

BETWEEN THE ATTORNEY-GENERAL

Appellant

AND PRINCE and GARDNER

Respondents

Coram: Richardson P
Henry J
Thomas J
Keith J
Tipping J

Hearing: 10 and 11 September 1997

Counsel: Solicitor-General J J McGrath QC and W G Liddell for Appellant
R Chambers QC for Respondents

Judgment: 25 November 1997

JUDGMENT OF RICHARDSON P, THOMAS AND KEITH JJ
DELIVERED BY RICHARDSON P

Contents

The factual background	2
The pleadings	3
The High Court decision on the striking out application	4
Striking out	6
Determining in new situations whether a claim in negligence may lie	7
The adoption legislation	9
Adoption in 1969: the social setting	15
Adoption: a common law duty of care?	17
Policy factors	19
Breach of fiduciary duty	23
The 1983 complaint: the pleadings	23
The Children and Young Persons Act 1974	24
The 1983 complaint: a duty of care	29
Proximity	30
Wider policy considerations	32
The 1983 complaint: breach of fiduciary duty	36
Result	36

This appeal and cross-appeal are against the decision of Anderson J reported at [1996] 3 NZLR 733 ruling on an interlocutory application by the Attorney-General, defendant in the High Court and appellant on the appeal, for orders striking out the statement of claim. At issue is whether the Crown may be liable in tort or in equity for errors or failings on the part of social workers in performing their statutory duties and exercising their statutory powers under the Adoption Act 1955 and the Children and Young Persons Act 1974.

The factual background

The first respondent, Mr Prince, whose mother, the second respondent, Ms Gardner, gave him up for adoption following his birth on 10 April 1969, has had a difficult life. He is now in prison. The statement of claim avers that his childhood was appalling and as a consequence of his adoptive parents' abysmal parenting skills he was deprived of care, a home and education and of the chance to realise his potential; that he suffered impairment of his development, distress and emotional abuse; and that in his teenage years he had no home or home life, no adult caring for him and his education and suffered deprivation, impairment, distress and abuse in those various respects, and had to look after himself.

He and his birth mother, who discovered what had happened to him in about 1990, place responsibility for his problems, and their effects on both of them, on the Crown. Their separate concerns are directed to the adoption process carried out by child welfare officers of the Department of Education, the predecessor in this respect of the Department of Social Welfare ("DSW"). As well, Mr Prince claims that in 1983, when he was 14, DSW failed to investigate a complaint from one, Jane Richards, that the adoptive parents were not looking after him properly and failed to exercise its powers under the Children and Young Persons Act 1974.

The pleadings

The 1969 events give rise to two causes of action by Mr Prince and two separate causes of action by Ms Gardner. Mr Prince's first cause of action is pleaded in negligence. The second is for breach of fiduciary duty. A third cause of action for breach of statutory duty on the part of the social worker for failing to prepare certain adoption reports to the Magistrates Court carefully, was struck out by the High Court and is not pursued. There is no claim for misfeasance in public office.

As pleaded, Mr Prince's cause of action in negligence avers negligence on the part of the child welfare officer in preparing the reports required by s10 and s13 of the Adoption Act and recommending that Mr and Mrs Prince become the adoptive parents, for which, it is claimed, the department was vicariously responsible. The first cause of action also avers direct, systemic negligence on the part of the department and in various respects. The second cause of action pleads the existence of fiduciary duties owed by the officer and the department to Mr Prince (the child) and their breach, the particulars of breach mirroring exactly the particulars in negligence.

The two causes of action pleaded by Ms Gardner are also for negligence and breach of fiduciary duty with the particulars of breach also mirroring the particulars in respect of Ms Gardner's claim in negligence, with the added particular that the social worker concerned misrepresented the nature of the adoption process. Her claim is that, as a child welfare officer, a Ms Dickie represented to and assured her that if she consented to an adoption the child would go to a well off family which owned its own home; that every effort would be made to match the child with a family likely to be similar to her own; and that, if the adoptive parents divorced or died, no one else could take the child without her consent.

Mr Prince's remaining two causes of action are parallel causes of action in negligence and breach of fiduciary duty for failure by the department to respond to the complaint that the adoptive parents were not looking after him.

The High Court decision on the striking out application

In the High Court Anderson J struck out the causes of action pleaded by Mr Prince relating to the adoption and the fiduciary duty cause of action in respect of the 1983 complaint, but not the negligence claim in respect of the complainant. The Judge declined to strike out both causes of action relied on by Ms Gardner. The judgment being reported, it is not necessary for present purposes to set out the Judge's reasoning in detail.

He held against Mr Prince on the first two causes of action for two reasons. One was that witness immunity and court immunity precluded suit in respect of the social worker's acts or omissions in connection with the making of the interim and final adoption orders. The other was that neither the officer nor the department owed a common law duty of care. The duty postulated by the Judge was to take reasonable care to inform a court considering an adoption application of matters relevant to the welfare of the child in respect of whom orders were sought. Proximity being conceded by the Crown, the Judge reviewed policy considerations at length. He concluded that how the adoption court was or might have been influenced by an officer's report would be largely speculative; that privacy considerations necessarily affected inquiry into questions of parental causation and parental responsibility for a child's upbringing, life quality and character development which were scarcely justiciable; that the essential nature of the grievance was that the plaintiff claimed to have ended up with unsatisfactory parents who brought him up badly and damaged his life prospects and that the common fact of deficient parenting, causing the damage of

childhood deprivation, compelled a consideration of potential action against parents themselves which our contemporary society would reject; and that there were other systems of accountability through ministerial and parliamentary oversight of the department, through the statutory provision for variation or discharge of adoptive orders and through the supervision by the adoption court of the functions directly related to the adoption process.

The Judge accepted that there was a fiduciary relationship derived from the officer's role in acting on behalf of the child. But no basis for non-negligent and good faith omission amounting to breach of fiduciary duty was apparent from the pleadings or could be implied from the Adoption Act.

Anderson J was not prepared to strike out Ms Gardner's claim in negligence. There were no persuasive policy indications against recognising a duty of care. The Judge saw the vulnerable state of the birth mother, her reliance on the integrity of the advice tendered, the reliance such a mother was entitled to place on officers of the department charged with the welfare of children, the extent of the officer's statutory powers and responsibilities and the mother's inability to check the consequences, as overwhelming indications for recognising a duty of care. And, while she would not be entitled to compensatory damages for the emotional harm of learning of the consequences of the breach, exemplary damages might be awarded. For similar reasons the parallel cause of action for breach of fiduciary duty could not be struck out.

Finally, in relation to the department's alleged failure to respond to the complaint in 1983 that the adoptive parents were neglecting the child, the Judge concluded that there were very firm policy reasons for not withholding recognition of a common law duty of care to children at risk in the very respects for which the statute provided preventive and remedial objectives and powers and which were so consonant

with the standards and expectations of the New Zealand community. The Judge distinguished *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 as involving different statutory provisions. However there was nothing in the pleading to hint why a fiduciary duty to carry out a prompt inquiry in response to a complaint might exist and that cause of action was struck out.

The appellant seeks to have the remaining three causes of action struck out. The respondents seek the reinstatement of the first, second and last named causes of action.

Striking out

A striking out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*Lucas and Sons (Nelson Mail) Limited v O'Brien* [1978] 2 NZLR 289, 294-5; *Takaro Properties v Rowling* [1978] 2 NZLR 314, 316-7); the jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

Mr Chambers for the respondents submitted that the courts should be very slow to rule on novel categories of duty at the striking out stage. Where the hypothetical facts cover a range of factual possibilities, deciding wide public policy questions may lead to an unfocussed approach because the inquiry is then set against too broad a

factual canvas. And empirical evidence and other expert evidence properly tested may help the court in making the right public policy choices.

There is force in these submissions, highlighted by the application by the Solicitor-General to admit evidence as to the current resources and responsibilities of the department and present social work practices and accountabilities. It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the courts. In some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, policy considerations are patent. They may be explicit or implicit in the relevant legislation. They may be reflected in other areas of the law. Or the courts may feel the considerations are readily identifiable and capable of evaluation and need not be the subject of evidence to be tested at trial.

For reasons to which we shall come we are satisfied that there are specific powerful policy considerations relating to the adoption which are sufficiently self-evident and when taken together require the striking out of those causes of action. However, the negligence cause of action arising from the complaint to the department in 1983 raises different factual and policy considerations and it would be premature to rule out any possibility of a duty of care before trial.

