SUPREME COURT OF QUEENSLAND

CITATION:	*Hood & Anor v State of Qld & Ors* [2003] QCA 408
PARTIES:	**JUDITH JOYCE HOOD** (first plaintiff/first appellant) **GREGORY JOSEPH HOOD** (second plaintiff/second appellant) **v** **STATE OF QUEENSLAND** (first defendant/first respondent) **MINISTER FOR FAMILIES, YOUTH AND COMMUNITY CARE** (second defendant/second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF FAMILIES, YOUTH AND COMMUNITY CARE** (third defendant/third respondent)
FILE NO/S:	Appeal No 6330 of 2002 SC No 8337 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2003
JUDGES:	McMurdo P, Williams JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – WHERE NERVOUS SHOCK OR MENTAL DISORDER – COMMON LAW - where appellant care provider under the family day care scheme – where police investigated possible sexual abuse – where allegations not substantiated – where police and department did not inform the appellant of completion of investigation - where appellant suffered psychiatric disorder - whether a duty of care owed to the appellant - whether learned primary judge erred in the application of *Morgan v Tame* APPEAL AND NEW TRIAL – APPEAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – FAILURE TO EXERCISE DISCRETION –

where learned primary judge dismissed appellants claim seeking leave to proceed under r 389(2) *Uniform Civil Procedure Rules* 1999 (Qld) - whether appellant had reasonable cause of action – whether the respondents suffered prejudice - whether the learned primary judge erred in finding that the pursuit of an *ex gratia* payment was not reasonable factor in causing delay

Child Care Act 1991 (Qld), s 4, s 10, s 23, s 82
Uniform Civil Procedure Rules 1999 (Qld), r 389(2)
Child Care (Family Day Care) Regulation 1991 (Qld), s 30

AMP v RTA & Anor [2001] NSWCA 186, considered
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, considered
House v The King (1936) 55 CLR 499, followed
Morgan v Tame (2000) 49 NSWCA 121, distinguished
Sullivan v Moody (2001) 75 ALJR 1570, followed
Tame v NSW; Annetts v Australian Stations Pty Ltd (2002) 76 ALJR 1348, distinguished
Tyler v Custom Credit Corporation Ltd [2000] QCA 178; Appeal No 9466 of 1999, 19 May 2000, followed

COUNSEL: M W Jarrett for the appellants
D O J North SC, with J B Rolls for the respondents

SOLICITORS: Klooger Phillips Scott for the appellants
Crown Solicitor for the respondents

[1] **McMURDO P:** The first appellant, Mrs Hood, commenced an action for negligence, breach of statutory duty, breach of contract, defamation and injurious falsehood against the respondents in the Supreme Court by writ filed on 3 October 1996. This was renewed by leave on 30 September 1997 but not served on the respondents until 28 September 1998. The cause of action was alleged to have arisen between November 1993 and May 1994. On 10 May 2001, the fourth respondent brought an application to strike out the appellant's claim for want of prosecution and Mrs Hood consented to the discontinuance of her action against the fourth respondent. By an application filed 12 March 2002, she unsuccessfully sought leave to proceed under UCPR r 389(2) in her action against the State of Queensland, the Minister for Families, Youth and Community Care and the Chief Executive, Department of Families, Youth and Community Care ("the respondents"). She appeals from the learned primary judge's order dismissing that application.

The relevant legislation

[2] UCPR r 389(2) provides:

> "(2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice."

[3] The exercise of this discretion is a wide one and will turn on the relevant circumstances of the case for determination. Nothing said in one case fetters the proper exercise of discretion in another case, which always turns on its own facts.[1]

[4] Factors relevant to determining whether the interests of justice require the granting of leave to proceed under UCPR r 389 include the time between the events alleged in the statement of claim occurring and when the defendant became aware of the commencement of litigation; how long ago the litigation was commenced; the applicant's prospects of success; whether the litigation has been characterized by periods of delay and, if so, to whom the delay is attributable; whether the applicant's impecuniosity has been a cause of the delay and whether the respondent is responsible for that impecuniosity; whether the litigation between the parties would be concluded by striking out the applicant's claim; how far the litigation has progressed; whether the delay has been caused by the dilatoriness of the applicant's lawyers; whether there is a satisfactory explanation for the delay and whether or not the delay results in prejudice to the defendant leading to an inability to ensure a fair trial.[2]

