed the adoption of the three part test [19] of reasonable foreseeability, proximity and whether it is fair, just and reasonable, and his Honour reprised that conception in *Romeo v Conservation Commission of the Northern Territory* [20] .

4) Later, in *Sullivan v Moody [21]* , all members of the High Court except Kirby, J. rejected that idea, saying:

"What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* does not represent the law in Australia. Lord Bridge himself said that concepts of proximity and fairness lack the necessary precision to give them utility as practical tests, and 'amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope'. There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* approach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

5) In *Crimmins v Stevedoring Industry Finance Committee* [22] McHugh, J. with whom Gleeson, C.J. agreed, said that there is no longer any general test for determining whether a duty of care exists and that the correct approach now is to commence by ascertaining whether the case comes within a factual category where duties of care have been held to arise. His Honour added, however, that while a statutory authority may frequently be held to owe a duty of care because the facts of the case fall within one of those categories, it is not enough to look for factual similarities in decided cases. In novel cases it is necessary to examine the precedent cases to reveal their bases in "principle and policy" and thus to determine whether fact A in the instant case is truly analogous to fact B in the precedent case.

6) More recently, in *Graham Barclay Oysters Pty Ltd v Ryan* [23] , Gleeson, C.J. spoke in terms of the "the total relationship between the parties". On one view of the matter, "the total relationship between the parties" is proximity by another name.

7) More recently still, in *Swain v Waverley Municipal Council,* McHugh, J stated that the identification of a duty of care is dependent upon a "fact-value complex" in which are inherent "questions of fairness, policy, practicality, proportion, expense and justice". [24] With respect that looks like the test of "fair, just and reasonable" advocated by Kirby, J. in *Romeo* and rejected by the majority in *Sullivan v Moody* .

via

[15] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 C.L.R. 254 at 268 [35] ; *Sullivan v Moody; Thompson v. Cannon* (2001) 207 C.L.R. 562 at 572-573 [25] , 576 [42] , 583 [64] ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 C.L.R. 540 at 555 [9] .

Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

Sullivan v Moody (2001) 207 CLR 579
Summers v Salford Corporation

Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Irving v Kleinman [2005] NSWCA 116 (18 April 2005) (Hodgson, Ipp and Tobias JJA)

25 As regards tort, he submitted that *Paige* was distinguishable because it involved alleged abuse of children, which was also the case in *Sullivan* , where relevant legislation provided for the paramountcy of the interests of children. Also, he submitted, *Paige* concerned dismissal, as to which there were applicable statutory provisions so that special conditions apply.

Irving v Kleinman [2005] NSWCA 116 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Hirst v Nominal Defendant [2005] QCA 65 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
Nicholls v The Queen [2005] HCA 1 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
Moyne Shire Council v Pearce [2004] VSCA 246 -
Mackenzie v Albany Finance Ltd [2004] WASCA 301 -
McNally v Spedding; Nobles v Spedding [2004] NSWCA 400 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Coleman v Power [2004] HCA 39 -
Edwards v Attorney General [2004] NSWCA 272 -
Edwards v Attorney General [2004] NSWCA 272 -
Edwards v Attorney General [2004] NSWCA 272 -
Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2004] NZCA 97 -
Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 (15 June 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

14. The significance of a need for coherence in legal principle and values, when addressing a proposal for the recognition of a new form of duty of care, was stressed by this Court in *Sulliv*

an v Moody [5] . Although there are exceptional cases, as Lord Hope of Craighead pointed out in *Reeves v Commissioner of Police of the Metropolis* [6] , it is unusual for the common law to subject a person to a duty to take reasonable care to prevent another person injuring himself deliberately. "On the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury." This principle gives effect to a value of the law that respects personal autonomy. It is not without relevance to ask what the appellant says the respondent should have done by way of monitoring and controlling her behaviour. Whatever exactly it might have been, it would seem to involve a fairly high degree of interference with her privacy, and her freedom of action. It is not difficult to guess what the appellant's response would have been if the person who sold her a bottle of wine at 12.30 pm had demanded to be told whether she intended to drink it all herself. A duty to take care to protect an ordinary adult person who requests supply from risks associated with alcohol consumption is not easy to reconcile with a general rule that people are entitled to do as they please, even if it involves a risk of injury to themselves. The particular circumstances of individual cases, or classes of case, might give rise to such a duty, but we are not here concerned with a case that is out of the ordinary.

via

[5] (2001) 207 CLR 562 at 581 [55] .