Determining in new situations whether a claim in negligence may lie

The issue is whether a claim in negligence may lie. The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable to

recognise a duty of care by the defendant to the plaintiff. That depends on consideration of all the material facts in combination. It is an intensely practical question. For almost 20 years, and drawing on *Anns v Merton London Borough Council* [1978] AC 728, we have found it helpful to focus on two broad fields of inquiry. The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict - or strengthen the existence of - a duty in that class of case (*Fleming v Securities Commission* [1995] 2 NZLR 514, 527-528).

Three distinct claims in negligence require consideration. What may be termed the 1969 claims by the child and the mother respectively are outcomes of the adoption process. The complaint to the department in 1983, which gives rise to the other claims by the child, calls for close consideration of the Children and Young Persons Act 1974.

In determining whether any claim in negligence may lie, the first step is to summarise the material features of the particular legislation and then to assess those features in the social context along with any other relevant considerations. In that analysis it is important to distinguish actions to recover damages based on a private law cause of action, from judicial review proceedings in public law to enforce the due performance of statutory duties. In this appeal, too, the plaintiffs are not suing for misfeasance in public office, i.e. the exercise or non-exercise of statutory functions and powers with intent to injure the plaintiff or in the knowledge that the conduct is unlawful. And there is no longer a claim for the careless performance of a statutory duty. The causes of action pleaded are common law negligence and breach of

fiduciary duty based on the same particulars as given in respect of the alleged breach of the duty of care.

The adoption legislation

Before 1881 informal adoption arrangements were common and in some instances undertakings were obtained from the natural parent. But the common law did not recognise adoption. The rights, liabilities and duties of parents were inviolable. Adoption was deemed to be against the public interest. It was impossible by agreement to give the child the legal status of a child of the adopting parents. In 1881 with the passage of the Adoption of Children Act of that year New Zealand became the first member of the British Empire to pass adoption laws. The present legislation, which was the legislation in force in 1969 when Mr Prince was adopted, is the Adoption Act 1955. The act does not define adoption. Rather, it prescribes the process for obtaining an adoption order, variation or discharge of orders, and the legal effect of orders. *Trapski's Family Law* Vol V, para A.6 describes it in this way:

The Adoption Act does not define adoption; it merely describes the necessary procedures for obtaining an adoption order and legal effect of the order.

Adoption is a legal process culminating in the making of an adoption order by which the child's biological parents lose their status as parents and their parental rights and are absolved from their parental responsibilities. By the adoption order, the adoptive parents assume the status of parenthood and the accompanying rights and responsibilities in relation to the child. The child gains a new parent or parents and acquires a new set of relatives traced through the adoptive parent(s). The child loses its birth parents and the set of relatives traced through them. Adoption authorises and effects a legal transplant of the child, severing relationships with its family of origin and creating a new set of family relationships through the adoptive parent(s).

In 1969 adoption orders could be made by a Magistrate's Court or the Supreme Court on appeal; now it is a Family Court or District Court or the High Court on appeal (the adoption court).

The statutory process requires an application by two spouses or by the mother or father of the child alone or jointly with his or her spouse (the adoptive parents). The applicants must file an affidavit containing the information specified in Reg 8 of the Adoption Regulations 1959 including their ages, their state of health, particulars of their financial circumstances, the sex, age and state of health of any child of the applicants or either applicant, and the reasons for wanting to adopt the child. At any hearing of the application the applicants and the child must attend personally before the adoption court, unless the court directs otherwise (Reg 10). The natural mother is not required to attend.

The required consents (here of the birth mother, Ms Gardner) must be filed in the adoption court or dispensed with by the court in certain tightly defined circumstances (ss7 and 8). Importantly, as requiring a reasonable period of time before the mother's consent is effective, s7(7) provides that a document signifying the consent shall not be admissible unless the child is at least 10 days old. Further, it must be witnessed by (in 1969) a Magistrate, a Registrar of the Supreme Court or a Magistrate's Court, or a solicitor or a Judge, Commissioner or Registrar of the Maori Land Court (s7(8)) - and the solicitor cannot be the solicitor acting for the applicants (Reg 9(2)); and the form of the document signifying the consent must contain an explanation of the effects of an adoption order and have endorsed a certificate by the witness that he or she personally explained the effect of an adoption order to the person giving consent (s7(9)). The forms of consent specified by Reg 9 state the effect of an adoption order including that "(a) the child is deemed for all purposes and as regards all relationships to become a legitimate child of the adoptive parents; and (b) rights of guardianship and existing relationships in respect of the child cease except

for the very special purpose of determining forbidden relationships in connection with marriage and with the crime of incest". And the certificate on the form is:

I hereby certify that before the said _____ signed the foregoing consent I fully explained to him (*or her or them*) the effect of the making of an adoption order as set out in the Adoption Act 1955, and that he (*or she or they*) appeared fully to understand the same.

The legislation also requires a report to the adoption court from a social worker (in 1969 a child welfare officer) and before furnishing that report the social worker must make inquiries of the police as to whether anything is known to them about the character of the applicants, and make known to the court the result of his or her inquiries (Reg 7).

If the adoption court considers that an application should be granted it must, in the first instance, make an interim order in favour of the applicant or applicants provided that it may make an adoption order without first making an interim order if all the conditions of the Act governing the making of an interim order have been complied with and special circumstances render it desirable that an adoption order should be made in the first instance (s5). Sections 10 and 11 provide:

10. Social Worker to report - (1) Before the Court makes any interim order, or makes any adoption order without first making an interim order, -

- (a) The Registrar of the Court shall require a Social Worker to furnish a report on the application;
- (b) Reasonable time shall be allowed to enable the Social Worker to furnish a report, and the Court shall consider any report which the Social Worker may furnish; and
- (c) The Registrar shall give the Social Worker reasonable notice of the hearing of the application:

Provided that this subsection shall not apply in any case where the applicant or one of the applicants is an existing parent of the child,

whether his natural parent or his adoptive parent under any previous adoption.

(2) The Social Worker shall be entitled to appear at the hearing of the application, and to cross-examine, call evidence, and address the Court.

11. Restrictions on making of orders in respect of adoption -

Before making any interim order or adoption order in respect of any child, the Court shall be satisfied -

- (a) That every person who is applying for the order is a fit and proper person to have the custody of the child and of sufficient ability to bring up, maintain, and educate the child; and
- (b) That the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child; and
- (c) That any condition imposed by any parent or guardian of the child with respect to the religious denomination and practice of the applicants or any applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child is being complied with.

Section 12 goes on to empower the adoption court, on the application of any person and in its discretion, to revoke an interim order on such terms as the court thinks fit. And while the interim order remains in force any social worker may at all reasonable times visit and enter the residence in which the child lives (s15(2)(b)). In terms of s13 an adoption order may issue on the application of the adoptive parents where the interim order has continued in force for (ordinarily) not less than six months. A report by a social worker is required. If it recommends that an adoption order be issued and certain other pre-conditions are satisfied, the Registrar issues the adoption order without further hearing; otherwise there is a further hearing for which a social worker reports and at which the social worker is entitled to appear, cross-examine on the evidence, and address the court (s13(4)).

To sum up at this point, the statute requires that following a hearing, and in some cases two hearings, the adoption court be satisfied on the evidence before the court that the adoption order should be made. That evidence includes, but is by no means confined to, the report from the social worker to the court. And in reporting and in participating at the hearing the social worker is exercising an independent professional judgment under the legislation and is not subject to directions from the department in discharge of that responsibility. In *Re an application by B* (High Court, Napier M106/80, judgment 5 December 1980) O'Regan J had to consider the obligations of a social worker and in particular the influence of policy on an individual social worker. He observed:

If a policy is laid down which the social worker as a servant is obliged to implement the Director-General has taken upon himself a power which has not been conferred upon him by the legislature. All in all, I think the position is that Parliament has deliberately conferred the power to report and to take part in the proceedings upon the local social worker and that such power encompasses a wide discretion to the social worker to take an overall view of the circumstances obtaining in each individual case unfettered by any policy of general application laid down by the Director-General.

The effects of a final adoption order are set out in s16 of the Act. These include that the adopted child is deemed to become the child of the adoptive parents and the adoptive parents are deemed to become the parents of the child, with the legal and logical consequences of that change in status as set out extensively in the section.

Section 20 provides for the variation or discharge of adoption orders. It is of particular significance in assessing whether a cause of action lies in favour of Ms Gardner in respect of the allegedly negligent representations and assurances given to her in 1969. Subsections (1) and (3) provide:

(1) The Court may in its discretion vary or discharge any adoption order ... subject to such terms and conditions as it thinks fit.

...

(3) No application for the discharge of any adoption order or adoption shall be made without the prior approval of the Attorney-General; and no adoption order or adoption shall be discharged unless -

- (a) The adoption order or adoption was made by mistake as to a material fact or in consequence of a material misrepresentation to the Court or to any person concerned; or
- (b) The discharge is expressly authorised by any other section of this Act.

It is long settled that such applications may be made even though the child is of age (e.g. *Wingfield and Wife v Bartholomew* [1933] NZLR 693). In *Application by C and K (Adoption)* (1984) 3 NZFLR 321 a lapse of 20 years did not preclude setting aside an adoption order on grounds of mistake and misrepresentation. See also *In re I* (1947) 42 MCR where the time lapse was 25 years. In *S and S v M* (1984) 1 FRNZ 312 where M signed a consent to adoption following assurances from the social worker that access could be guaranteed although not formally recorded, Casey J upheld the revocation of the interim order, concluding that the absence of true consent to an adoption was a fatal flaw. M's consent could not be regarded as fully informed if based on a misunderstanding of the consequences where she thought she was consenting to an adoption which would give her liberal access on a permanent basis. And in *GM v T* [1996] NZFLR 817 the Family Court set aside an adoption order made three years earlier where there had been material misrepresentations and mistakes of fact in a social worker's report and serious irregularities in the processes followed and the court concluded that had the true position been apparent the adoption order would not have been made.

Next, there are important provisions as to secrecy. Adoption applications are heard in camera and no report of the proceedings may be published except by leave of the adoption court (s22). By s23:

- (1) An adoption order shall be open to inspection by any person who requires to inspect it for some purpose in connection with the

administration of an estate or trust of which that person is executor, administrator, or trustee.

- (2) Adoption records shall be open to inspection by any Registrar of Marriages or marriage celebrant under the Marriage Act 1955 for the purpose of investigating forbidden degrees of relationship under that Act.
- (3) Adoption records shall not be available for production or open to inspection except -
 - (a) To the extent authorised by subsection (1) or subsection (2) of this section or by section 11(4)(b) of the Adult Adoption Information Act 1985; or
 - (b) On the order of a Family Court, a District Court, or the High Court, made -
 - (i) For the purposes of a prosecution for making a false statement; or
 - (ii) In the event of any question as to the validity or effect of any interim order or adoption order; or
 - (iii) On any other special ground.

The relevant offence referred to in s23(3)(b)(i) is of making any false statement for the purpose of obtaining or opposing an interim order or adoption order (s27(1)(f)).

Adoption in 1969: the social setting

The Adoption Act 1955 was major social legislation. Its purpose and effect was to extinguish all ties between child and natural parents and extended family and to give the child new replacement parents and their extended families. The new parent/child relationship was to be accepted without question in the knowledge that the circumstances surrounding the adoption should not in general be disclosed.

The Act established a comprehensive self-contained adoption process. There is a statutory blanket of confidentiality and secrecy. Before the passing of the 1955

Act the natural parent had to know the identity of the proposed adoptive parents when giving consent to the adoption. Under the 1955 statute natural parents and adoptive parents need never know and may never learn the identity of the other. Secrecy attaches to the proceedings and to the records of proceedings. Those provisions particularly support closed stranger adoptions.

Also central to the legislation is the emphasis on a judicial determination of whether or not to make an adoption order. The legislation provides for particular material to be supplied to the adoption court by the applicants and the social worker and for obtaining consents which on their face have been independently validated and vouched for by a professional officer, often a solicitor. Social workers have three statutory roles: to approve an initial placement of the child before an interim order is made (s6); to report to the adoption court and take part in hearings before the court (ss10 and 13); and to oversee the placement of the child between interim and final orders (s15(2)(b)). As Campbell, *Law of Adoptions in New Zealand* (2nd ed 1957) 48 notes, reporting is the principal means of ensuring that the information supplied by the applicants in support of the application is checked, that the court is placed in possession of relevant information, and that the prospects for successful adoption are objectively assessed by a trained investigator who has seen all the parties and who has looked at the child's intended home. Nevertheless the social worker's report is only part of the evidence which the adoption court must consider in deciding whether or not to grant the application.

It is also important to keep in mind that we are concerned with the adoption process in 1969 under the Adoption Act 1955, not with current community perceptions of and attitudes to adoption. The Adult Adoption Information Act 1985 reflected a modification of earlier social attitudes to permanent extinguishing of relations between child and natural parent. And clearly there have been substantial levels of concern and dissatisfaction with the philosophy and processes underlying the 1955 legislation which are reflected in various official reviews of adoption laws and practices and in specialist publications (see *Trapski's Family Law* para A-10; and

Griffith, *New Zealand Adoption, History and Practice, Social and Legal 1840-1996*).

Statistics, too, are revealing. In the decade before the 1955 Act there were around 1,400 adoptions a year. Following the passing of the statute there was a sharp rise in adoption orders, reaching almost 4,000 per year between 1968 and 1971 before falling back and in the last 10 years dropping from 1,000 per year to only 540 in 1996. In the early years under the 1955 Act the great majority of adoptions (60% to 70%) were stranger adoptions. Over the last 15 years only about 20% to 25% have been stranger adoptions and many of those relatively few stranger adoptions are open arrangements providing by agreement, but without any obvious statutory basis, for continuing contact between the two families. But, in the period with which we are concerned in this case, closed stranger adoptions in conformity with the scheme and purpose of the 1955 Act clearly had substantial community support.

Adoption: a common law duty of care?

It is common ground that the social workers and the department could foresee damage to the child (and to the natural mother) if their statutory responsibilities were carried out negligently, and that the relationship between them (and the department) and the child (and the mother) is sufficiently proximate. The question then is whether it is just and reasonable to impose a common law duty of care on the social workers for which the Crown is liable. Although the case is concerned with the rights of an adopted child and natural mother in relation to particular aspects of the adoption process, it must raise the broader question of whether the law should recognise that those responsible for carrying out functions contemplated by the Adoption Act are under a duty of care to persons who foreseeably may be caused damage by their actions. If there is no such general duty owed, there would seem not to be any particular circumstances in this case which would require the imposition of such a duty.

Persons immediately affected by the adoption process are at the three corners of the triangle: the child, the natural parents or guardians of the child, and the adoptive parents (including the spouse of an adoptive parent where the application is not joint). Those having obligations under the Act (other than the child) include the Director-General, the department, social workers, the police, solicitors and others certifying consents, and the adoptive applicants.

The implications of imposing a duty are these. First, in relation to the child there is the risk of liability for influencing the adoption court to make an adoption order in favour of unsuitable applicants; for adverse consequences of being placed in an approved home (s6); and for bad parenting by adoptive parents. Second, in relation to natural parents (or guardians) there is the risk of liability for adverse consequences of careless advice as to the suitability and particular qualities of adoptive applicants, and as to the effects of adoption; and for mental anguish and distress of discovering the child suffered from bad parenting by adoptive parents. Third, in relation to adoptive parents, there is the risk of liability for their adopting an unsuitable child.

The essential claim by Mr Prince is that because of the negligence on the part of the social worker and the department the adoption was made and he has suffered from bad parenting by the adoptive parents. The essential claim by Ms Gardner is that her consent to the adoption was wrongfully induced by negligent misrepresentations as to the suitability of any adoptive parents and the assurance that her further consent would be required should they part or die. The misrepresentations which are pleaded are within the scope of the matters which would be, or properly could be expected to be, traversed and resolved as part of the process for obtaining the consent of the natural mother. Consequently, Ms Gardner's claim cannot be divorced from the adoption regime and is subject to essentially the same policy concerns.

Policy factors

There are we think two major policy considerations which support the imposition of a duty of care on those responsible for carrying out functions under the Act. First, as it was put in the *Bedfordshire* case at 663 per Lord Bingham MR and 578 per Lord Browne-Wilkinson, the proper consideration which has first claim on the loyalty of the law is that errors should be remedied and that very potent counter considerations are required to override that policy. Second, as independent professionals social workers are expected to exercise reasonable care and skill in carrying out their statutory functions; and in the present situation the fulfilment of the duty to the child (or the mother) is consistent with the social worker's duty to the court. There is, too, an element of reliance: explicit reliance by the mother on the pleaded negligent misrepresentations and assurances; implicit reliance by the child on the exercise of reasonable care and skill by the social worker.

However, the countervailing considerations are in our view much stronger overall. First, and particularly significant, it would be inconsistent with the policy and scheme of the Act to allow individual claims in negligence in respect of particular acts or omissions in the carrying out of the statutory functions.

The legislation establishes a process leading to judicial consideration and determination on the evidence then before the adoption court of whether an adoption order should be made. The social worker has an important role. So do others in exercising their rights and discharging their obligations under the statutory process. The applicants provide relevant information concerning their family situation, their health, their financial circumstances and their reasons for wanting to adopt the child. The social worker furnishes a report and is entitled to take part at the hearing of the application. Anything known to the Police about the character of the applicants is also conveyed to the adoption court. The adoption court is required to consider any report which the social worker may furnish (s10(1)). It is not obliged to accept the

report or its recommendations. The court makes its own assessment of all the material including any oral evidence and cross-examination. It is the court which must be satisfied that the requirements of ss4 and 11 are met and the necessary consents have been given or should be dispensed with (ss7 and 8).

The natural parent may impose a condition with respect to the religious upbringing of the child (s11(c)) but in a closed stranger adoption is not otherwise involved in the assessment by the adoption court under s11 as to whether the applicants are suitable adoptive parents (s11(a)) and whether the welfare and interests of the child will be promoted by the adoption (s11(b)). The comprehensive consent provisions have special features designed to show on their face that informed consent has been given: the 10 day waiting period after the birth of the child before the consent document is signed; the form of consent with its explanation of the effects of an adoption order; and the certificate by an independent solicitor or statutory officer that he or she has personally explained the effect of an adoption order to the person giving consent, who appeared fully to understand the same. The social worker does not have a direct statutory role in the giving of consent and the legislation proceeds on the premise that consents completed in accordance with the statutory requirements and filed in the court are valid and effective.

There is nothing in the legislation to indicate a Parliamentary purpose to create actionable obligations. On the contrary, to impose a common law duty of care on social workers involved in that process and on the department would cut across that statutory regime. The adoption court makes the ultimate decision. Social workers see the parties and assess the prospects for successful adoption. The social worker contributes to the information before the court, but the report is not accorded any statutory primacy when the adoption court is deciding whether or not to make an interim order or adoption order.

Further, to allow a claim in negligence would undermine the intended finality of the adoption. The legislation does not contemplate any subsequent performance appraisal of the adoptive parents or of the wellbeing of the child. Any claim in negligence would constitute an indirect attack on the adequacy of the statutory process and the integrity of the adoption order. It would be extraordinary if a claimant could allow the adoption to stand unchallenged, including in the case of the mother the validity of her consent, but still seek damages on the footing that the adoption order should not have been made and her consent was induced by material misrepresentations. And it would be inconsistent with the deliberately narrow remedies and sanctions provided in the statute (s12 for revocation of an interim order, s20 for variation and discharge of an adoption order, and s27(1)(f) for making a false statement for the purpose of obtaining or opposing an interim order or adoption order). The application for the discharge of an adoption order requires the prior approval of the Attorney-General and no adoption order or adoption can be discharged unless it was "made by mistake as to a material fact or in consequence of a material misrepresentation to the court or to any person concerned". As the authorities under the section show, a long time lapse is not a bar, but it is only in those narrow circumstances that the integrity of the adoption can be challenged. The need to obtain the approval of the Attorney-General to make the application and the existence of an ultimate discretion in the court to refuse the application reinforce the legislative intent to circumscribe challenges to adoption. Significantly, too, the offence provisions of s27(1)(f) provide a limited sanction (3 months imprisonment and a fine not exceeding \$100) for making a false statement for the purpose of obtaining or opposing an interim order or an adoption order.

Finally, the secrecy provisions do not envisage the disclosure of what would be essential information in determining negligence suits. Section 23 provides a narrow exception to the general unavailability for production or inspection of adoption records. The exception is that the court may make an order (a) for the purposes of a prosecution for making a false statement, or (b) in the event of any question as to the validity or effect of an interim order or an adoption order, or (c) "on any other special

ground". Statutory powers must be exercised in accordance with the policy and purpose of the legislation. Given the statutory emphasis on confidentiality and secrecy of adoptions and the special grounds designated in (a) and (b), it would seem impossible to justify making an order under (c) to support private, civil litigation, necessarily undermining the adoption.

The second set of policy considerations pointing against recognising a duty of care can be summarised very shortly. They are less significant in the overall assessment than the considerations to be drawn from the adoption legislation which we have been discussing, but they are still important in public policy terms. If a principal cause of the child's problems as they emerge over the years can be ascribed to bad parenting it is incongruous to allow a suit against a secondary party but not against the parents, whether adoptive or natural - and it was not suggested that the child could bring such a suit in negligence against parents. And if for public policy reasons a child cannot sue the social worker and the department there could be no policy justification for allowing the natural mother to sue on learning of the child's problems while leaving the adoption unchallenged. Further, the imposition of the duty of care contended for could not sensibly be confined to social workers and the department. Others involved in the adoption process (apart from the court which is the effective decision maker) could scarcely be excluded. The consequences for the public interest would in our view be unacceptably expansive.

As well, there are fair trial considerations. Disentangling factors that contributed to the decision of the adoption court, usually long after the event, and determining to what extent the adoption court was influenced by the alleged negligence of the social worker would be difficult, if not often impossible. Causation, including weighing the respective influences of nurture and nature in shaping the child and affecting his or her life prospects, and quantification of any loss are likely to be highly speculative, if indeed justiciable. Finally, there are other systems of accountability for performance by social workers of their professional responsibilities and for

maladministration of the department. Standard public law remedies apply in respect of the exercise of statutory powers. Departments are subject to ministerial and parliamentary oversight. Social workers are subject to departmental disciplinary regimes. Complaints may be made to the Ombudsman.

For these reasons we would hold that the claims in negligence as pleaded by Mr Prince and Ms Gardner do not lie and should be struck out.

Breach of fiduciary duty

The respondents have pleaded that the social worker and the department owed Mr Prince "fiduciary duties" to act at all times in his "best interests" and to "act with the utmost good faith towards him". A breach is pleaded, but the particulars of the breach repeat the particulars given for breach in negligence. There are no allegations of bad faith expressed or implicit in those particulars. In the absence of such particulars we do not consider that the cause of action can be sustained. It is also struck out.

The 1983 complaint: the pleadings

The duty of care and the circumstances giving rise to it are pleaded as follows:

21. AT about the end of 1983 Jane Richards of Auckland advised the Department of Social Welfare (hereinafter called "DSW") that neither Mr Prince nor Mrs Prince was looking after the First Plaintiff or was prepared to look after him.

22. DSW did nothing.

23. THE First Plaintiff thereafter, although still a young person, had to look after himself as best as he could, and thereafter mixed in inappropriate circles and became for a time a "street kid".

24. DSW, in its failure to do anything about the advice it received as referred to in paragraph 21 above, was negligent.

Particulars

- (1) It failed to investigate the complaint adequately or at all.
- (2) It made no attempt to exercise its powers under the Children and Young Persons Act 1974.
- (3) It failed to take any steps to ensure that the First Plaintiff was adequately housed, educated, and cared for.

The statement of claim goes on to aver that as a consequence of that negligence Mr Prince's life was seriously and detrimentally affected in the ways specified, which were summarised earlier in the judgment. The parallel cause of action for breach of fiduciary duty requires no elaboration for present purposes. For its part the statement of defence avers that the department has no or insufficient knowledge of the factual allegations contained in those paragraphs of the statement of claim and denies the existence of a duty of care or a fiduciary duty to Mr Prince in the circumstances pleaded.

The Children and Young Persons Act 1974

The Department of Social Welfare Act 1971 which established the department (s3), (by subsequent amendment) charged the department with the administration of the Children and Young Persons Act 1974 under the control of the Minister (s4(1)(a)) and required the department to provide such social welfare services as the Minister from time to time directed (s4(2)(b)). The Director-General had wide powers of delegation (s12) and the Act provided for the appointment of such officers and employees as social workers as might be necessary for the effective and efficient carrying out of the functions of the department (s8).

The Children and Young Persons Act 1974 has been replaced by the Children, Young Persons and Their Families Act 1989, but the 1983 events have to be

considered under the framework of the 1974 Act. The purpose of the 1974 Act , as stated in the long title, was "to make provision for preventive and social work services for children and young persons whose needs for care, protection, or control are not being met by parental or family care and who are, or are at risk of becoming, deprived, neglected, disturbed, or ill-treated, or offenders against the law".

By s3, the objects of the Act were:

- (a) To promote the well-being of children and young persons by assisting individuals, families, and communities to overcome social problems with which they are confronted:
- (b) To promote the welfare of the family, to reduce the incidence of disruption of family relationships, and to mitigate the effects of such disruption where it occurs:
- (c) To assist parents in the discharge of their parental responsibilities:
- (d) To encourage co-operation between agencies (whether administered by the Crown or not) whose activities directly affect the well-being of the community and its children or young persons:
- (e) To establish and promote, and to assist in the establishment and promotion of, services and facilities within the community designed to advance the well-being of children and young persons; and to co-ordinate the use of such services and facilities.

A "young person" is a boy or girl of or over the age of 14 but under 17 (s2(1)).

In December 1983 Mr Prince as a 14 year old was a young person.

By s4:

Any Court which or person who exercises in respect of any child or young person any powers conferred by this Act shall treat the interests of the child or young person as the first and paramount consideration to the extent that this is consistent with adopting a course calculated to -

- (a) Secure for the child or young person such care, guidance, and correction, as is necessary for the welfare of the child or young person and in the public interest; and
- (b) Conserve or promote as far as may be possible a satisfactory relationship between the child or young person and other persons (whether within his family, his domestic environment, or the community at large).

Section 4A goes on to require any court or person in applying s4 to have regard to the principle that every young person is entitled, unless the Act otherwise expressly requires or unless it is impracticable, to live in the association of that young person's culturally recognised family group.

Section 5 imposed positive duties on the Director-General:

- (1) It shall be the duty of the Director-General to take positive action and such steps under this Act as in his opinion may assist in preventing children or young persons from being exposed to unnecessary suffering or deprivation or from becoming seriously disturbed or from committing offences.
- (2) In pursuance of the duty imposed on him by subsection (1) of this section the Director-General shall arrange -
 - (a) For prompt inquiry where he knows or has reason to suspect that any child or young person is -
 - (i) Suffering or likely to suffer from ill-treatment or from inadequate care or control; or
 - (ii) By reason of his behaviour, causing serious concern to his parents, guardians, or teachers:
 - (b) For the provision of such assistance, whether financial or otherwise, as the Director-General considers reasonable to any parent, guardian, child, or young person or to the person for the time being having the care of the child or young person where, in the opinion of the Director-General, such assistance is likely to assist in overcoming deficiencies in the care of the child or young person or to improve the behaviour of the child or young person:

- (c) For inquiry into any allegation that any child or young person who is being cared for, whether by the day or intermittently or continuously, away from his parents or guardians is not being properly cared for or is being cared for under conditions that are not suitable for his training or development.

By s27(1):

Any member of the Police or any Social Worker who reasonably believes that any child or young person is in need of care, protection, or control may make a complaint under this section requiring the child or young person to be brought before a Children and Young Persons Court to have the matter heard and determined in accordance with the provisions of this Act.

A young person is considered in need of care, relevantly for present purposes, if:

- (a) His development is being avoidably prevent[ed] or neglected; or
- (b) His physical or mental health, or his emotional state, is being avoidably impaired or neglected; or
- (c) He is being, or is likely to be, neglected or ill-treated; or
- (d) His parent or guardian or the person for the time being having care of him, -
 - (i) Has failed or is failing to exercise the duty and care of parenthood; or
 - (ii) Is unable or unwilling, to carry out the duty and care of parenthood.

Social workers and police could seek warrants to search for young persons and to ascertain whether there were any grounds for making a complaint under s27 where there was reasonable ground for suspecting that a young person was being ill-treated or "neglected in a manner likely to cause unnecessary suffering or [was] living in an environment injurious to his physical or mental health" (s7). At the next step after a complaint had been made they could seek warrants to remove young persons from

their surroundings where there was reasonable ground for believing that the young person was likely to be neglected or subject to inadequate care or control (s28(1)).

Before the court made an order following a finding that a complaint had been proved it was required to have available and consider a social worker's report on the circumstances of the case and personal details of the young person and his or her parentage, family situation and background as might be of assistance to the court in determining the most suitable method of dealing with the young person (s41(3)). Any social worker furnishing a report under the section was not under any civil or criminal liability in respect thereof "unless he [or she] had acted in bad faith or without reasonable care" (s41(8)). On finding the grounds of the complaint proved the court could make an order placing the young person under the guardianship of the Director-General or under the supervision of a social worker (s31(1)(d)).

To sum up, the 1974 Act was welfare legislation in which the interests of the child or young person were the first and paramount consideration. The statute reflected significant policy changes in the roles and responsibilities of the department and social workers when compared with the replaced legislation, the Child Welfare Act 1925 and the Infants Act 1908. The statement of objects (s3), the focus on the interests of the child (ss4 and 4A) and the imposition of duties on the Director-General to take preventive action and to investigate complaints of neglect were all new; and so, too, was the Children and Young Persons Court (see *Trapski's Family Law* Vol I para 1-5, NT 1.01-1.07). The Act contemplated intervention by the State, between the young person on the one hand and the parents on the other. The powers of social workers were broadly defined and their exercise and the discharge of the duties imposed on the Director-General and social workers called for sensitivity and judgment.

The 1983 complaint: a duty of care

On the argument of the appeal the appellant sought leave to adduce affidavit evidence of two departmental officers as to the resource implications and the effect on social worker practices of potential liability in negligence. Apart from the timing of the application and the inappropriateness on a striking out application of receiving factual and opinion material that the respondents would dispute, that proposed material was directed in the main to the 1989 legislation and the current position. But the focus in the present inquiry is necessarily on whether the department owed a duty of care to Mr Prince when responding or failing to respond to the complaint alleged to have been made to it in 1983.

The philosophy and thrust of the 1989 legislation are different. Significantly s5 of the 1974 Act has been replaced by diffuse and diluted investigation provisions far different from the positive duties under s5. As well, public sector processes have been substantially affected by legislative and organisational reforms of the last decade. The detailed guidelines introduced by the Children and Young Persons and Their Families Service during the last year for responses to situations of alleged abuse or negligence obviously cannot simply be transposed back to 1983. And, unlike the statute in the *Bedfordshire* case, the 1974 Act did not provide for social service functions to be exercised in accordance with such directions as might be given by the Secretary of State. And so any (as yet undisclosed) guidelines existing in 1983 lacked statutory force.

It may be accepted that in 1983 social workers could be expected to exercise judgment when considering complaints received, assessing the situation of the young person, and determining the urgency of any response. It may be accepted that acting in the best interests of the young person the department would also seek to avoid unnecessary intrusion on the family. But the first difficulty in the present striking out

is that in terms of the pleadings the case cannot be characterised as one of total failure to consider the alleged complaint - the allegation is of failure to investigate the complaint "adequately or at all". There is no basis for determining striking out on the footing that it is necessarily a pure omission case, or that the Director-General or a social worker exercised any particular judgment. It cannot be predicated that the department made any particular decision in relation to the complaint, let alone that the decision was not outside the ambit of discretion granted to the department and social workers by the legislation. The pleadings are wide enough to cover simple administrative carelessness or an absence of any real exercise of any professional discretion. These considerations suggest that a sharp focus on the facts proved at trial is a more appropriate means of determining whether there is a duty of care than considering every factual possibility across the wide spectrum of these pleadings.

Proximity

The two broad fields of inquiry in determining whether it is just and reasonable to recognise a duty of care in new situations are the degree of proximity or relationship between the alleged wrong-doer and the person who has suffered damage, and the assessment of other policy considerations bearing on the existence of a duty of care in that class of case.

Proximity was, it seems, accepted by the Crown in the High Court. However on the argument of the appeal it was submitted that the degree of proximity was insufficient considered on the basis of analogy with decided cases, competing moral claims and an absence of assumed responsibility towards Mr Prince as a 14 year old young person.

The substantial argument to the contrary which we prefer may be put very shortly. Governmental agencies discharging statutory functions are often performing professional tasks. The Department of Social Welfare Act 1971 provides for the appointment of such social workers as necessary for the effective and efficient carrying out of the functions of the department. The 1974 Act is directed to the care and protection of children and young persons. The class of persons for whom the statutory protection was enacted is clear. The discharge of the particular function calls for the exercise of special social work skills and responsibilities. There is a professional relationship between social worker and client child or young person. Children and young persons are seen as vulnerable. Because of their youth and immaturity they cannot assert their own rights and needs. Others must do it for them. Just as it is right that the department and its professionals have a generalised duty under the statute to promote the wellbeing of children and young persons (s3), so, too, when exercising their statutory powers in respect of a particular child or young person they assume a responsibility to that child or young person (s4). And the duty to consider a complaint of neglect is specific to the particular child or young person, the subject of the complaint (s5). While a deprived child or young person may have no particular expectation that the department will seek to assist him or her, given general community expectations reflected in the statute it is not unreasonable to conclude that a child or young person is to be regarded as implicitly relying on the department and its officers to consider complaints that they are in need. Finally, it is readily foreseeable that inadequate consideration of complaints that a young person is neglected might cause harm. A young person who is the subject of the complaint is directly within the contemplation of the departmental officer receiving the complaint. The complaint here was that this 14 year old was neglected or likely to be neglected by his parents. In such a case the officer must have known that failure to give adequate consideration to the complaint and take any appropriate action might increase the risk of harm. For its part the department is not in a position to say that the imposition of a duty of care

would expose the officer and the department to a burden out of proportion to their moral culpability.

Wider policy considerations

The 1974 Act is the starting point. It sets the framework within which the department carries out its functions and the department and social workers discharge their duties and exercise their powers. The positive duties imposed by s5 are of central importance. It is the duty of the Director-General "to take positive action and such steps under this Act as in his opinion may assist in preventing children or young persons from being exposed from unnecessary suffering or deprivation". The Director-General is required to be pro-active in preventing children and young persons from suffering harm. He or she is also required to take appropriate steps under the Act to attain that end with the decision as to which of those steps to take being a matter for the Director-General's judgment. In pursuance of that duty s5(2) requires the Director-General to "arrange ... for prompt inquiry where he knows or has reason to suspect that any child or young person is ... suffering or likely to suffer from ... inadequate care or control" (para (a)). The subsection also requires the Director-General to inquire into any allegation that a young person who is being cared for away from his or her parents or guardian is not being properly cared for (para (c)). Those specific duties cannot be put aside or excused as if they were generalised duties to the community at large. The duty contended for here arises only when a specific complaint is made to the department in relation to a particular young person. They are matters of obligation, not the exercise of discretionary power.

The stated purpose of the Act is to provide for the care and protection of children at risk. The department is charged with the administration of the Act and by necessary implication is responsible for establishing and maintaining systems and

processes to enable it to perform its statutory functions and duties and exercise its statutory powers and within that framework facilitate the exercise by its social workers of their statutory responsibilities and powers. That being so it is also arguable that the department was required to develop processes to allow for the proper and timely consideration of allegations that children or young persons were being neglected or at risk in order to respond to any allegations under s5(2)(c) and to determine whether the threshold requirement of s5(2)(a) was met, namely that the Director-General or a social worker carrying a delegated responsibility "knows or has reason to suspect" that the young person concerned has suffered from or was likely to suffer from inadequate care or control. If that threshold is met the Director-General is required to arrange for prompt inquiry. If the result of that inquiry, supported as it is by the power to seek warrants under s7, (or of the inquiry under para (c)), is that a social worker "reasonably believes" that the young person is "in need of care" as that expression is relevantly defined in s27(2), the social worker may make a complaint under the section requiring the young person to be brought before a Children and Young Persons Court. Other steps may be taken to deal with the situation where it is reasonably believed that a young person is in need of care, e.g. providing financial or other assistance to a care giver to assist in overcoming deficiencies in the care (s5(2)(b)), and seeking a warrant to remove the young person from his or her surroundings (s28(1)) and thereafter following the statutory steps. But the statute does not contemplate that nothing at all need be done by the department where its responsible officer reasonably believes that the young person is in need of care. The complaint proceedings could result in the young person being placed under the guardianship of the Director-General or under the supervision of a social worker and the statute also contemplates earlier removal of a young person from an unsatisfactory environment. It follows that the responsiveness of the department and its systems to an allegation of neglect is a crucial step in the statutory process.

That statutory scheme does not lead inevitably to a conclusion that there was a common law duty of care to take proper steps to investigate allegations of neglect and thereafter to take such further and successive steps as the circumstances required. The question is whether it is just and reasonable to superimpose a common law duty of care on the department in relation to the performance of its statutory responsibilities for the protection and care of children and young persons. But, given the conclusion that proximity is satisfied, the statutory framework within which the department and its social workers act is consistent with the imposition of a common law duty of care. The narrow argument is that liability may arise where the person charged with the responsibility either unreasonably fails to carry out the duty to consider the matter or reaches a conclusion so unreasonable as to show failure to do its duty.

Given the important features of the 1974 Act which we have been emphasising, it cannot be said that a common law duty of care in these terms would cut across the whole statutory scheme. At that early triggering step a specific positive duty rests on the Director-General. At that step it does not require participation with other agencies. The duty suggested does not conflict with any other duty by the department and its officers. On the contrary it enhances it.

In the *Bedfordshire* case Lord Browne-Wilkinson at p739 emphasised that the question whether there is a common law duty, and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. In the various respects we have been discussing the Children and Young Persons Act 1974 is clearly distinguishable from the statutes before the House of Lords in the *Bedfordshire* case and the statutes under consideration in the large number of cases (but few in the child protection field) canvassed in argument. Little is to be gained from a point by point comparison. Also, the rescue cases are not comparable because in those cases any statutory framework was very different from the 1974 Act.

There are other policy considerations to be considered although we would not weigh them as heavily in this case as the scheme and policy of the 1974 Act. First, the difficulty and delicacy of the social worker's task and its judgmental nature are relevant. Intrusion into the family has to be handled with tact in the interests of the child or young person. The social worker must also have regard to the advantages of not disrupting the family environment and to the advantages and disadvantages of other options for the care of the young person. Clearly a plaintiff would have difficulty in establishing that an assessment made by a social worker fell outside the bounds sanctioned by professional opinion. Nevertheless considerations of that kind cannot absolve the department and social workers from the responsibility of considering and responding to specific complaints with professional skill and care.

Next, the Solicitor-General submitted that the imposition of a duty would or could cause the department and social workers to adopt a more cautious and defensive approach to their duties. He drew our attention to a considerable body of professional literature on that point and to the recognition of it in the *Bedfordshire* case (see also *Barrett v Enfield London Borough Council* [1997] 3 WLR 628, 636 and 638). But like lawyers and doctors, social workers are professionals. At that triggering step (and at other steps) they should be expected to have shouldered willingly a standard of reasonable skill and care that their private sector counterparts were expected to discharge. And in the absence of any data as to potential claims based on the roles and responsibilities of the department and social workers under the 1974 Act, which was replaced eight years ago by a very different legislative scheme, it would be unwise to give any particular weight to the resource implications of allowing for a common law duty of care.

Finally, and as pointing against the imposition of a duty, there are the obvious difficulties of reaching conclusions as to causation and damages. Clearly any such claims would be very difficult to establish. That in itself cannot, we think, be adequate

justification for ruling out the possibility of any claim for negligence whatever the circumstances.

For these reasons, on the pleadings as they stand, we would not strike out the cause of action in negligence.

The 1983 complaint: breach of fiduciary duty

Anderson J accepted there was a fiduciary relationship between the department and Mr Prince as a child and then as a young person, but he concluded in effect that there was no describable fiduciary duty to match the arguably present common law duty of care in receiving and responding to the complaint that Mr Prince as a young person was at risk.

The duty of the fiduciary, here the department, is to act in the child or young person's best interest and with the utmost good faith towards that child or young person. Essentially for the same reasons as apply in respect of the cause of action in negligence, we consider that the matter should be allowed to go to trial to allow the factual concerns and considerations to be investigated.

Result

The appeal and cross-appeal are allowed, each only in part. The court is unanimous as to the adoption issues and in the result the causes of action pleaded by Mr Prince and Ms Gardner are or remain struck out. As to the 1983 complaint and in

accordance with the views of the majority the causes of action pleaded survive the striking out application.

If any questions of costs arise counsel may submit memoranda.

A handwritten signature in dark ink, appearing to be 'M. Robinson P', is located in the middle right of the page.

Solicitors:

Crown Law Office, Wellington, for appellant

Judith Collins & Associates, Auckland, for respondents

BETWEEN THE ATTORNEY-GENERAL

Appellant

AND R D PRINCE and R V GARDNER

Respondents

Coram: Richardson P
Henry J
Thomas J
Keith J
Tipping J

Hearing: 10 and 11 September 1997

Counsel: Solicitor-General J J McGrath QC and W G Liddell for Appellant
R S Chambers QC for Respondents

Judgment: 25 November 1997

JUDGMENT OF HENRY J

I have had the advantage of reading in draft the judgment of Richardson P. As regards all the causes of action which relate to the adoption proceedings I am in agreement with the conclusions and reasons expressed and have nothing to add. I have however reached a different conclusion in respect of the two causes of action based on the allegation that nothing was done in response to a complaint made in late 1983 that neither of Mr Prince's adoptive parents were looking after him, and were not prepared to do so. The causes of action are based on negligence and breach of fiduciary duty. The factual background alleged in the pleading is set out in Richardson P's judgment, and need not be repeated. It foreshadows establishment at trial of a deprived and distressing childhood. Mr Prince would have been 14 years of age at the time the complaint now in question was made to the Department of Social

Welfare. For what to my mind are understandable reasons, there is no cause of action alleging breach of statutory duty in respect of this matter.

Negligence

The issue before this Court is whether the pleading discloses that Mr Prince was owed a common law duty of care. The relevant paragraphs in the statement of claim are:

21. AT about the end of 1983 Jane Richards of Auckland advised the Department of Social Welfare (hereinafter called 'DSW') that neither Mr Prince nor Mrs Prince was looking after the First Plaintiff or was prepared to look after him.

22. DSW did nothing.

23. THE First Plaintiff thereafter, although still a young person, had to look after himself as best as he could, and thereafter mixed in inappropriate circles and became for a time a 'street kid'.

24. DSW, in its failure to do anything about the advice it received as referred to in paragraph 21 above, was negligent.

Particulars

- (1) It failed to investigate the complaint adequately or at all.
- (2) It made no attempt to exercise its powers under the Children and Young Persons Act 1974.
- (3) It failed to take any steps to ensure that the First Plaintiff was adequately housed, educated, and cared for.

25. AS a consequence of that negligence, the First Plaintiff's life was seriously and detrimentally affected in that, in his crucial teenage years, he:

- (a) had no home or home life;
- (b) had no adult caring for him in any way;
- (c) had no one responsible for his continued education and guidance;

- (d) eventually ended up in prison;
- (e) suffered impairment of his personal and intellectual development;
- (f) suffered emotional abuse.

The breaches of duty can only be sourced to the Children and Young Persons Act 1974, and in essence the claim is for unreasonably failing to exercise statutory powers, or perhaps for exercising them without due care. The scheme and the relevant provisions of the Act are helpfully set out in Richardson P's judgment, and it is sufficient for my present purpose to refer, but in that context, to s5(1) and (2) and to s27(1) which provide:

S5(1) and (2)

- (1) It shall be the duty of the Director-General to take positive action and such steps under this Act as in his opinion may assist in preventing children or young persons from being exposed to unnecessary suffering or deprivation or from becoming seriously disturbed or from committing offences.
- (2) In pursuance of the duty imposed on him by subsection (1) of this section the Director-General shall arrange -
 - (a) For prompt inquiry where he knows or has reason to suspect that any child or young person is -
 - (i) Suffering or likely to suffer from ill-treatment or from inadequate care or control; or
 - (ii) By reason of his behaviour, causing serious concern to his parents, guardians, or teachers:
 - (b) For the provision of such assistance, whether financial or otherwise, as the Director-General considers reasonable to any parent, guardian, child, or young person or to the person for the time being having the care of the child or young person where, in the opinion of the Director-General, such assistance is likely to assist in overcoming deficiencies in the care of the child or young person or to improve the behaviour of the child or young person

- (c) For inquiry into any allegation that any child or young person who is being cared for, whether by the day or intermittently or continuously, away from his parents or guardians is not being properly cared for or is being cared for under conditions that are not suitable for his training or development.

S27(1)

Any member of the Police or any Social Worker who reasonably believes that any child or young person is in need of care, protection, or control may make a complaint under this section requiring the child or young person to be brought before a Children and Young Persons Court to have the matter heard and determined in accordance with the provisions of this Act.

A young person is considered in need of care, relevantly for present purposes, if:

- (a) His development is being avoidably prevent[ed] or neglected; or
- (b) His physical or mental health, or his emotional state, is being avoidably impaired or neglected; or
- (c) He is being, or is likely to be, neglected or ill-treated; or
- (d) His parent or guardian or the person for the time being having care of him, -
 - (i) Has failed or is failing to exercise the duty and care of parenthood; or
 - (ii) Is unable or unwilling, to carry out the duty and care of parenthood.

The assertion is that the powers (or duties as they are framed in s5) should have been exercised in such a way as to prevent the detrimental consequences that are set out in para 25 of the Statement of Claim. That assertion recognises the basic formulation of the duty of care in the tort of negligence - a duty to take reasonable care to avoid foreseeable harm. It is, in my view, important at the outset of the

inquiry to identify the duty being propounded. Put shortly, the duty contended for here is to take reasonable steps by exercising statutory powers to terminate the inadequate care and control to which Mr Prince was then subjected. In my view it is inappropriate to confine consideration to the issue of inquiry into a complaint. It is Mr Prince's case that steps should have been taken to protect him. It must follow that the contention is there was a duty to protect. Performance of the duty would require inquiry as a first step, but also required would be subsequent action if protection was to result. On its own, failure to inquire is insufficient and, in the absence of a failure to take reasonable consequential follow up action, falls short of establishing entitlement to damages. Section 5(2) itself recognises that the duty to inquire promptly is one to be exercised in pursuance of the overall duty imposed by subs (1), and is therefore part of it.

Although proximity in relationship as between the Department and Mr Prince in the sense required for the tort of negligence was argued in this Court, I am satisfied that the test is met in the circumstances, again for the reasons set out by Richardson J. The crucial enquiry there is whether wider policy considerations are such that it is just and reasonable to impose this duty of care. As I understand the position, it is common ground that there is no comparable New Zealand case where such a duty has been imposed, and the question is whether this extension should be recognised.

I accept that the question must be considered on the assumption that there may be justiciable issues, for example a failure to consider the complaint at all, or the unreasonableness of the failure to take steps to remove Mr Prince from the care of his adoptive parents. I also accept that the enquiry must be on "a worst case scenario", and if the appellant is to succeed it will be because the conclusion is that whatever was done or was not done in this case (matters presently unknown), no duty is imposed. In this context the true factual situation would seem to be relevant to the question of breach, rather than existence, of a duty of care.

The procedures available to the Department to provide protection for a child or young person in a case such as the present are important. If the result of an inquiry is that a social worker reasonably believes the child or young person is in need of care, a complaint may be made under s27. If complaint is made, there is a Court hearing. The Court is empowered to appoint the Director-General as guardian of the child or young person, or to place the child or young person under the supervision of the Director-General. Removal from the care and control of parents is in the hands of the Court. Procedural requirements are laid down, including the need for a report from a social worker (s41), and in the case of a child a probable initial referral to the Children's Board (s27(2A)). The importance of this framework, which includes the possible involvement of police, teachers, doctors and others, is twofold. First, it demonstrates that the avoidance of harmful consequences such as those pleaded here involves a carefully constructed and integrated process, resulting ultimately in the Court taking the final necessary steps in the exercise of a discretion. Second, if a duty of care is imposed on the Department, it would be logical to apply it not only to the specific obligations in s5(2)(b) and (c), but also to the general obligations set out in s5(1) and to other statutory duties or powers given for the purpose of ensuring protection of children and young persons who are in need of care and control.

So far as the Department is concerned, it is significant that under s5(1) the duty of the Director-General is to take such positive action and steps under the Act as in his opinion may assist in preventing certain consequences. That wording would seem to detract from the argument for grafting a common law duty of care on to the statutory powers.

There are several factors which in my view point strongly against the imposition of this particular duty, namely

- (1) removing or remedying the status of being in need of care protection or control lies ultimately with the Court, a process which involves inter disciplinary input;
- (2) there are likely to be difficult areas of judgment and evaluation, with a possible need for prompt decisions on those;
- (3) conflicting interests may require consideration;
- (4) potential tortfeasors may act defensively, to the possible ultimate detriment of the young person;
- (5) the problems of linking the damage claimed to any breach of duty must be substantial, if not in many cases overwhelming;
- (6) breaches of duty are likely to be historical, with resulting difficulties in ascertaining the relevant facts;
- (7) the width of the duty.

As against those, factors which justify the imposition of the duty include:

- (1) the need to provide a remedy for a wrong - the wrong being the failure to carry out a statutory obligation;
- (2) the lack of alternative accountability on the part of those entrusted with the statutory duties - those suggested by the appellant, namely recourse to judicial review or by way of complaint to the Ombudsman, appear to be of marginal value; the significance of the Office of Commissioner for Children under the 1989 Act must be doubtful;
- (3) public expectation, which is probably closely associated with accountability.

I accept that these three are significant, and cannot be treated lightly. However when weighed in the overall balance, they do not lead me to the conclusion that it is just and reasonable to impose the duty I have tried to identify. In reaching this conclusion, I am also mindful that in this particular case all that is contended is that

express statutory powers have not been exercised, either at all or with care. Yet it is accepted that an action for the tort of breach of statutory duty does not lie. Of course that is not and cannot be determinative. It is however in my view relevant when the whole scheme of the legislation is considered.

It is important to remember that we are concerned not with negligent acts or omissions incidental to carrying out the statutory duties or powers, but with carrying them out in a negligent manner, including a negligent failure to carry them out at all. The distinction is important, because if the claimed common law duty is not recognised, it does not mean that all careless conduct is protected from civil liability. For example a social worker would be civilly liable if a young person's property was damaged as a result of the worker's negligent driving of a motor vehicle when transporting the young person in the course of assisting in the execution of a warrant obtained under s28(1).

I return to what I consider to be a proper identification of the common law duty, which highlights its extreme nature. Mr Prince is seeking damages for in effect having suffered bad parenting after 1983, something for which his parents are not liable. I am not persuaded that the Act was seen as creating such a liability on the part of the Department and its officers. It is also a liability which for compensation purposes must exclude personal injury, even though personal injury will frequently be a feature of the lack of care envisaged by the Act as requiring attention. Ill-treatment certainly includes the infliction of personal injury, and is something expressly covered in the very provision relied upon (s5(2)(a)(i)). Yet liability for personal injury was removed only two years previously by the 1972 Accident Compensation legislation. It would seem unlikely that in 1974 a new but limited liability for harm, likely to be extremely difficult to separate out from personal injury in many cases, was envisaged. The overall indications are, in my judgment, to the contrary.

In the course of argument some reliance was placed on s41(8) of the Act as indicating common law liability for negligence at least on the part of a social worker, was envisaged. It states:

Any Social Worker who furnishes, and any principal or head teacher who supplies, any report under this section shall not be under any civil or criminal liability in respect thereof unless he has acted in bad faith or without reasonable care.

It was introduced by the 1982 amendment. The reason is not evident from a reading of the Parliamentary Debates. I do not think it lends weight to the argument in favour of imposition of the duty. Under s41(7) a social worker can, or can be required by a Judge, to report in respect of a complaint under s27. The social worker can for this purpose obtain information from a principal or head teacher. The subsection does not purport to create any criminal liability. Neither does it purport to create civil liability. It simply gives protection unless there has been bad faith or lack of reasonable care. Any cause of action in the civil area must be found elsewhere. Examples could be defamation and disclosure of confidential information. The provision is entirely consistent with the absence of a common law liability attaching to the powers and duties imposed by the Act including the provision of a report by a social worker - indeed it could hardly have application to such a liability, which by definition envisages the absence of reasonable care.

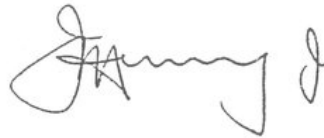
I have not found it necessary to embark on a consideration of the case law - the issue is really to be determined on a consideration of the statute itself. Cases such as *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 are helpful but of limited assistance when it comes to an evaluation of the New Zealand 1974 Act, and what is or is not to be seen as an appropriate extension of existing duty of care situations. In my judgment it is not just and reasonable to impose on the Department an actionable duty of care of the kind presently proposed.

Fiduciary Duty

There is an alternative claim based on breach of fiduciary duty. In the particular circumstances I do not think that can succeed. Again, the only allegations are the same as those pleaded in the claim for negligence. Bad faith as such, evidence of which would have to be available to a plaintiff before it can properly be pleaded, is not alleged. In my judgment the present allegations cannot found an action based on breach of fiduciary duty. Even assuming the Department comes into a fiduciary relationship with every child or young person who comes under its jurisdiction, the existence of that relationship cannot impose duties of care which are not otherwise actionable under the general law.

Conclusion

For the above reasons I would strike out all causes of action.

A handwritten signature in black ink, appearing to be 'J. Collins', written in a cursive style.**Solicitors**

Crown Law Office, Wellington, for Appellant

Judith Collins & Associates, Auckland, for Respondents

BETWEEN

THE ATTORNEY-GENERAL

Appellant

AND

R D PRINCE and R V GARDNER

Respondents

Coram: Richardson P
Henry J
Thomas J
Keith J
Tipping J

Hearing: 10 and 11 September 1997

Counsel: Solicitor-General J J McGrath QC and W G Liddell for Appellant
R S Chambers QC for Respondents

Judgment: 25 November 1997

JUDGMENT OF TIPPING J

When a defendant carelessly causes foreseeable harm to a plaintiff, the law must decide whether the defendant should compensate the plaintiff for the harm caused. That question depends on whether the defendant owed the plaintiff a duty to exercise reasonable care to avoid that harm. How then does the law decide whether a duty of care was owed in the particular circumstances?

The primary considerations are proximity and policy. If statutory provisions are responsible in whole or in part for placing the plaintiff and the defendant in a relationship of sufficient proximity, those provisions will be an important ingredient

in deciding whether in policy terms the relationship so created supports the existence of a common law duty of care. So it is in this case. We are concerned with relationships created in two statutory environments; first the Adoption Act 1955 and second the Children and Young Persons Act 1974.

I agree with the conclusion arrived at by Richardson P, and for the reasons he gives, that all the causes of action arising out of the adoption of Mr Prince in 1969 must be struck out. The overriding consideration of policy on this aspect of the case is that, subject to the terms of the Adoption Act itself, adoptions are intended to be final, for better or for worse. The Act does not grant, and implicitly militates against, challenges direct or indirect to the adoption itself, or to the process by which it was brought about, by means of the tort of negligence. Thus Mr Prince has no cause of action in tort for the harm he claims to have suffered as a result of the alleged negligence of the social worker or workers involved in his placement for adoption.

Similarly, Ms Gardner has no cause of action for the harm she claims to have suffered because she was given what she says was erroneous information about the parents who would adopt her baby son. While at first glance her claim for negligent misstatement might be thought to fall within conventional *Hedley-Byrne* principles, the case is novel in relation to the nature of the damage she claims to have suffered; and in any event the identified policy consideration of finality overwhelms whatever prima facie entitlement to relief she may be thought to have. The claims for breach of fiduciary duty must fall with the claim in negligence. As pleaded, they add nothing more to the negligence claims. The asserted characterisation of the duty as fiduciary cannot convert an unsustainable claim at common law into a sustainable claim in equity.

While the environment created by the Adoption Act 1955 points strongly against recognising a duty of care in tort, the position under the Children and Young Persons Act 1974 is in marked contrast. The allegation is that Mr Prince suffered harm as a result of the failure of the Department of Social Welfare to investigate and

follow up a complaint by a third party about how his parents were looking after him. There was clear proximity between Mr Prince and the Department. In the present context the Department's *raison d'être* was to prevent harm of the type Mr Prince claims to have suffered. Section 5 of the Children and Young Persons Act 1974, being the statute in force at the relevant time, cast on the Director-General of Social Welfare a duty to take positive action and such steps as in his opinion might assist to prevent harm of the very kind of which Mr Prince complains. The fact that the positive action and steps required of the Director-General were in a sense conditioned by his opinion, cannot assist him because it must be implicit he would exercise reasonable care in forming his opinion.

The Act gives the Director-General certain powers. They must have been given in the expectation that they would be exercised in aid of his statutory duty to take positive action. I see the statutory environment as supporting the imposition of a common law duty to perform the statutory duties with due care and likewise to exercise the statutory powers with due care for the protection of those to whom the duty was owed. Specifically, I consider that the statutory framework supports a common law duty to investigate with reasonable care a complaint that a child was not being looked after properly. That duty was owed to the child. It was clearly foreseeable that a failure to exercise care might lead to that child suffering harm, or further harm. It is true that careful investigation would not in and of itself obviate that harm unless follow-up action were taken. Whether one addresses that follow up action by saying that there was a further duty to take reasonable care in that respect, or as a facet of causation, need not be finally decided.

Clearly it will not be enough for Mr Prince to show carelessness in the failure to investigate. He will also have to show that such carelessness caused him qualifying harm. Specifically he will have to show by direct evidence, or by a legitimate process of inference, that had reasonable care been taken at the investigation stage, the harm which he claims was caused by its absence would, on the balance of probabilities, have been avoided. This will involve an enquiry into what would probably have happened if the complaint had been properly

investigated. There will be large issues in this area and in the area of damages, both of which are inherently difficult. Those difficulties should not, in my view, in the circumstances of this case negate the very existence of a duty of care. Any damage covered by the Accident Compensation legislation will have to be excluded. The pleadings appear to have been drawn with that point in mind.

Henry J has identified a number of factors which militate against a duty of care on this aspect of the case. I acknowledge their force, albeit I see some of them as problems relating to causation rather than duty. Notwithstanding those matters, the overriding policy factor for me is that the Act placed a positive duty on the Director-General to take action to avoid the sort of harm of which Mr Prince complains. A breach of that duty as a statutory duty is not asserted. However, I consider that if such breach was careless and caused harm, the person damaged is entitled, at least *prima facie*, to a remedy at common law. Thus the present causes of action should not be struck out *in limine* without a full appreciation of the facts of the case.

To the extent possible, the law should reflect the reasonable expectations of the society it serves. To hold that the Director-General owed no common law duty of care in present circumstances would, in my judgment, not only fail to meet society's reasonable expectations, but would cause legitimate concern as to why the breach of an express public duty afforded no private remedy to a person for whose benefit the public duty existed in the first place. It is for these reasons that I agree with what Richardson P has written on this aspect of the case.

In summary, I would strike out all the adoption causes of action but leave standing the causes of action based on the 1983 complaint.



Solicitors

Crown Law Office, Wellington, for Crown

Judith Collins & Associates, Auckland, for Respondents