[5] Before 4 October 1993, Mrs Hood was a care provider and, according to her proposed statement of claim, licensed by the Uniting Church in Australia through the Merthyr Family Day Care Centre ("Merthyr") to provide day care for children in her own home. Mrs Hood was a family day care provider under a scheme established by the *Child Care Act* 1991 (Qld) ("the Act") and the *Child Care (Family Day Care) Regulation* 1991 ("the Regulation").

[6] The objects of the Act include:

> "(a) to provide for an effective system of licensing child care services; and
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> (b) to provide a statutory basis for the establishment of child care regulations that set standards for the provision of quality child care; and
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> (c) to ensure that child care services provide care that is a safe, positive, nurturing and educational experience for children; and
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> (d) to require child care services to provide child care programs that promote the emotional, intellectual, social and physical development of children; and
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> (e) to support families by enabling the development of a range of child care services responsive to different needs and appropriate to different stages of child rearing; and
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> (f) to encourage and support the planning and delivery of culturally appropriate child care in a multicultural society; and
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> (g) to promote the positive involvement of consumer parents and other members of the community in child care services; and
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> (h) to support the development of a cohesive and integrated child care sector; and …

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1 *Cooper v Hopgood & Ganim* [1999] 2 QdR 113, 119.

2 *Tyler v Custom Credit Corporation Ltd* [2000] QCA 178; Appeal No 9466 of 1999, 19 May 2000.

> (2) The interests of children are to be regarded as the paramount consideration under this Act."[3]

[7] The Chief Executive of the Department of Families, Youth and Community Care ("the Department") is responsible for issuing licences to providers of child care services;[4] Merthyr was a licensee. The licensee is obliged to provide safe and suitable child care[5] and has extensive obligations under the Act.[6] The licensee may approve an appropriate person to practise family day care,[7] that is, child care provided at home by a care provider.

[8] The family day care scheme is largely set up under the Regulation. The licensee of a family day care scheme, here Merthyr, manages the scheme and must keep the Chief Executive informed of the details of those engaged as family day care providers. A licensee who suspects that a child in family day care has suffered abuse whilst in that care must give the Chief Executive written notice within seven days of becoming aware of the suspected abuse.[8] The licensee must also ensure that the quality of care meets the standards provided for in the Regulation. If the licensee is satisfied that the care provider is no longer providing appropriate care for a child[9] or the behaviour of another member of the care provider's household is inappropriate for the care of the child[10] or the care provider's home is no longer a safe place in which to provide care to children[11] the licensee may suspend the care provider's certificate of approval. The licensee may only suspend a certificate of approval if the care provider has been given a reasonable opportunity to make the necessary changes or there is an immediate risk to the child.[12] The licensee acting to suspend the care provider's certificate of approval must give the care provider written reasons for the suspension and inform the care provider of his or her right to make oral and written submissions to the licensee within 14 days of the suspension.[13] The licensee must then consider the submissions and may remove the suspension with or without conditions or continue the suspension for a specified period or cancel the certificate of approval.[14] The licensee must notify the care provider of its decision and, if it acts in any of these ways, must give written reasons within 30 days of receiving the care provider's submission and inform the care provider that the care provider may appeal to the Chief Executive.[15] Any appeal must be in writing and lodged within 14 days of receipt of notice of the licensee's decision.[16] In addition, the Chief Executive may prohibit a person from providing paid care at home[17] if of the opinion that it is in the interest of the relevant children.[18]

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3 Section 4 of the Act.
4 Section 10 of the Act.
5 Section 23.
6 See Part 3 of the Act.
7 Section 80 of the Act; defined in s 3 of the Act.
8 Section 11 of the Regulation.
9 Section 30(1)(b) of the Regulation.
10 Section 30(1)(d) of the Regulation.
11 Section 30(1)(e) of the Regulation.
12 Section 30(2) of the Regulation.
13 Section 30(3) of the Regulation.
14 Section 30(4) of the Regulation.
15 Section 30(5) of the Regulation.
16 Section 30(6) of the Regulation.
17 Section 82(1) of the Act.
18 Section 82(2) of the Act.