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
Harriton v Stephens [2004] NSWCA 93 (29 April 2004) (Spigelman CJ, Mason P and Ipp JA)
Sullivan v Moody (2001) 207 CLR 562
Sutherland Shire Council v Heyman

Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour [2004] FCAFC 93 -
Harriton v Stephens [2004] NSWCA 93 -
Harriton v Stephens [2004] NSWCA 93 -
Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Mastipour [2004] FCAFC 93 -
New South Wales v Godfrey [2004] NSWCA 113 -
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New South Wales v Godfrey [2004] NSWCA 113 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 (01 April 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

73. It is unnecessary to determine whether the majority Justices would have reached the same result even if the doctrine of proximity was not regarded as binding. The decisive rejection of that doctrine by this Court in *Sullivan v Moody* [121] is sufficient reason for holding that the material facts of *Bryan v Maloney* cannot be used – even by way of analogy – as persuasive. Facts that are regarded as material for the purpose of one legal doctrine are not necessarily material for another doctrine. The materiality of facts depends on the principle or principles that is or are applied to them. Once the stated principle of a case is rejected or distinguished, the materiality of the particular facts of the case must depend on the new principle or doctrine that governs the case. Since the doctrine of proximity was rejected in *Sullivan* , the only *ratio decidendi* that can be extracted from *Bryan v Maloney* is one based on its principal facts and assumptions. Its *ratio* is that the builder of a dwelling house owes a duty to a subsequent purchaser who relies on the skill of the builder to protect that person from reasonably foreseeable decreases in value resulting from latent defects in the house. *Bryan v Maloney* does not govern this case.

The indicia of a duty to prevent pure economic loss as the result of constructing commercial premises

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 (01 April 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

159. I cannot forbear to mention two features of more recent developments that lead me to nurture the hope that this Court may, even yet, come in time to endorse the *Caparo* approach. The first is the fact that *Caparo* continues to be observed in the courts of our region and beyond. Thus, in *Pacoil Fiji Ltd v The Attorney General of Fiji* [233], decided since *Sullivan v Moody* [234], the Supreme Court of Fiji Islands preferred to follow the *Caparo* approach in deciding whether a cause of action in negligence existed rather than to resort to whatever guidance the decisions of this Court could offer on that point. Our guidance, to say the least, is less than clear. It has driven trial judges and intermediate courts in Australia back to the original Atkinian idea that a duty arises from a "close relationship" [235], opaque though that expression is. Alternatively, it has sent them searching for collections of "salient features" of the evidence or notions of "vulnerability", which are at best open-ended and somewhat confusing and at worst question begging.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 (01 April 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

161. Nevertheless, until this Court reconsiders its stand, I accept the obligation imposed on me by the authority of *Sullivan* to approach the issue in the appeal more obliquely, as the other members of this Court favoured in *Perre*.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
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Harvey v PD [2004] NSWCA 97 -
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Harvey v PD [2004] NSWCA 97 -
Cran v State of New South Wales [2004] NSWCA 92 (29 March 2004) (Santow, Ipp and McColl JJA)

60 Moreover, in considering whether there was any implied assumption of responsibility or implied undertaking, there was nothing in the present dealings between Police and accused, or DPP and accused, which was in any way analogous to the kind of relationship which could invoke an implied assumption or undertaking of responsibility found in other cases. I refer here to relationships such as solicitor and client, teacher and pupil, banker and customer, employer and reference recipient with the undertakings implied by that relationship; compare *Spring v Guardian Assurance PLC* [1995] AC 296 at 317-8 per Lord Goff. The nearest case I have found is *L v Reading Borough* Council [2001] 1 WLR 1375, whose correctness must be doubtful in this country since *Sulliva n v* Moody (supra). There an implied assumption of responsibility was found, after a father had been interviewed by the police officer concerning the mother's allegations of sexual abuse of their child. There was said to be no assumption of responsibility towards the father as a suspect. But there was thereafter said to be arguably an assumption of responsibility to him by the police to take reasonable steps not to damage him, as by misrepresenting the result of the interview. The difficulty, as in *Sullivan v Moody*, lay in the evident conflict between what was done, albeit mistakenly, to protect the child, and the harm thereby inflicted unfairly on the father. I do not consider that this case is in any event analogous.