The facts

[9] The proposed statement of claim pleads that in July 1993 the mother of a child cared for by Mrs Hood through the family day care scheme complained to Mrs Hood that the child had said things of an inappropriate sexual nature. Mrs Hood notified Merthyr who notified the Department, who in turn notified the police and the Royal Brisbane Hospital Scan Team to investigate the matter, rather than taking action under the licensing provisions. During this investigation police interviewed the appellant's husband, Mr Hood, as a suspect who may have sexually abused the child in Mrs Hood's care.

[10] On 4 October 1993 on advice of the Department, Mrs Hood's care provider's certificate of approval was suspended by Merthyr. Five weeks later in November 1993 the police and the Scan Team completed their investigation and closed their files deciding not to take further action. Mrs Hood was not notified of the closure of the investigation in a timely fashion; she only became aware of it in May 1994. She then complained to the Department about its handling of the matter, including their failure to comply with s 30(3)(b) of the Regulation which required Merthyr to give written reasons for the suspension and to inform Mrs Hood of her right to make submissions to Merthyr about the suspension within 14 days of it. It is common ground that Merthyr did not comply with s 30(3)(b) of the Regulation.

[11] One set of minutes of an outcome meeting on 22 November 1994 attended by officers from the Department, Merthyr and Mr Jory, an officer from the Police Department's Child Abuse Investigation Unit, recorded Mr Jory as reporting:

> "… as far as the police were concerned, the case had been resolved and no charges had been laid. … looking at the material in the file, the strength of the case against Mr Hood is very weak.
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> … the police can't notify the scheme regarding the outcome of an investigation, but that this can be done through the Department of Family Services."

The minutes of that meeting recorded by Heather Lord, the Acting Senior Resource Officer of the Department, differed slightly. They referred to the presence of "Peter Jaroy from Queensland Police, Child Abuse Investigation Unit" and recorded:

> "He was able only to confirm the nature of the alleged offences, and the finding that there was insufficient evidence to charge the family day care provider's husband. The officer explained however, that this was not a statement of innocence. Such cases had to be very strong to be considered able to succeed in court, and therefore for the Police Department to lay charges."

[12] The appellant lodged a complaint with the Ombudsman on 22 December 1994. On 19 January 1995 Merthyr advised the appellant it knew of no reason why her certificate of approval as a carer should not be renewed, but on 17 February 1995, the Director-General of the Department wrote to the Director of Merthyr in terms which included:

> "I refer to the outcome meeting which was convened on 22nd November, 1994 in relation to the status of Mrs Judy Hood, a care provider with the Merthyr Family Day Care Scheme.

> At the above meeting the issues associated with the suspension of Mrs Hood's registration as a family day care provider were discussed. These issues were discussed within the context of an allegation that Mrs Hood's husband had sexually assaulted a child who was in the care of Mrs Hood. These allegations have been investigated by the Police and to date no charges have been laid.
>
> In view of the need to ensure that young children are not at risk, my advice is that children not be placed by the Merthyr Family Day Care Scheme within the Hood household. This advice confirms the oral information provided by Departmental officers at the outcome meeting of 22nd November, 1994.
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> I trust that this advice will assist members of the Management Committee in the matter of Mrs Hood's status as a family day care provider."

[13] The Ombudsman referred the complaint to the Department on 14 March 1995. On 2 May 1995, the Department again advised Merthyr that children not be placed with the appellant; they did not prohibit Mrs Hood from providing day care.[19]

[14] Mrs Hood deposes that she issued the writ on 3 October 1996 to preserve her rights, pending her pursuit of an ex gratia payment from the Department through the Ombudsman's investigation. In both his report of 7 August 1997 and his final report of 31 March 1998 the Ombudsman was of the view that the Department had not properly managed the matter; he advised the Department to enter into meaningful negotiations with Mrs Hood to achieve an acceptable compensation package by way of an ex gratia payment for loss of earnings, legal expenses incurred in obtaining redress and for personal suffering as a consequence of the inappropriate way in which the investigation was handled.[20] Between 8 May 1998 and 21 August 1998 negotiations continued between the appellant, the Ombudsman and the Department as to compensation. On 12 June 1998, the respondents requested any medical or psychiatric reports justifying Mrs Hood's claim for pain, suffering and stress but the material before this Court does not suggest these were provided, and certainly the respondent did not receive any psychiatric reports of Mrs Hood's condition.

[15] On 21 August 1998, the Director-General of the Department wrote to the appellant apologizing in these terms:

> "On behalf of the department, I wish to express my regrets for the trauma that Mr and Mrs Hood have experienced. I apologise to them unreservedly."

The Director-General indicated a preparedness to affix the following notation to every Departmental file concerning the appellant and her husband:

> "It should be noted that a full Police investigation has been conducted into the allegations raised against Mr Hood and that the investigation concluded on the basis that no evidence of any

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19 Section 82 of the Act.

20 It is not suggested the Ombudsman's report would be admissible at trial; it is led as an explanation for the delay.

> impropriety could be found on the part of Mr Hood. At no time has Mr Hood ever been charged with any offence in relation to this matter and there are no matters outstanding or under investigation in this regard."

[16] Mrs Hood changed solicitors in September 1998. On service of the writ on 29 September 1998 Mrs Hood's solicitors advised the respondents that an appearance was not required because of the continuing negotiations.

[17] On 30 April 1999, the appellant sought medical advice relevant to the claim for damages but no report was received until 13 September 2000. It seems she changed solicitors again in June 1999 and this may have been a partial cause of the further delay during this period although there is no direct evidence to that effect. In that report, psychiatrist Dr David Alcorn, who examined Mrs Hood for the first, and at the time of the report, only time on 31 August 2000 for less than two hours, noted that in late 1993 after police involvement she developed a number of anxiety symptoms, mostly agitation, but before Christmas that year she had severe fears and could not walk out her front stairs. By early 1994, she had sufficient diagnostic criteria for Panic Disorder. During 1994, a major depressive disorder developed. After she learned in mid-1994 that the police investigation was closed, she moved from being anxious and depressed to additionally being angry. In 1995, her condition intensified with near-melancholic features. The actual conduct of the litigation and changes of solicitors has added to her distress. Her major depressive disorder has remitted with medication, as has her panic disorder with agoraphobia, but the latter still remains prominent and is concurrent with her anxiety and panic attacks. In answer to a question from Mrs Hood's solicitor as to whether the psychiatric condition resulted from the delay by the Department and Merthyr in notifying her of the completion of the police investigations or whether the condition developed from the investigations themselves, Dr Alcorn noted:

> "The chronology provided by the subject does suggest that although she did develop a lesser psychiatric condition (probably that of an Adjustment Disorder with Depressed Mood) as a consequence of the initiation of the police investigation in October 1993, from early 1994 there was a gradual evolution of psychiatric symptomatology such that by mid-1994 when she was notified of the police's lack of interest in the case, there was clearly established psychiatric illnesses of Major Depressive Disorder and Panic Disorder with Agoraphobic symptoms. After notification, there was also a significant increase in mood lability associated with anger."

[18] In February 2001, counsel was briefed to draft the proposed statement of claim. On 23 April 2001, Mrs Hood notified the respondents of her intention to proceed with her action. This was the first time the respondents became aware that Mrs Hood had suffered psychiatric harm. Only on 12 March 2002 was the application for leave to proceed filed, five and a half years after the writ was issued and about eight years after the cause of action is alleged to have arisen.

The primary judge's decision

[19] The learned primary judge noted the considerable delay in pursuing the action and determined that the real reason for the delay was the appellant's choice to pursue her complaint through the Ombudsman rather than her impecuniosity, which did not

prevent her retaining a solicitor and issuing a writ to preserve her rights should she be unsuccessful with the Ombudsman.