Cran v State of New South Wales [2004] NSWCA 92 (29 March 2004) (Santow, Ipp and McColl JJA)

39 Finally, Callinan J at [335-6] would test the scope of police immunity in providing a report of their investigations by whether "*the lawful administrative purposes of the* [relevant] *scheme in its implementation are reconcilable with the imposition of a duty not to cause psychiatric injury to persons the subject of a relevant report*". His reasoning was as follows:

> "[335] In *Sullivan* , the Court referred to *Hill v Chief Constable of West Yorkshire* 356 in this way357:
>
> > 'In *Hill v Chief Constable of West Yorkshire* ,358 the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out359 that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate.'
>
> [336] In *Sullivan* , reference was made to the statutory scheme which the defendants there were implementing, a scheme relevantly for the protection of children360. The administrative scheme here has a number of purposes: to provide statistical information with a view, presumably, to exploring means for the prevention of accidents; to facilitate the investigation of accidents; to assist in the bringing of criminal or quasi-criminal proceedings in respect of them; and, perhaps other administrative purposes. There is a question here of the kind which was answered in the negative in Sullivan: whether the lawful administrative purposes of the scheme and its implementation are reconcilable with the imposition of a duty not to cause psychiatric injury to persons the subject of a relevant report."
>
> > 356 [1989] AC 53 .
> > 357 (2001) 75 ALJR 1570 at 1580 [57] ; 183 ALR 404 at 416.
> > 358 [1989] AC 53 .
> > 359 [1989] AC 53 at 63.
> > 360 (2001) 75 ALJR 1570 at 1580 [62]; 183 ALR 404 at 417.

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Cran v State of New South Wales [2004] NSWCA 92 -
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Scott v Pedler [2004] FCAFC 67 (26 March 2004) (Gyles, Conti and Allsop JJ)
Sullivan v Moody (2001) 207 CLR 562
Graham Barclay Oysters Pty Ltd v Ryan and Others

Scott v Pedler [2004] FCAFC 67 -
Bashford v Information Australia (Newsletters) Pty Ltd [2004] HCA 5 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 (18 December 2003) (Malcolm CJ; McKechnie and Hasluck JJ)

Sullivan v Moody (2001) 75 ALJR 1570

Kschammer v R W Piper & Sons Pty Ltd [2003] WASCA 298 -
Purvis v New South Wales [2003] HCA 62 -
Purvis v New South Wales [2003] HCA 62 -
State of New South Wales v Karen Therese Stevens [2003] NSWCA 298 -
State of New South Wales v Karen Therese Stevens [2003] NSWCA 298 -
Commissioner of Police v Minahan [2003] NSWCA 239 (24 September 2003) (Sheller JA at 1; Santow JA at 2-7; Foster AJA at 8-15)

38 The argument is partly elaborated in the following paragraphs of the Commissioner's written submissions:-

"It cannot have been the intention of Parliament that an investigating officer should ensure that he conducts his investigations into another officer in the manner required by that officer, after consultation with him. Such a requirement:
a. is inconsistent and incompatible with the statutory scheme for investigation of police officers set up by the *Police Service Act 1990* , and

b. would have an effect similar to imposing upon investigating officers a duty of care towards persons under investigation, which has been repeatedly rejected by the courts in other contexts: see, for example, **State of NSW v Paige** [2002] NSWCA 235 and **Sullivan v Moody & Ors** [2001] 183 ALR 404 ".

Commissioner of Police v Minahan [2003] NSWCA 239 (24 September 2003) (Sheller JA at 1; Santow JA at 2-7; Foster AJA at 8-15)

Sullivan v Moody & Ors [2001] 183 ALR 404
State of NSW v Paige

Commissioner of Police v Minahan [2003] NSWCA 239 -
Hood v State of Queensland [2003] QCA 408 (12 September 2003) (McMurdo P Williams JA White J)

26. In *Sullivan v Moody* [27] the appellants were suspected of sexually abusing their children. They were investigated by the respondents who acted under the *Community Welfare Act* 1972 (SA) which, as in this case, required the interests of the children to be treated as paramount; it also gave the respondents statutory responsibilities including investigating and reporting upon allegations that the children had suffered and were under threat of serious harm. The allegations were not substantiated. The appellants claimed damages for shock, distress, psychiatric injury and consequential personal and financial loss, alleging the State owed them a duty to carry out its responsibilities in relation to the investigation of sexual abuse of children with due care, skill, discretion and diligence and that the investigating officers of the Department of Community Welfare and the medical practitioners and social workers involved, acted negligently. The appellants' action for damages was struck out for failing to disclose a cause of action and the case made its way to the High Court.

    The court recognised that people may be subject to a number of duties provided they are not irreconcilable but if a suggested duty of care gives rise to inconsistent obligations, that would ordinarily be a reason for concluding that the duty does not exist. Public authorities or their officers charged with the responsibility of conducting investigations or exercising powers in the public interest or in the interests of a specified class of persons will not ordinarily be subject to a duty to have regard to the interests of another class of persons if that would impose conflicting claims or obligations.[28] The statutory scheme concerned the protection of children and required that the interests of children be treated as paramount. It would be inconsistent with the proper and effective discharge of professional and statutory responsibilities involving investigating and reporting upon allegations of child abuse to subject the respondents to a legal duty, breach of which results in damages, to protect those suspected of being the sources of harm to children. The court gave by way of example the instance where an examination results in no more than a suspicion that the child may have been abused; the interests of the child would favour reporting that the suspicion of abuse has not been dispelled whilst the interests of the suspect would be to the contrary.[29]

Hood v State of Queensland [2003] QCA 408 (12 September 2003) (McMurdo P Williams JA White J)

20. His Honour observed that it seemed too onerous and without precedent to place a duty on the Department or its officers to inform Mrs Hood of the outcome of police investigations to avoid psychiatric injury to her, applying *Morgan v Tame* ;[21] *AMP v RTA & Anor* [22] and *Sulliv an v Moody* . [23] His Honour concluded that Mrs Hood would probably be unable to establish first, that the psychiatric condition she developed resulted from "a sudden affront or assault on her psyche" arising from any act or omission of Departmental officers, and second, that any psychiatric condition did not result from a gradual deterioration of her mental health caused by anxiety from the police investigations. Mrs Hood had very slender prospects of succeeding in her claim that it was reasonably foreseeable that the failure of the Department or its officers to notify her of the close of police and Scan investigations would expose her to a real risk of psychiatric injury.

via

[23] (2001) 75 ALJR 1570 , 1580-81 .

Hood v State of Queensland [2003] QCA 408 (12 September 2003) (McMurdo P Williams JA White J)

53. The conclusion in *Sullivan v Moody* (2001) 207 CLR 562 in respect of claims that a duty of care was owed by persons performing their obligations under child protection legislation to persons who may be the subject of investigation that there will be no duty imposed where there could be conflicting claims or obligations has recently been considered by the English Court of Appeal. In three appeals heard together, the first-named of which is *JD v East Berkshire Community Health* [2003] EWCA Civ 1151, in facts broadly similar to *Sullivan* , the Court concluded that no duty of care was owed to a third party if it would conflict with that owed to the child. That is not to say that there will necessarily be a blanket immunity but the plaintiffs here would have faced significant difficulties and the learned judge below was correct to conclude that the prospects of success were faint.

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via

[27] (2001) 75 ALJR 1570 .