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

[21] His Honour determined that the respondents had suffered significant prejudice because of the nature of the psychiatric condition the appellant now claims to have suffered eight years ago and because of her delay in obtaining a psychiatric report relying on *Brisbane South Regional Health Authority v Taylor*.[24]

[22] His Honour concluded that Mrs Hood had failed to show good reason why he should give leave to proceed because of her unlikely prospects of success, prejudice and the extensive delay attributable to her decision to pursue her claim against the Department through the Ombudsman and so dismissed the application.

The appellant's case

[23] In her proposed draft statement of claim, Mrs Hood now only seeks to pursue her cause of action against the respondents in negligence. Her complaint is that she was not informed in a timely manner by the Department that the police investigation had been completed by 11 November 1993. The Department took no steps to revoke the direction that her registration as care provider be suspended; nor did it take steps to have her registration as care provider reinstated. She claims that in those circumstances the Department's officers knew or ought to have known that failure to take such steps could cause injury, loss and damage to her. The submissions made on behalf of Mrs Hood have focussed on the contention that the Department was under a duty to advise her that the police and the Scan team had closed their file investigating her husband and that, through the Department's officers, the respondents ought to have foreseen that she may have become distressed and suffer psychiatric injury if she believed that police and the Scan team enquiries involving her husband continued beyond about January 1994.

[24] The appellant contends that the learned judge erred first, in the application of *Morgan v Tame*[25] and second, in the exercise of his discretion by failing to give sufficient weight to the facts that Mrs Hood had a reasonable cause of action; that the delay was caused by her solicitors; that it was reasonable for her to pursue an ex

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21 [2000] NSWCA 121. At that time the High Court had given special leave to appeal but had not determined the appeal.

22 [2001] NSWCA 186 at [115].

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

24 (1996) 186 CLR 541, 554-5.

25 (2000) 49 NSWLR 21.

gratia payment through the Ombudsman and that there was no prejudice to the respondents.

[25] This is an appeal from an exercise of discretion and to succeed the appellant must show the learned primary judge erred in some way or the decision was unreasonable or plainly unjust; it is not enough that the judges of this Court may have acted differently: *House v The King*.[26]

The judge's application of *Morgan v Tame*

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

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

[27] *Morgan v Tame*, referred to by his Honour, on appeal to the High Court became *Tame v New South Wales*, a decision heard and reported in conjunction with *Annetts v Australian Stations Pty Ltd*.[30] *Annetts* was a claim for damages for psychiatric injury resulting from the disappearance and death of the Annetts' 16 year old son who was employed as a jackeroo with the respondent. The Annetts agreed to allow

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26 (1936) 55 CLR 499, 504-505.
27 (2001) 75 ALJR 1570.
28 At 1580, [60].
29 1580-1581.
30 (2002) 76 ALJR 1348.

their son to work for the respondent only after its assurances that the boy would be working under constant supervision and would be generally well cared for. The duty Mrs Hood seeks to rely on here is quite different from that in *Annetts*. There, the duty arose out of the assurance of the employer to the parents to supervise and take care of their son so as to avoid inflicting harm on the parents.[31] There is nothing of that kind here.

[28] *Tame* concerned a claim for damages for psychiatric injury arising from an incorrect blood alcohol reading recorded by a police officer in a Traffic Collision Report. Gleeson CJ reaffirmed in *Tame* the principles espoused in *Sullivan v Moody*;[32] the police officer was under a duty to fill out a report for his superiors; it would be inconsistent with that duty to require him to take care to protect from emotional disturbance and psychiatric illness someone whose conduct was the subject of the investigation. Gaudron J also found there was no special relationship between Mrs Tame and the police officer which could give rise to a duty of care to her;[33] he was not under a duty of care to take reasonable steps to avoid a risk of psychiatric injury to her, assuming such an injury was foreseeable;[34] such a duty was incongruous and may give rise to incompatible duties (approving *Sullivan v Moody*) if a person charged with the investigation of a possible offence were to owe a duty of care to the person whose conduct is the subject of that investigation. Hayne J reached a similar conclusion.[35]

[29] Although there may be nothing irreconcilable between the respondents' paramount duty to protect the interests of children here and any duty that may exist on the part of the Department to keep Mrs Hood informed of the completion of an investigation by the Police Department and the Scan team concerning one of the children in her care and her husband, it remains doubtful whether such a duty exists. In *Tame*, Gleeson CJ,[36] Gaudron,[37] and Hayne JJ[38] found that an investigating police officer owed no duty to a person whose conduct is under investigation to protect them from emotional and psychiatric injury, and Gummow and Kirby JJ thought it unlikely that such a duty was owed.[39] It seems even less likely that the Department would owe a duty of the type claimed to Mrs Hood. Her counsel contends, however, that *Sullivan v Moody* and *Tame* can be distinguished because she was not the victim of the Department's mistake but the victim of the Department's carelessness, amounting to a failure to conform to a legal obligation it owed to her. I cannot see that this distinction supports the existence of a duty of the type contended for on behalf of Mrs Hood or that *Sullivan* or *Tame* supports that contention.

[30] Although the Chief Executive of the Department could prohibit the appellant from carrying out paid family day care[40] that did not happen here. The scheme for family day care under the Regulation is arranged so that there is no direct relationship between the respondents and Mrs Hood. Any relationship is by way of the

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31 Supra, Gleeson CJ [37], Gaudron J [54], Gummow and Kirby JJ [144], Hayne J [301]-[304], Callinan J [357].
32 1354, [24].
33 [55].
34 [56].
35 [298]-[300].
36 [24]-[27].
37 [56].
38 [298]-[300].
39 Ibid, [231].
40 Section 82 of the Act.

intermediate licensee, Merthyr, against whom the appellant's action has been discontinued. The relationship between the Department and Mrs Hood was not an especially proximate one. If a police officer does not have a duty to inform someone under investigation of the outcome to avoid foreseeable emotional and psychiatric damage, which seems to be the effect of *Tame*, the respondents, whose relationship with the appellant was more remote, are even less likely to be under such an obligation.

[31] The decision in *Tame* had not been delivered at the time of the primary decision; had it been, his Honour's reasons for concluding that the appellant had unpromising prospects of success would have been differently expressed but his conclusion would almost certainly have been the same. It follows that the first ground of appeal, that his Honour erred in the application of *Morgan v Tame*,[41] fails.

The primary judge's exercise of discretion

(1) Prospects of success

[32] The appellants' prospects of success are a factor to be taken into account in deciding whether to give an order under UCPR r 389(2). It is not necessary for the respondents to establish that she has no prospects of success but if this were established, there would be no point in giving the order sought. On the other hand, a finding that Mrs Hood had excellent prospects would be an important factor weighing in favour of giving the order. Here, for the reasons discussed above, her prospects were not promising. The difficulties with Mrs Hood's cause of action do not end with her ability to establish the respondents owed her a duty of care. The psychiatric evidence before the court by no means establishes that any psychiatric problems she may have were caused by the failure of the respondents to inform her of the completion of the police and Scan team investigation rather than the investigation itself.

[33] That is not to say that had Mrs Hood complied with her obligations under the UCPR she would necessarily be prevented from pursuing her claim and testing the boundaries of the law of negligence resulting in psychiatric harm on facts established at a trial. She has not, however, complied with those obligations and it is sufficient for the purposes of this application to conclude that her prospects of success are not promising and do not favour the giving of the order she seeks.

(2) The question of prejudice

[34] The respondents contend they will suffer prejudice of the general type referred to by McHugh J in *Brisbane South Regional Health Authority v Taylor*,[42] especially because of Mrs Hood's claim of psychiatric injury. The risk of general prejudice is moderated here; the respondents have been aware of and focussed on Mrs Hood's grievance since 1994, because of the early correspondence from her solicitors and the investigation by the Ombudsman. It is also true that the background facts are largely not in dispute. The respondents have not, however, had notice of Mrs Hood's claim for psychiatric illness until much more recently. Whilst the Ombudsman's preliminary report of 7 August 1997 urged the Department to consider Mrs Hood's personal suffering, it did not directly alert the respondents to the fact that she had psychiatric injury. The respondents requested that Mrs Hood send them reports of any psychiatric injury on 12 June 1998 but it seems no report

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41 fn 25.

42 (1996) 186 CLR 541, 556.

was forthcoming. Common sense suggests that the lengthy delay will make it much more difficult for the respondents to authoritatively test the cause of any psychiatric problems Mrs Hood may have and whether they relate to the alleged breach of duty rather than to the police and Scan team investigation. As a result the respondents will suffer prejudice because of the lengthy delay in that it will be more difficult for them to have a fair trial of the issues.

(3) Explanation for the delay

[35] The appellant deposed that the primary reason for the delay was because she wanted to resolve her case without resort to litigation though the court system. The Ombudsman took almost four years to complete his investigation. Her solicitors wrote to the Ombudsman and to The Speaker of the Queensland Parliament in an effort to expedite a response from the Ombudsman. Negotiations between the parties broke down after the second Ombudsman's report in March 1998. Even from that time, there was considerable subsequent delay whilst the appellant sought legal advice, obtained a medico-legal psychiatric report and briefed counsel to draft the proposed statement of claim before she filed the application for leave to proceed on 12 March 2002. Mrs Hood also deposed to her belief that delay was caused by the respondents' tardiness in supplying relevant information eventually obtained through the freedom of information process and that, despite her efforts, much documentation has still not been disclosed. There was a further delay of about three or four months whilst the appellant obtained funds from a bank to progress the litigation; she deposed that both she and her husband are of limited financial means; she has not had paid work since 4 October 1993 and their joint weekly income is "extremely modest".

[36] It is clear that the main reason for the delay was Mrs Hood's exercise of her apparently informed choice to pursue redress through the Ombudsman rather than to pursue in a timely fashion any cause of action she may have. This may have been a reasonable decision for her to make but it does not alone, or when combined with the other matters raised, provide an explanation justifying a favourable exercise of judicial discretion under UCPR r 389(2). A satisfactory explanation for the delay is not a condition precedent to the granting of leave to proceed: *Dempsey v Dorber*[43] but Mrs Hood must show that there is a good reason for excepting these proceedings from the general prohibition of continuing after a delay of two years or more from the last step taken in the proceeding.

(4) Other Factors

[37] Mrs Hood did depose to her husband's and her limited financial means and it may have been inferred that this is, at least in part, a result of her inability to work as a family day care provider for some years, something for which she claims the respondents are responsible. Mrs Hood's unlikely prospects of success in the action do not make the last-mentioned contention convincing. The material did not compel his Honour to conclude that her impecuniosity has been either a significant cause of the delay or that this was the fault of the respondents.

[38] Because of the lengthy delay here, the refusal of Mrs Hood's application for leave to proceed will mean that her claim will be struck out and it will be fruitless to issue new proceedings which would be statute-barred. A decision to refuse the

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43 [1990] 1 QdR 418.

application will effectively end the action: such a decision is not lightly undertaken.[44]

[39] It is true that Mrs Hood has not contravened court orders in delaying this action but that factor must be looked at in the context that the litigation had barely commenced with not even a statement of claim filed or served at the time of the application. This does not support the granting of Mrs Hood's application.

[40] Contrary to Mrs Hood's submissions on appeal, the material before his Honour did not require him to infer that the delay had been caused by the dilatoriness of Mrs Hood's lawyers; rather it suggested that it was because she had made an apparently informed decision to pursue an alternative course in her quest for redress.

[41] For the reasons I have set out, Mrs Hood's prospects of success in this action are unpromising. There has been very substantial delay in her pursuit of this litigation: the cause of action arose in 1994 and no steps have been taken in the action for many years. Mrs Hood's primary explanation has been that she pursued a remedy through the Ombudsman but her choice to pursue an alternative avenue of remedy does not entitle her to any leniency from this Court; that choice and the resulting considerable delay means that it is now much harder for her to pursue her cause of action through the court, especially when she has already received one indulgence with the renewal of her writ in 1998. The delay continued after that time with her continued pursuit for many years of her rights through the Ombudsman rather than through the courts; she only showed renewed interest in her negligence claim when she was finally dissatisfied with the outcome of the alternative avenue of remedy. The UCPR, which have been in force since 1 July 1999, require the just and expeditious resolution of matters and the avoidance of undue delay.[45] Whilst Mrs Hood has given some explanation for the delay, which also included impecuniosity, change of solicitors and other factors, his Honour was not obliged to find any one of those factors, alone or in combination, necessitated an order giving leave to proceed under UCPR r 389(2). The respondents are able to indicate the potential of some prejudice and this also supports the rejection of the application. Even though this has the result that Mrs Hood will be shut out from pursuing her claim in court, the action had not progressed beyond the serving of the writ in September 1998, four and a half years before this application.

[42] The learned primary judge in a careful judgment considered the factors relevant to the exercise of his discretion. The appellant has failed to demonstrate any error in his approach. His Honour's decision was plainly open and reasonable on the material before him.

Order

[43] The appeal must be dismissed with costs.

[44] **WILLIAMS JA:** The question for this court is whether or not, in the circumstances outlined in the reasons for judgment of the President, the appellants, JJ & GJ Hood, satisfied the court that there was good reason for giving them leave to proceed notwithstanding that no step had been taken in the proceeding as required by Rule 389 of the UCPR. The learned judge at first instance in a carefully

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44 *General Steel Industries Inc v Commissioner for Railways NSW* (1964) 112 CLR 125, 128-130, 136-137.

45 UCPR r 5.

reasoned judgment concluded that the appellants had not discharged that onus, and in the exercise of his discretion dismissed the application for leave.

[45] The events which gave rise to the alleged cause of action (which are fully set out in the reasons of the President) occurred in 1993-4. The appellant JJ Hood formally complained about the conduct of the Department of Families, Youth and Community Care in about September 1994. Thereafter on 22 December 1994 she lodged a formal complaint with the Ombudsman.

[46] The matters in issue had not been resolved by October 1996. The then solicitors for the appellants advised that a writ be filed but not served, to protect the rights of the appellants. The Ombudsman reported in March 1998 that the Department had not properly managed the matter and advised that "meaningful negotiations" be entered into in order to "achieve an acceptable compensation package by way of an ex gratia payment for loss of earnings" and other compensable losses. Thereafter there were further meetings involving the appellants, the Department, and the Ombudsman.

[47] In September 1997 the appellants had obtained an order renewing the writ, but it was not served until 28 September 1998, after there had been a change of solicitors retained by the appellants. At the time of service the defendants were advised that that steps had been taken to preserve the appellants' rights and that an appearance was not required.

[48] There was then another change of solicitors in June 1999, but no report with respect to the first appellant's medical condition was obtained until 13 September 2000. It was not until February 2001 that counsel was briefed to draft a Statement of Claim.

[49] Then the application for leave to proceed was heard on 3 April 2002.

[50] Whilst the appellants' desire to arrive at an amicable solution through discussions with the Department was understandable in the light of the Ombudsman's report, the lengthy delay (largely intentional) in prosecuting the proceedings, when combined with the learned judge's conclusion at first instance that the first appellant had only slim prospects of success (assuming a duty situation existed) in establishing that she had developed a psychiatric condition as a consequence of the way in which the issues in question were handled by the Department (a finding open on the evidence), clearly justified a refusal of the application for leave to proceed.

[51] In all the circumstances I agree with the President that the appeal should be dismissed with costs.

[52] **WHITE J:** I have read the reasons for decision of the President and Williams JA and agree with them for the reasons that they give that the appeal should be dismissed.

[53] The conclusion in *Sullivan v Moody* (2001) 207 CLR 562 in respect of claims that a duty of care was owed by persons performing their obligations under child protection legislation to persons who may be the subject of investigation that there will be no duty imposed where there could be conflicting claims or obligations has recently been considered by the English Court of Appeal. In three appeals heard together, the first-named of which is *JD v East Berkshire Community Health* [2003] EWCA Civ 1151, in facts broadly similar to *Sullivan*, the Court concluded that no

duty of care was owed to a third party if it would conflict with that owed to the child. That is not to say that there will necessarily be a blanket immunity but the plaintiffs here would have faced significant difficulties and the learned judge below was correct to conclude that the prospects of success were faint.

[54] I agree with the order proposed by the President.