Hood v State of Queensland [2003] QCA 408 -
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Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

96. The foregoing conclusion establishes, by Dovuro's concession, that it owed the Wilkins a duty of care. Trial counsel for Dovuro should not be criticised for making that concession. Whilst I accept that this Court has not yet provided a clear and simple formula to be applied to ascertain the existence, or absence, of a duty of care [111] (nor even a simple methodology that commands general assent [112]) I agree with Branson J in the Full Court [113] that it would be difficult to reconcile a contrary conclusion about the existence of a duty of care in this case with this Court's holding in *Perre v Apand Pty Ltd.*

via

[112] Such as the three-fold test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich: see eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 281-286 [274]-[288] . See now *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] and *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 226-227 [229], 227-229 [234]-[238]; 194 ALR 337 at 397-400 .

NCS Australasia Pty. Limited v Hindi [2003] NSWCA 233 (21 August 2003) (Meagher and Beazley JJA, Santow J)

(i) Foreseeability of injury is not sufficient of itself to found negligence: Sullivan v Moody (2001) 183 ALR 404 .

NCS Australasia Pty. Limited v Hindi [2003] NSWCA 233 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
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Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -

Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
King v The Queen [2003] HCA 42 -
Cattanach v Melchior [2003] HCA 38 -
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Cattanach v Melchior [2003] HCA 38 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Fairfield City Council v Petro [2003] NSWCA 150 -
Fairfield City Council v Petro [2003] NSWCA 150 -
Fairfield City Council v Petro [2003] NSWCA 150 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
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Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Cehner v Borg [2003] VSCA 72 -
Cehner v Borg [2003] VSCA 72 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Mensinga v Director of Public Prosecutions [2003] ACTCA 1 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)

Sullivan v Moody (2001) 207 CLR 562

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

237. *Choosing the new approach*: In 2001 in *Sullivan v Moody* [196] an appeal in which I did not participate, five members of this Court, in a unanimous joint opinion, rejected the three-stage test for a duty of care propounded in *Caparo* . Hints that this outcome was likely had been given in earlier decisions in which individual members of the Court had declined to embrace the *Caparo* approach [197] . It was clear from these earlier decisions, and clearer still from *Sullivan* [198] , that the members of this Court were concerned that the frank acknowledgment, in the third stage of the *Caparo* approach, of the need to consider policy questions, could divert the courts (and decision-makers applying the law) from the clear application of discoverable legal norms into an evaluation of policy that is not properly the business of courts. This concern is a natural one and I understand it. Even in England it has led to the insistence by a number of the Law Lords upon the fact that they are concerned in this regard only with questions of *legal* principle or prescribed *legal* policy [199] . The flaw in the *Caparo* approach, discerned in the joint reasons in *Sullivan* , was that the question of liability might be "reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case" [200] . That, it was concluded, would introduce into judicial decision-making an unacceptable unpredictability based on an inappropriate methodology.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

238. In the face of this explicit disapproval of the *Caparo* approach, my duty is to conform to the opinion that the majority of this Court has stated. This is not an area of the law where the interpretation of the Constitution imposes special obligations upon individual Justices to give effect to their opinions about the requirements of the basic law. Nevertheless, I relinquish my adherence to the *Caparo* approach with reluctance. It is, after all, the

methodology adopted in the major common law legal systems with which Australian judges are familiar [201] . It at least provides a methodology or approach for the determination of a complex question, which a search for the so-called "salient features" of a case does not. *Sulliv an* has been criticised, correctly in my respectful opinion, as involving "serious error" [202]. T his Court has been taken to task for its repudiation of the idea that "policy" has a dominant role to play in the determination of duty issues. It has been castigated for embracing "a chimera"[203]. With the utmost respect, I agree with the comment made that in *Sullivan* this Court[204]:

> "has acted without due care in abandoning [the *Caparo*] test. It is difficult to conceive how duty issues can properly be analysed without resort to each of the three elements in the test. It is clear that courts must look for factors which indicate a minimum ability to avoid the causation of damage and for factors which identify particular persons as being appropriately placed to take care so as to avoid such damage. Foreseeability and proximity, respectively, serve these functions. But the decision whether or not to impose a duty will be, ultimately, a normative one – a question of legal policy, if you like. For this reason, *Caparo* ... is likely to remain an irresistible force in the law of negligence."

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
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Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
BNP Paribas v Pacific Carriers Ltd [2002] NSWCA 379 -
BNP Paribas v Pacific Carriers Ltd [2002] NSWCA 379 -
Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -
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Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -
Cloud v State of Queensland [2002] QCA 458 (01 November 2002) (Davies and Jerrard JJA and White J,)

40. Further, the appellant complains that he was injured because of information adverse to him given by the departmental officer to the mother, to (perhaps) Dr Varhgese and the author of the family report (and perhaps others), which the appellant pleads may have adversely affected assessments made of him. In saying that, he complains of a matter also considered in *Sullivan v Moody* (supra). That is, the core of his complaint is that he was injured as a result of what others were told by the Departmental officers. The High Court observed in *Sul livan v Moody* that:

> "At once, then, it can be seen that there is an intersection with the law of defamation, which resolves the competing interests of the parties through well developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an all together different basis. It would allow recovery of damages for publishing statements to the discredit of the person where the law of defamation would not." [12]

via

[12] Paragraph 54 of the judgment in *Sullivan v Moody* .

Cloud v State of Queensland [2002] QCA 458 (01 November 2002) (Davies and Jerrard JJA and White J,)

> 39. That was because it would be inconsistent with the proper and effective discharge of their responsibilities in a statutory scheme, formed for the protection of children in which those defendants were required to treat the interests of the children as paramount, to subject them to a legal duty to take care to protect the interest of the parents of the children, breach of which would result in damages. In this case the interests of a parent in not suffering the immeasurable loss of a child to adoption are quite different from the needs, welfare, and best interests of the child. The judgment in *Sullivan v Moody* positively discourages the view that there can co-exist both a legal duty, to parents thought not capable of caring for a tiny child, to protect the interests of those parents, and a statutory responsibility to act in that child's best interests. The principles discussed in that case are obviously applicable in this one.

Cloud v State of Queensland [2002] QCA 458 -
Cloud v State of Queensland [2002] QCA 458 -
Cloud v State of Queensland [2002] QCA 458 -
Cloud v State of Queensland [2002] QCA 458 -
Cloud v State of Queensland [2002] QCA 458 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 (23 September 2002) (Meagher and Santow JJA, Davies AJA)

> 75 *Sullivan v Moody* (2001) 183 ALR 405 at 415 cites as an example of where a duty of care is denied cases which involve "the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits"; compare *Perre v Apand Pty Ltd*. In the present case the duty, if found, would have at least to extend to every manufacturer supplying asbestos products to the State of New South Wales, whether the employee concerned was engaged in that manufacture or simply a bystander contiguous to those who were. Such an extension thus goes well beyond the limited class of persons engaged in asbestos manufacture on *these* premises.

Royal and Sun Alliance Insurance Australia Limited v Betta Industries Pty Limited; Harlander Pty Limited (in liq) v State of New South Wales [2002] NSWCA 323 (23 September 2002) (Meagher and Santow JJA, Davies AJA)

Sullivan v Moody (2001) 183 ALR 405
Voli v Englewood Shire Council

Twynam Pastoral Co Pty Ltd v Bennett [2002] NSWCA 319 -
Twynam Pastoral Co Pty Ltd v Bennett [2002] NSWCA 319 -
Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

> 26. The primary duty of a police officer filling out such a report is to make available to his or her superiors, honestly and frankly, the results of the observations, inquiries and tests that were made. It would be inconsistent with such a duty to require the police officer to take care to protect from emotional disturbance and possible psychiatric illness a person whose conduct was the subject of investigation and report [18] .

via

[18] See *Sullivan v Moody* (2001) 75 ALJR 1570 at 1580 [60] ; 183 ALR 404 at 417.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

58. The second matter which indicates that Acting Sergeant Beardsley did not owe a duty of care to Mrs Tame is the fact that the direct cause of her psychiatric illness was not the inaccurate recording of her blood alcohol level, but its communication to others. Thus, in this case as in *Sullivan v Moody* , "there is an intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like" [36] . And as in *Sullivan v Moody* , "[t]o apply the law of negligence in the present case would resolve that competition on an altogether different basis" [37] . At the very least, the law of negligence with respect to psychiatric injury ought not be extended in a disconformity with other areas of the law.

via

[37] (2001) 75 ALJR 1570 at 1579 [54] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ ; 183 ALR 404 at 416.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

298. Police officers investigating possible contravention of the law do not owe a common law duty to take reasonable care to prevent psychiatric injury to those whose conduct they are investigating. Their duties lie elsewhere and to find a duty of care to those whom they investigate would conflict with those other duties [322] .

via

[322] *Sullivan v Moody* (2001) 75 ALJR 1570; 183 ALR 404 .

Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
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Tame v New South Wales [2002] HCA 35 -
State of New South Wales v Paige [2002] NSWCA 235 (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

> 79 The Appellant's basic contention is that there was no duty that extended to encompass the conduct on behalf of the Appellant in issue in these proceedings. The Appellant relied on the recent decision of the High Court in *Sullivan v Moody* (2001) 75 ALJR 1570 .

State of New South Wales v Paige [2002] NSWCA 235 (19 July 2002) (Spigelman CJ, Mason P and Giles JA)

> 101 Within the confines of the limited range of statutory provisions upon which the Appellant relied in submissions in this case, the conflict of responsibilities is not as stark as that found in the legislation under consideration in *Sullivan v Moody* . Nevertheless, there is at least a level of tension, and perhaps of conflict, between the duty imposed upon the Director-General and his or her officers, a duty owed to both the public at large and to the particular school community, to ensure the efficient and effective operation of the State education system, on the one hand, and a duty to provide a "safe" disciplinary process with respect to such matters, on the other hand.

State of New South Wales v Paige [2002] NSWCA 235 -
State of New South Wales v Paige [2002] NSWCA 235 -
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State of New South Wales v Paige [2002] NSWCA 235 -
State of New South Wales v Paige [2002] NSWCA 235 -
South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205 (12 July 2002) (Heydon and Santow JJA, Ipp AJA)

> 3 In *Sullivan v Moody* (2001) 183 ALR 404 at [42] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ said:
>
> > "the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205 (12 July 2002) (Heydon and Santow JJA, Ipp AJA)

Sullivan v Moody (2001) 183 ALR 404
Morris v Murray

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Van der Sluice v Display Craft Pty ltd [2002] NSWCA 204 -
Macquarie Area Health Service v Egan [2002] NSWCA 26 -
Macquarie Area Health Service v Egan [2002] NSWCA 26 -
Macquarie Area Health Service v Egan [2002] NSWCA 26 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 (19 February 2002) (Powell, Heydon and Hodgson JJA)

Sullivan v Moody (2001) 183 ALR 404
Van Gervan v Fenton

New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 (19 February 2002) (Powell, Heydon and Hodgson JJA)

59 One difficulty with this passage is that it may assume that "proximity" is an essential element in liability for negligent acts. To the extent that it did make that assumption, it received some support from later High Court authority. But in *Sullivan v Moody* (2001) 183 ALR 404 at [43]-[48] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ indicated that the role of "proximity" is a limited one. They said:

New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
New South Wales Land and Housing Corporation v Watkins [2002] NSWCA 19 -
City of Ballarat v Perovic [2001] VSCA 222 -
TC v State of New South Wales [2001] NSWCA 380 (31 October 2001)

Finally, his Honour considered whether it was fair, just and reasonable that the common law should impose a duty of care. (See now ***Sullivan v Moody*** [2001] HCA 59 at [49] .) In this context Studdert J addressed the policy considerations said to negative a duty of care in the ***Bedfordshire County Council Case*** at 749-51 (Lord Browne-Wilkinson), ***Hillman v Black*** (1996) 67 SASR 490 (Full Court of Supreme Court of South Australia) and other cases; as well as those pointing in the opposite direction in ***Attorney-General v Prince and Gardiner*** [1998] 1 NZLR 262 (New Zealand Court of Appeal).

Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -