Supreme Court of New South Wales

Williams v The Minister, Aboriginal Land Rights Act 1983 and Anor [1999] NSWSC 843 (26 August 1999)

Last Updated: 1 September 1999

NEW SOUTH WALES SUPREME COURT

CITATION: Williams v The Minister, Aboriginal Land Rights Act 1983 & Anor [1999] NSWSC 843

CURRENT JURISDICTION: Common Law

FILE NUMBER(S): 10257/93

HEARING DATE{S): 19/04/99, 20/04/99, 21/04/99, 22/04/99, 23/04/99, 27/04/99, 28/04/99, 29/04/99, 30/04/99, 03/05/99, 06/05/99, 07/05/99, 10/05/99, 11/05/99; 14/05/99.

JUDGMENT DATE: 26/08/1999

PARTIES:

Joy Williams - Plaintiff

The Minister, Aboriginal Land Rights Act 1983 - 1st Defendant

State of New South Wales - 2nd Defendant

JUDGMENT OF: Abadee J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

Mr N. Hutley SC; Ms C. Adamson - Plaintiff

Mr C. Barry QC; Mr D. Cowan - 1st and 2nd Defendants

SOLICITORS:

Kingsford Legal Aid Centre - Plaintiff

State Crown Solicitor - Defendants

CATCHWORDS:

NEGLIGENCE - Duty of care to whom - Aborigines Welfare Board - Common Law duty of care to protect promote and maintain child placed in its control by mother - Whether a duty of care owed to plaintiff - Novel case - Test for recognition of duty - Whether such should be recognised - No duty of care - No breach of duty - No causation;

STATUTE - Aborigines Protection Act 1909-1943 - Whether giving rise to a private right of action - Private right of action not created

EQUITY - Fiduciary relationship - Whether fiduciary relationship between child ("ward") and the Aborigines Welfare Board under the Aborigines Protection Act - Nature of relationship scope and content of duty assuming a fiduciary relationship - Whether duty of care to prevent personal injury - Whether breach of fiduciary duty - Causation - Laches, prejudice and delay as "bars" to equitable relief if entitlement established

DAMAGES - No entitlement to damages - Difficulties in any compulation - Damages highly speculative - Assessment only done contingently to assist in event of Appeal and having regard to age and general ill health of plaintiff - No entitlement to aggravatory or exemplary damages

EXPERT EVIDENCE -Nature of such - Assessment and acceptance of such - Qualifications

EVIDENCE - State of Knowledge

LAW REFORM - Whether a claim for breach of fiduciary duty (if available) arising from the same facts and circumstances relied upon to support a common law cause of action should be subject to the provisions of the Limitation Act.

ACTS CITED:

Aborigines Protection Act

Adoption Act

Child Welfare Act (NSW)

Child Welfare Act (WA)

Limitation Act

Aboriginal Land Rights Act 1983

Crown Proceedings Act 1988

Evidence Act (NSW)

Public Service Act 1902

Aborigines Protection (Amendment) Act No 12 1940

Neglected Children and Juvenile Offenders Act

Children and Young Persons Act 1974

DECISION:

Verdict and judgment for the Defendants

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

ABADEE J

THURSDAY 26 August 1999

10257/93 - Joy WILLIAMS v THE MINISTER, ABORIGINAL

LAND RIGHTS ACT 1983 & Anor

HEADNOTE

The plaintiff, the daughter of an Aboriginal woman and a father of Irish descent, was born out of wedlock in 1942. The plaintiff following her birth was placed on her mother's application under the control of the Aborigines Welfare Board, a Board constituted under s 4(1) the **Aborigines Protection Act 1909-1943**. The plaintiff was placed under the Board's control pursuant to s 7(2) of the Act. She remained under its control until she turned 18. In accordance with its practice, for the benefit of the child, the plaintiff was placed by the Board with the United Aborigines Mission at its Aborigines Children's Home at Bomaderry for the purposes of providing for her custody, maintenance, upbringing and care. At the age of four and a half years, the plaintiff, whilst still a ward, was transferred in 1947 to the Lutanda Children's Home at Wentworth Falls, a home conducted by members of the Plymouth Brethren faith. There she was brought up, cared for and maintained, as a ward of the Board, between 1947 and 1960.

In 1993 the plaintiff commenced proceedings against the defendants claiming that she had developed a Borderline Personality Disorder (and substance abuse disorder) as the result of her childhood experiences. She further claimed that as a child she was denied bonding and attachment, had been a victim of maternal deprivation and further suffered a disorder of attachment.

The plaintiff alleged that her psychiatric injury was due to the default of the defendants. The plaintiff claimed damages for negligence, breach of fiduciary duty, breach of statutory duty

and for trespass. The plaintiff sought to recover very substantial damages for her misfortunes, upbringing and her disturbed and unhappy life, as well as for her claimed psychiatric injury, harm, mental and emotional problems and difficulties. She also sought to recover exemplary and aggravatory damages.

Held

1. There was no duty of care, breach of duty or relevant causation established. The plaintiff's action in negligence failed;

2. No trespass was established. No private action for breach of statutory duty was available;

3. Assuming a fiduciary relationship (not decided) there was no breach of fiduciary duty. In any event had a fiduciary duty or breach of fiduciary duty been established there would have been a basis for denying equitable compensation by reason of laches, prejudice or delay;

4. Any assessment of damages or equitable compensation was highly speculative, however, a "contingent" assessment of damages was appropriate in the circumstances;

5. There was no entitlement to exemplary or aggravatory damages in any contingent assessment.

THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

ABADEE J

THURSDAY 26 August 1999

10257/93 - Joy WILLIAMS v THE MINISTER, ABORIGINAL

LAND RIGHTS ACT, 1983 & Anor

JUDGMENT

INTRODUCTION

1 **HIS HONOUR:** The plaintiff, Joy Williams by her tutor, by her Further Amended Statement of Claim sues the Minister responsible for the **Aboriginal Land Rights Act 1983** ("the first defendant") and the State of New South Wales ("the second defendant"). She claims damages from them. Further or alternatively, she claims equitable compensation.

2 A tutor was appointed shortly before the trial on 12 April 1999. The plaintiff in March had been admitted to hospital with a clinical diagnosis of psychosis and there is no dispute that the plaintiff is and has been unable to give oral evidence at the trial.

3 The first defendant is sued upon the basis, by statute, that the Minister is the legal entity against whom claims made against the Aborigines Welfare Board ("AWB" or "Board") must be brought. The Board was constituted under s 4 of the **Aborigines Protection Act 1909-1943** ("the Act"). The second defendant, it is said, is liable to be sued pursuant to s 5 of the **Crown Proceedings Act 1988** and is said to be vicariously liable for the acts of the first defendant and the Board.

4 The defendants (appearing by the same counsel) have submitted that the second defendant is not personally liable because the express provisions of s 5 of the **Crown Proceedings Act 1988** exclude claims or demands against a statutory corporation representing the Crown and that the first defendant is such a statutory corporation representing the Crown: **Aboriginal Land Rights Act 1983** s 50. It also submitted that the second defendant is not vicariously liable for the acts of the first defendant and the AWB. In his written submissions in reply counsel for the plaintiff stated he did "not take issue with the submissions of the defendants in this regard". It is appropriate to here record also that the case pleaded is a case against the AWB, and that no action is pleaded or alleged against the State of New South Wales in respect of any "activity" or breach or breaches of any duty involving the former Child Welfare Department of the Government of New South Wales.

5 Before turning to the pleadings its is important from inception to make clear that the case does not concern so called "Stolen Generation" issues. The plaintiff was not a member of the "Stolen Generation" as that expression is used: cf **Cubillo v The Commonwealth of Australia** (1999) FCA 518 (30 April 1999). So much will appear from the reasons herein.

The Pleadings

6 It is convenient to summarise the allegations made in the Further Amended Statement of Claim. That document is some nineteen (19) pages in length and contains numerous allegations of negligence and breach of duty.

7 The plaintiff alleges she was born on 13 September 1942 and that her mother was an Aboriginal. It is alleged that the AWB assumed the role of guardian and placed itself in loco parentis viz-a-viz the plaintiff "**by taking** the plaintiff from her natural mother and assuming custody of her. It is claimed that the AWB owed the plaintiff a duty of care including to supervise her upbringing; to monitor at regular intervals the care she was receiving; to interview the plaintiff regularly for purposes of assessing her well being; to investigate or inquire into allegations of maltreatment; to acquaint the plaintiff from time to time with details of her mother's whereabouts; to take reasonable care to safeguard her mental and physical well-being.

8 Shortly after the plaintiff's birth the plaintiff alleges that in the exercise of its powers under the Act (and particularly s 11B thereof), the AWB placed the plaintiff in the custody of the United Aborigines Mission (UAM) which placed the plaintiff in its Aboriginal Children's Home at Bomaderry (NSW).

9 The plaintiff alleges that by "removing the plaintiff from her mother" the AWB breached its duty of care by failing to facilitate the bond between the mother and the plaintiff; removed the plaintiff in circumstances where the Board was not in a position to provide an adequate substitute for the plaintiff's mother in the form of a caring adult who would be likely to "form a reciprocal attachment for the plaintiff and thereby ensure or promote her healthy psychological development"; failed to take precautions for the psychological well-being of

the plaintiff and exposed her to a risk of psychological harm. It is also alleged that the AWB failed to take adequate steps to permit the plaintiff to remain with her mother.

10 It is also said that by placing the plaintiff at Bomaderry the AWB knew or ought to have known Bomaderry was an institution in which the plaintiff would have no or inadequate opportunity to form an attachment with a caring adult which was necessary for her psychological well-being; that the plaintiff would inevitably suffer from "maternal deprivation" which would require treatment and change of circumstances to reverse; and that Bomaderry was overcrowded so that formation of close emotional attachment between the plaintiff and a caring adult was unlikely to occur.

11 It is alleged that by requiring the plaintiff to remain at Bomaderry until the age of four years there were further breaches of duty in failing to provide a proper environment whereby the plaintiff could form a close emotional attachment to "one caring adult"; failing to acquaint itself with the then state of knowledge as to the hazards to a child of the plaintiff's age of institutional life; and failing to restructure the institution to increase the likelihood of the plaintiff forming a close emotional attachment with at least one caring adult.

12 In April 1947 the plaintiff (then four and a half years old) was transferred to another home, "Lutanda" at Wentworth Falls by the AWB, which was allegedly done pursuant to s 11B of the Act or otherwise. (In her case I might add the plaintiff accepts that the transfer to Lutanda was not the subject of any allegation of negligence or lack of good faith). It is alleged that the AWB thereafter breached its duty in a number of respects. These include failing to inquire whether if the plaintiff resided at Lutanda, she would have contact with members of her family and members of the Aboriginal race; that the plaintiff would be properly looked after, and not be subjected to vilification, physical or mental cruelty or sexual abuse; failure to inquire whether the plaintiff would have the opportunity to form a reciprocal close emotional attachment with a caring adult; that the plaintiff's psychological well being would be safely guarded by appropriate care in the form of attachment and inquire that Lutanda was sufficiently cognisant of psychological learning of the day to permit damage to the plaintiff by her removal from her mother to be identified and treated.

13 Alternatively, it is alleged that the Board, when it caused or permitted the plaintiff to be placed in the institution at Lutanda, knew or ought to have known of a number of matters including that Lutanda was a place likely to prejudice her psychological well-being because of the absence of any adequate opportunity for the plaintiff to form a close reciprocal attachment with a caring adult who would look after her; that Lutanda did not operate according to the known state of psychological learning of the day and was not in a position to recognise aspects of the plaintiff's behaviour as childhood antecedents of an "attention-seeking disorder" which if not treated was likely to develop into a psychiatric disorder by the time the plaintiff reached late adolescence or adulthood.

14 It is alleged that at Lutanda the combination of the plaintiff's relatively fair complexion and her Aboriginality carried with it certain risks including that she would not be informed of her Aboriginality; that at some stage her Aboriginality would be revealed to her by Lutanda staff; that there was a chance of her not being placed in a foster home; that she would be treated differently because of her Aboriginality; and that she was likely to deny her Aboriginality. In consequence of the above matters it is said that the plaintiff was likely to be deprived of the opportunity of forming close relationships with others and with aboriginals and more particularly with at least one caring adult who would "care for the plaintiff individually and promote the development of attachment and assist in the reversal of harm

suffered by her removal from her mother at birth and institutionalisation at Bomaderry".

15 By reason of the matters so claimed it is alleged that there was a serious risk that the plaintiff:

"(i) would develop a disorder in the development of attachment (if she had not already done so at Bomaderry; or

(ii) be subjected to aggravation of a disorder in the development of attachment, which had its onset at Bomaderry which if not adequately treated or reversed would render her susceptible to a serious personality disorder in adult life".

16 It is alleged the AWB caused or permitted the plaintiff to remain at Lutanda until 1960. The following further breaches of duty were particularised in paragraph 11 of the further amended Statement of Claim in respect of the plaintiff's time at Lutanda:

"(a) failed to supervise the plaintiff's upbringing adequately or at all;

(b) failed to monitor at regular intervals or at all the care which the plaintiff was receiving at Lutanda; [in the written submissions (p 81) the plaintiff argued that for the AWB to have discharged its duty of care it would have visited the plaintiff at regular intervals "at least once a year and more frequently in earlier years"].

(c) failed to inquire as to, or investigate, any allegations of maltreatment of the plaintiff;

(d) failed to interview the plaintiff at any time for the purpose of assessing her well-being or for any other purpose;

(e) failed to provide any supervision which was sufficient to detect the vilification, physical and emotional maltreatment, the physical and mental cruelty and the sexual abuse to which the plaintiff was subjected whilst at Lutanda;

(f) failed to remove the plaintiff from Lutanda;

(g) took no steps, or insufficient steps, to ensure that persons having the care of the plaintiff were not guilty of conduct which was proscribed by the Act;

(h) failed to acquaint the plaintiff's mother with details of the plaintiff's whereabouts notwithstanding a specific request contained in a letter from the plaintiff's mother to the Board dated 10 December 1956;

(i) failed to acquaint the plaintiff with details of her mother's whereabouts;

(j) failed to ensure that the plaintiff's circumstances were reasonably adequate for her health, physical and mental well-being, maintenance, education and advancement in life; and

(k) breached each of the statutory duties which it owed to the plaintiff which are particularised in paragraph 13(a)-(c) below."

17 At the trial the plaintiff alleged that there was a failure to take the plaintiff to a Child Guidance Clinic during her stay at Lutanda and that had such been done her childhood attachment disorder problem would have been reversed and addressed.

18 The plaintiff also alleges that the defendant owed a statutory duty under s 7(1)(c) of the Act to provide for her custody and maintenance and under s 7(1)(e) to exercise general supervision and care over all matters affecting her interests and welfare and to protect her against injustice, imposition and fraud. It is alleged that these statutory provisions were each breached.

19 The particulars in support of the common law counts are also relied upon as constituting allegations of breaches of the statutory duty. In addition, it is also asserted that the AWB failed to protect the plaintiff from injustice by placing her at Bomaderry and Lutanda in institutions which the AWB knew or ought to have known were inimical to her psychological well being because they were not conducive to the development of a close emotional attachment between the plaintiff and a caring adult and in removing the plaintiff from her mother when it had no legal justification to do so. Further, it is alleged there was a breach of statutory duty including placing her in institutions where in the case of Bomaderry psychological harm was likely to result but be undetected, and in the case of Lutanda physical abuse including sexual abuse was likely to be inflicted and unlikely to be detected by the AWB.

20 Further the AWB was alleged to have been in breach of duty by failing to visit the plaintiff or make inquiries about her whilst she was at Lutanda which visits or inquiry would have revealed that the plaintiff was subjected to vilification, physical and mental cruelty and sexual abuse.

21 Next the plaintiff relied upon a cause of action in trespass (wrongful or false imprisonment) based upon a claim of being taken from her mother in September 1942 until her discharge from Lutanda in 1960.

22 The plaintiff has also made a claim for equitable compensation for alleged breach of fiduciary duty in a number of respects.

23 The plaintiff claims damages, exemplary damages, aggravated damages and equitable compensation.

24 I now turn to the defendants' defence. By its Further Amended Defence they denied negligence (including a denial of any duty of care, breach or causation). They denied trespass. They denied that an action for breach of statutory duty arose. They denied the existence of any fiduciary duty or breach thereof. Further or alternatively, in respect of the claim for breach of fiduciary duty they raised further "defence(s)" of laches and prejudice. These defences were pleaded to an action for breach of fiduciary duty but were not (and could not be pleaded) in respect of the common law causes of action.

The Nature of the Case

25 As will be seen from the above, the case does not involve what might perhaps be described as a specific single identifiable act or omission occurring at a particular time and constituting, inter alia, negligence. No specific incident, happening or event in the history from 1942 to 1960 is relied upon as giving rise to the plaintiff's claimed psychiatric or psychological conditions. Nor is there any identifiable single casual act of negligence alleged. The conduct (essentially "omission" conduct) relied upon to constitute negligence is said to have generally been of an ongoing nature throughout the period referred to.

26 The plaintiff's primary case (and which, for reasons which will appear, I accept) is that

the plaintiff was admitted to the control of the AWB on the mother's application in accordance with s 7(2) of the **Aborigines Protection Act 1909** (the Act) as amended. As will appear from this judgment I have found that the plaintiff's mother for reasons no doubt valid to herself, applied to the Board to take control of her child between the time of her birth on 13 September 1942 and the child's transfer to the United Aboriginal Mission Children's Home at Bomaderry, New South Wales on 13 October 1942. My finding is that the AWB considered the mother's application to give up control of the plaintiff to its control, and having done so, admitted the child to its control. I find that there was not any removal by the Board to the plaintiff, in the sense of taking the child against the will of the mother. The plaintiff was taken into the AWB's control because the mother did not want the child, could not keep the child and asked the AWB to take control of her: see s 7(2).

27 The primary submission made by Mr Hutley SC for the plaintiff, was that there was no unlawful removal and detention or taking of the plaintiff at any time and that there was no factual removal of the plaintiff in the sense of her having been "stolen". If there was a removal, or taking it was pursuant to the mother's request for the Board to do so. She applied or asked the Board to take control of the plaintiff and the Board acceded to her application. It is right and proper that any misconceptions, or potential misconceptions about the nature of the plaintiff's case should be removed early in my reasons for judgment. The following passages appear in the transcript (at 498):

"**HIS HONOUR:** Mr Hutley, I want to know whether at the end of the day you will be suggesting that this child is somehow or other to be described emotively or otherwise as being a stolen generation child.

HUTLEY: Your Honour will not hear me use that terminology at all because I don't think it is of assistance in a case of this variety. What we say is, and this seems to be the law, it's my learned friend that had the child under its control from its birth, or shortly after its birth, it's for them to prove it was legal".

28 The following exchange later took place between the plaintiff's junior counsel and myself:

"**HIS HONOUR:** It is correct to say that [Mr Hutley] does not maintain that this particular plaintiff, to use the expression, is a member of the stolen generation, whatever that expression might mean: Is that correct?

ADAMSON: Quite, your Honour. The plaintiff's primary case is that the plaintiff's mother made an application to the Board under s 7(2).

HIS HONOUR: It would be inconsistent.

ADAMSON: Quite.

HIS HONOUR: Because the plaintiff's case is that her mother surrendered control of the child to the Board.

ADAMSON: Yes, pursuant to an application.

HIS HONOUR: And in fact made an application under s 7(2) and if indeed she surrendered the child to the Board, or asked the Board to take control of the child, then that is her application.

ADAMSON: Quite, your Honour that is the plaintiff's primary case.

HIS HONOUR: And in fact it is done at her behest.

ADAMSON: At the plaintiff's mother's request, quite, your Honour.

HIS HONOUR: Am I also correct in saying that the plaintiff's case is not that the Board in any way sought to remove the child, but that the mother requested the Board to take control of the child, for reasons best known to the mother?

ADAMSON: Yes, that's right and it appears that that occurred on or about 12 October 1942."

29 Although, as will be seen the plaintiff in her Further Amended Statement of Claim has spoken in terms of the AWB taking the plaintiff from her natural mother, that claim must be understood to involve a taking at the mother's request and not in the sense of the plaintiff being "stolen". Further, for example, the history given by the plaintiff to Dr Twomey (13 April 1999) that soon after her first child's birth, that that child was taken from her ("the third of the stolen generation") is equally not correct, despite its assertion in the history to him.

30 I find as my reasons shall make clear that the plaintiff following her birth then became a ward of the AWB within the meaning of s 3 of the Act and thereafter until the age of 18 the plaintiff remained a ward of the AWB and under its control. I further find as a fact that the plaintiff's mother at no time between 1942 and 1960 made application to the AWB or, otherwise sought to have the plaintiff released from the AWB's control, or sought her restoration to her care within the meaning of s 11D(1)(h) of the Act, nor was any discharge of the plaintiff sought at any time pursuant to s 11D(1)(i) of the Act. The reasons for such will appear later.

31 It is appropriate if I immediately record here that a number of conclusions of fact urged by the defendants (written submissions 111) were conceded to be appropriate by the plaintiff (written submissions in Reply at 51).

32 Firstly it was accepted that the plaintiff's placement at Bomaderry and/or control or custody by the AWB was lawful, being with the consent of and at request of her mother. Second, the plaintiff's "legal guardian" was at all times her mother. Third, the transfer to Lutanda was with the consent of the mother. Fourth, transfer was in accordance with the Board's statutory duty. Fifth, transfer was for the purpose of giving the plaintiff a better chance in life at Bomaderry. It is appropriate if I also record the plaintiff made no allegations that her transfer to Lutanda was improper or negligent. I make the above findings.

Borderline Personality Disorder and Attachment Disorder

33 It is appropriate if I here mention several other matters. The plaintiff in her Further Amended Statement of Claim has made reference to a disorder in the development of attachment and to her suffering from a Borderline Personality Disorder (and an associated substance abuse disorder as well). It is perhaps convenient if I deal with these suggested disorders. They will be dealt with again in a more extensive way in the judgment.

34 In his report of October 1991 Dr Waters said (at p 8) that Borderline Personality Disorder:

"... appears to be due to a fundamental failure in parenting. Typically adults who develop borderline personality disorder have sustained psychological abuse often, but not necessarily, associated with physical and sexual abuse and neglect. The typical pattern of parenting recalled is of rejection, terrorising, neglect, ignoring (etc), most of which are reported by Ms Williams. These patterns fundamentally distort a person's capacity to have relationships and to have a stable personality, and often also lead to substance abuse and self destructive behaviour. In addition such individuals are ill-equipped to parent and very often provide just the type of parenting to their children which Ms Williams has provided for her two older children ....

In my view Ms Williams' bond of attachment to a primary caretaker living in a congruent cultural setting was never established".

35 Further, he said that Borderline Personality Disorder was a disorder of attachment usually happening when a child is young, around three to four years. He said that Borderline Personality Disorder was rarely constitutional. It could not be technically diagnosed before the age of 18 in its proper form, but its antecedents were usually evident in adolescence and even in early childhood.

36 In the **Diagnostic and Statistical Manual of Mental Disorders Fourth Edition** ("DSM-IVTM) (1994) published by the American Psychiatric Association (tendered by the plaintiff although an earlier version was referred to by Dr Waters in his report) there is a discussion of Borderline Personality Disorder. It is appropriate to say that DSM-IVTM (the first edition was published in 1952) is a text that classifies diagnoses and categories of mental disorders and is used by psychiatrists in this country. The DSM appears to divide mental disorders into categories, and relevantly into types of personality disorders based on criteria with certain defining features. Both parties referred to, and relied upon DSM-IVTM in the presentation of their cases. The DSM on foot as at 1952 to 1968 was not referred to or relied upon nor were portions of it tendered in the plaintiff's case. In DSM-IVTM the matter of Borderline Personality Disorder is discussed at 650. Underneath the heading **"Borderline Personality Disorder"** and the sub-heading **"Diagnostic Features"** the following appears:

"The essential feature of Borderline Personality Disorder is a pervasive pattern of instability of interpersonal relationships, self image and affects, and marked impulsivity that begins by early adulthood and is present in a variety of contexts".

37 The diagnostic criteria are said to be nine in number with diagnosis based upon the presence of five or more of such criteria. The impairment from the disorder is said to be greatest in the young adult years and gradually wanes with advancing age. In their thirties and forties the majority of individuals with the disorder attain greater stability in their relationships and vocational functioning. It is stated that physical and sexual abuse, neglect, hostile conflict, and early parental loss or separation are more common in the childhood histories of those with Borderline Personality Disorder.

38 The text discusses the matter of differential diagnosis. Similar but alternate diagnoses to Borderline Personality Disorder (BPD) are:

1. Histrionic Personality Disorder.

2. Schizotypal Personality Disorder

3. Paranoid Personality Disorder

4. Narcissistic Personality Disorder

5. Antisocial Personality Disorder

6. Dependent Personality Disorder

39 BPD must be further distinguished from:

Personality change due to a General Medical Condition

Symptoms that may develop in association with chronic substance use.

40 Borderline Personality Disorder may be confused with a number of other personality disorders. This is usually because these other disorders share some common characteristic features particularly noting this in relation to Anti-Social Personality Disorder. I do not understand that a particular diagnosis necessarily implies a specific level of impairment or disability on the part of a sufferer or that particular behaviour and actions on any particular occasion ought necessarily to be attributed to that disorder. The circumstances surrounding such individual behaviour, or control on any instant occasion still needs to be examined. Additional factual information is required including as to functional activities at the relevant time. Nor does diagnosis carry any implications as to its necessary aetiology.

41 The DSM-IVTM states that Borderline Personality Disorder is diagnosed predominantly (about 75%) in females. The pattern of behaviour has been seen in many different settings around the world. Under the heading **"Prevalence"** the following passage appears (at 652):

"The preponderance of Borderline Personality Disorder is estimated to be about 2% of the general population, about 10% among individuals seen in out-patient mental-health clinics and about 20% among psychiatric in-patients. It ranges from 30% to 60% among clinical populations with Personality Disorders."

42 It is not suggested that the Australian experience would be statistically different to that in the United States.

43 The importance of this passage is that institutional care is not identified as the one relevant factor in the 2% of the general population figure. The percentage does not distinguish between those who suffer from it, having been brought upon in a parent's home, adopted parent's home, foster parent's or in an institution or home (State or charitable or religious). Second, despite the learning on the matter in 1950's the disorder has not been eliminated perhaps suggesting it cannot be, or, that the risk of suffering from it, cannot be removed. Third, the fact that it cannot be removed or eliminated gives rise to important questions in relation to duty and breach, and whether negligence can be found, or should be. Fourth, as DSM-IVTM makes clear, Borderline Personality Disorder is about five times more common among first degree biological relatives of those with the disorder than in the general population. Fifth, as Dr Waters admitted, the Kenmore Hospital records reveal that the plaintiff's mother had a very long history of alcoholism (for most of her life was a user of alcohol) and (T 118-119) and was an alcoholic. Against such background, according to Dr Waters, had the plaintiff remained with her mother when the mother was an alcoholic at the time the plaintiff was young, the plaintiff could in any event have developed the Borderline

Personality Disorder he "diagnosed". The important point is that the alleged diagnosis is not one *dependant* on a child being brought up in an institution.

44 As to the category Borderline Personality Disorder, there is the view of Dr Ellard that it is a spectrum, having taken years to achieve its "present status". He said it did not have that status in the "1940's, 1950's or even the 1960's". Dr Ellard also made clear that not everyone subjected to a disadvantages early environment would develop a Borderline Personality Disorder. I would add that DSM-IVTM does not in terms point in terms to the need for an antecedent condition of disorder of attachment as a condition for its occurrence. According to Dr Ellard some persons without early deprivation will become borderline with many "borderlines" having no history of early deprivation.

45 The plaintiff alleges that she also suffered from the childhood antecedents of personality disorder (also termed "attachment disorder") which were reversible and Borderline Personality Disorder. The plaintiff particularly relies upon an expert, Dr Katz, to show that there was a connection between lack of attachment and personality disorders. The lack of bond of attachment (with the mother) was said to be known to be a very common condition of people who develop personality disorder. Indeed, it is part of the plaintiff's case. The plaintiff alleges that by early adolescence if not before, she was solitary, bitter, sulking, resentful, negative and sad and that had the AWB been told of these matters they would have sent the plaintiff to a Child Guidance Clinic for assessment and treatment. They allege that the plaintiff's disorder would have been reversible had she been given timely treatment by a child psychiatrist (who generally worked in one of the few clinics) or other child mental health professionals. In support of her case both Dr Katz (retired child psychiatrist) and another expert, Mrs Bull, (a retired social worker) gave evidence. Their evidence is that the reversal of attachment disorder would be facilitated if there is a loving person with whom the unattached child can form a close attachment.

46 In his evidence Dr Water said that although the plaintiff no longer met the diagnostic criteria for Borderline Personality Disorder, she continues to abuse substances. She claims that the Borderline Personality Disorder and associated substance abuse has compromised her life in all respects including an ability to form relationships and to look after herself. Indeed, her claim is that the abuse of substances was a consequence of the Borderline Personality Disorder, and that many of her current problems are due to substance abuse. Dr Waters considered that the plaintiff was a recovered alcoholic. He accepted her mother had been an alcoholic. When asked whether alcoholism was not in part hereditary, he replied (123) that it was a controversial subject, but that there was, in a fairly complex way, an inherited component to alcoholism.

47 Dr Waters accepted that there was a distinction between Borderline Personality Disorder and psychosis (a biological condition), that the plaintiff as at the time of hearing had a psychosis, and that it was possible that the plaintiff even possibly had a genetic predisposition to psychosis.

48 The matter of "the human phenomenon attachment" (or bonding) and attachment disorder has been raised as an important issue in this case. It is a matter concerned very much with mother-infant interaction. This is a matter that has been explored in the area of emotional research and development of children. It is a matter arising in the field of human emotions in human relationships. The quality of the bond ("the attachment process") between infant and care giver is, so it is claimed, instrumental in the development of personality and provides the foundation for healthy psychological functioning.

49 Dr Katz spoke of the need for the development of close emotional relationships with a caring adult. He said that such would probably have been sufficient to prevent childhood antecedents of disorder in the development of attachment from developing into a Borderline Personality Disorder. He said that attention seeking disorder (from which she was allegedly suffering in 1948) was a disorder in the development of attachment. It reflects the lack of availability of an appropriate person with whom the child can form an attachment.

50 Dr Katz also said that because the plaintiff was "deprived" of contact with her mother (usually the prime carer with whom the reciprocal bond is formed), she was, in the absence of a substitute mother, at grave risk from the time of birth, of suffering from a disorder in the development of attachment. The institutional environment at Bomaderry he said, was likely to aggravate the risk in so far as she was suffering from disorder in development of attachment at some time between removal from mother and arrival at Lutanda and because there was no effective facilitation of the formation of attachment at Bomaderry.

51 The instant case raises issues of personal and interpersonal relations concerning interpersonal experiences generally between the infant and the mother - that is, interaction between the two. It concerns among other things the interactive creation of the attachment bond of effective communication between primary care giver and infant - an event central to human emotional development. If a mother-infant interaction is successful it is suggested that there is the foundation for a healthy personality structure and healthy psychological functioning. Dr Waters (October 1991) referred to the plaintiff having been placed in an environment where no primary bond of attachment to a primary care giver was established and in an environment where she did not have the opportunity to form new stable, caring and developmentally appropriate attachments.

Dr Bowlby's Views in 1951-1952

52 In 1948 in response to concerns about the problems and needs of homeless children in post-war Europe, an important project looking at the "mother-infant" bonding process, was commissioned by the World Health Organisation. Dr John Bowlby, a British Psychologist was inter alia, asked to undertake an assessment of mother and infant behaviour. Dr Bowlby's work (1951) **Maternal Care and Mental Health (**Geneva World Health Organisation), and his development of what appears to have become known as the attachment theory heavily impacted upon research into mother-infant interactions. His report was tendered in the plaintiff's case, and is, inter alia, relied upon.

53 As I understand his views, if early interaction is successful, critical foundation stones of personality structure are laid down. The mother helps the baby attach and learn to recognise emotions and their vicissitudes. Early infant experiences or lack thereof may lead to insecure attachment formation resulting in personality deficits later manifesting themselves in different ways.

54 The long term consequences of inadequate attachment it was claimed may lead to or include personality disorder. The plaintiff's case is, inter alia, built upon the views of Dr Bowlby in his 1951 report.

55 In order that the plaintiff's allegations can be further understood, (and indeed the issues in this case also) it is appropriate if I now quote somewhat extensively from Dr Bowlby's report.

56 I quote in full from pages 11 and 12 of his report under the heading **"Some Origins of Mental Ill-Health"**:

"Among the most significant developments in psychiatry during the past quarter of a century has been the steady growth of evidence that the quality of the parental care which a child receives in his earliest years is of vital importance for his future mental health. Such evidence came first from the psycho-analytic treatment of adults and then from that of children. It has been greatly amplified during the past decade by information gathered by psychologists and psychiatrists working in child guidance and child care - two fields affording unrivalled opportunities for first-hand observation both of the developing child and of his milieu.

Largely as a result of this new knowledge, there is today a high level of agreement among child-guidance workers in Europe and America on certain central concepts. Their approach to cases, their investigations, their diagnostic criteria, and their therapeutic aims are the same. Above all, the theory of ethology on which their work is founded is the same.

The basic principles of this theory of the origins of mental health and mental illness will be discussed more fully later. For the moment it is sufficient to say that what is believed to be essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment. [my emphasis]. Given this relationship, the emotions of anxiety and guilt, which in excess characterise mental ill-health, will develop in a moderate and organised way. When this happens, the child's characteristic and contradictory demands, on the one hand for unlimited love from his parents and on the other for revenge upon them when he feels that they do not love him enough, will likewise remain of moderate strength and become amenable to the control of his gradually developing personality. It is this complex, rich, and rewarding relationship with the mother in the early years, varied in countless ways by relations with the father and with siblings, that child psychiatrists and many others now believe to underlie the development of character and of mental health. [my emphasis]

A state of affairs in which the child does not have this relationship is termed `maternal deprivation'. This is a general term covering a number of different situations. Thus, a child is deprived even though living at home if his mother (or permanent mother-substitute) is unable to give him the loving care small children need. Again, a child is deprived if for any reason he is removed from his mother's care. This deprivation will be relatively mild if he is then looked after by someone whom he has already learned to know and trust, but may be considerable if the foster-mother, even though loving, is a stranger. All these arrangements, however, give the child some satisfaction and are therefore examples of partial deprivation. They stand in contrast to the almost complete deprivation which is still not uncommon in institutions, residential nurseries, and hospitals, where the child often has no one person who cares for him in a personal way and with whom he may feel secure. [my emphasis].

The ill-effects of deprivation vary with its degree. Partial deprivation brings in its train acute anxiety, excessive need for love, powerful feelings of revenge, and arising from these last, guilt and depression. These emotions and drives are too great for the immature means of control and organisation available to the young child (immature physiologically as well as psychologically). The consequent disturbance of psychic organisation then leads to a variety of responses, often repetitive and cumulative, the end products of which are symptoms of neurosis and instability of character. Complete deprivation, with which we shall be dealing principally in this report, has even more far reaching effects on character

development and may entirely cripple the capacity to make relationships.

The evidence on which these views are based is largely clinical in origin. Immensely valuable though this evidence is, it is unfortunately neither systematic nor statistically controlled, and so has frequently met with scepticism from those not engaged in child psychiatry.

Investigators with a statistical bent have worked with the concept of the `broken home' and a number of studies have demonstrated a relation between maladjustment and this situation.

But though these studies have been of value in amplifying and confirming clinical evidence of the far-reaching importance of the child's early experience in his home, the concept of the broken home is scientifically unsatisfactory and should be abandoned. It includes too many heterogeneous conditions having very different psychological effects.

In place of the concept of the broken home we need to put the concept of the disturbed parent-child relationship which is frequently, but not necessarily, associated with it." [my emphasis]

57 What neither Dr Bowlby, nor the evidence in the case addressed, is how one can quantify or measure or specify the required scope or content of maternal care required (in "advance" or "at all") in a particular relationship between mother and child, and which will avoid the risk of any Borderline Personality Disorder or any personality disorder later developing. Whilst laying down views as to the need for "a warm intimate and continued relationship" in which both find satisfaction and enjoyment, such is left unspecified in terms of quantity, or quality. It is difficult to see scope for its enforcement or implementation in human relationships. How maternal deprivation can be necessarily avoided, how maternal warmth and intimacy can be enforced or compelled is not clear, since a child may even be deprived if living at home with a natural mother (or permanent mother substitute) who is unable or unwilling to give "the loving care small children need", or the child is unable to find satisfaction or enjoyment in the intimate relationship.

58 Before leaving Dr Bowlby's WHO report it is appropriate if I refer to several other points made by him.

1. Anxieties arising from an unsatisfactory relationship in early childhood allegedly predispose children to respond in an anti-social way to later stresses (p 13).

2. Dr Bowlby considered that it was not necessary to detail father-child relationships in the report because and I quote "almost all the evidence concerns the child's relationship to his mother, which is without doubt in ordinary circumstances by far his most important relationship during these years. It is she who feeds and cleans him, keeps him warm and clean, and comforts him. It is to his mother that he turns when in distress. In the young child's eyes the father plays second fiddle and his value increases only as the child's vulnerability to deprivation decreases. ... While continued reference will be made to the mother-child relation, little will be said of the father-child relation, his value as the economic and emotional support of the mother will be assumed". (p 13)

59 By way of aside even in a contemporary society (whose views are not relevant to the determination of the issues), many ordinary citizens (not experts in behavioural science) could well disagree with these (Dr Bowlby) views. It is not for me to comment upon the current acceptability of such views by mothers, fathers and society in Australia in 1999.

Nevertheless, Dr Bowlby's views are relied upon (albeit expressed in a somewhat general ill-defined way) by the plaintiff to support a case of negligence against the defendants for events long since passed, occurring in the 1950's.

3. Dr Bowlby considered that deprivation of mother love in early childhood could have far reaching effects on mental health and personality development of human beings. Thus when deprived of maternal care the child's development is almost always retarded - physically, intellectually, emotionally and socially and that symptoms of physical and mental health may appear: (pp 15-16).

4. Dr Bowlby was insistent throughout this report that the right place for the child "is his own home" (p 109). Neither foster home nor institutions can provide children with the security and affection which they need. For the child they are always makeshift (p 112).

5. Dr Bowlby said group care of infants and young children must always be unsatisfactory because of "the impossibility of providing mothering of an adequate and continuous kind but also because of the great difficulty of giving a number of toddlers the opportunity for active participation in the daily life of the group which is of utmost importance for their social and intellectual development" (p 133).

60 This view perhaps suggests the impracticability of avoiding the situation in a case such as the present where group care was in effect in practical terms a no choice option and unavoidable.

6. In his "conclusion" (at 157-158) Dr Bowlby referred to the lack of then recognition that "mother love in infancy and childhood was as important for mental health as are vitamins and proteins for physical health". He also stated that the evidence in the report was at many points faulty, "many gaps remained unfilled and critical information often missing" (p 158).

Damages Claim

61 The plaintiff claims that in consequence of the defendant AWB's breaches of duty she suffered psychiatric damage, psychological damage and physical injuries. These may be conveniently stated in terms of the amended Statement of Particulars pursuant to Part 33 Rule 8A filed on the eve of hearing on 14 April 1999.

62 The injuries are summarised as being both physical and psychological. The physical injuries include a fracture of the right wrist, fracture of the collarbone (construed by the plaintiff to be deliberate), lacerations, abrasions and contusions due to corporal punishment being inflicted; self mutilation in the form of self-inflicted cuts; forcible confinement; and acts of sexual assault. The psychological injuries were particularised:

"(a) Maternal deprivation following removal from mother and failure to provide substitute which initiated disorder in development of attachment;

(b) Institutionalisation which caused or exacerbated disorder in development of attachment;

(c) Disorder in the development of attachment which manifested itself through childhood and adolescence in the form of attention-seeking behaviour and acts of self-mutilation;

(d) Borderline personality disorder, characterised by each of the following:

(i) frantic attempts to avoid real or imagined abandonment;

(ii) a pattern of unstable and intense interpersonal relationships characterised by alternating between extremes of idealisation and devaluation;

(iii) identity disturbance; marked and persistently unstable self image or sense of self;

(iv) impulsivity in areas that are potentially self-damaging (sex and substance abuse);

(v) recurrent self-mutilating behaviour;

(vi) affective instability due to marked reactivity of mood (eg. intense episodic dysphoria, irritability, or anxiety);

(vii) chronic feelings of emptiness;

(viii) inappropriate, intense anger or difficulty controlling anger (frequent displays of temper, constant anger);

(ix) transient, stress-related paranoid ideation or severe dissociative symptoms;

(e) concealment of the plaintiff's racial identity;

(f) concealment of the plaintiff's antecedents and in particular concealment of the identity of the plaintiff's mother and the fact that she was still alive and that at least from December 1956 wished to see the plaintiff."

63 The plaintiff alleges continuing disabilities including inability to form and maintain intimate relationships; inability to fulfil a parental role; compromised anger; poor self esteem characterised by feelings of ugliness and unworthiness of affection and attention of others; extreme guilt; severe anxiety; identity disturbance; terror at being left alone; depression; substance abuse; inability to work; inability to engage in activities requiring physical exercise due to physical deterioration consequent on substance abuse and anxiety which has manifested itself in arthritis, asthma, and emphysema; compromised ability to self care; propensity to psychosis due to substance abuse and stress; inability to partake in enjoyable activities.

64 The plaintiff submits that whilst the Borderline Personality Disorder could not have been diagnosed before the "age of 18", nevertheless, the childhood manifestation of attachment disorder manifested themselves before age five to six and were identifiable. The plaintiff's case is that the Borderline Personality Disorder did not occur or was not diagnosable until early adulthood (at T 727). Thus the claim for damages it is submitted runs from an early age. The conduct of the AWB it is said extends over a period between 1942 and 1960. In terms of both liability and damages, this case involves investigation of events that have occurred during that period starting over 50 years ago.

65 These matters will be looked at in greater detail when considering the matter of damages which it was agreed I should consider, even were I to find the defendants not liable.

66 The claim that the plaintiff makes is a very large one. I make this observation because that clearly appears to be the situation. In her submissions on damages the plaintiff has submitted that the total damages that should be awarded in respect of the common law counts should be in the order of $1.7 million to $2.2 million. This is apart from the claims for general damages, interest and for aggravated or exemplary damages. The case for an

aggravated or exemplary award is put inter alia, upon the basis that the plaintiff's "life has been impoverished not by a casual act of negligence on the part of an ephemeral tortfeasor but by a deplorable failure by a statutory body which held itself out as her guardian to have regard for her welfare for well over a decade when she was utterly unable to protect her interests". Further, it is submitted that the Board's conduct became "so neglectful, so dismissive of the plaintiff's welfare and so contumelious as the years passed and the plaintiff deteriorated that an award of aggravated or exemplary damages is warranted". The plaintiff's claim for damages is novel in many respects as will be seen when I turn to deal with it in detail, as I said I would irrespective of my decision on liability.

67 Further, or alternatively, equitable compensation is sought to be recovered for breach of fiduciary duty. The plaintiff conceded that there is no material difference between the content of the duty of common law and the fiduciary duties owed by the AWB to the plaintiff. Further in her reply, the plaintiff also has submitted that Equity would follow the law in quantifying equitable compensation by the same measures as are used in the assessment of common law damages. Next, there was no submission that the appropriate time for assessing damages was complicated by confusion or inconsistency surrounding the distinction between common law damages and equitable damages or compensation; cf **Ronnoc Finance v Spectrum Network Systems** (1998) 45 NSWLR 624 at 630-631. Mr Hutley also accepted that on the present state of the law, the better view was that, were equitable compensation to be awarded, there could not be included in any sum for equitable compensation any amount for aggravated or exemplary damages. That said he sought to reserve his position. I consider that he is correct in his view and his position is protected in the event that this case goes on appeal.

History of Proceedings

68 The original action was commenced by statement of claim in April 1993. The plaintiff in 1993 also filed a notice of motion seeking an order under the **Limitation Act 1969** (s 60G(2)) to extend the period within which she could bring proceedings against the first and second defendants. Studdert J in a judgment dated 25 August 1993 refused the notice of motion. The Court of Appeal by majority (Kirby P and Priestley JA with Powell JA dissenting), allowed the appeal. The Court of Appeal's decision is reported in **Williams v Minister, Aboriginal Land Rights Act 1983** (1994) 35 NSWLR 497. I will hereafter refer to that decision as **Williams [No 1]**.

69 Again as a matter of historical fact, it is appropriate to mention that the statement of claim has been amended on two occasions including on the eve of the hearing. There is now a count for breach of statutory duty. Further the particulars of breach of duty in her Further Amended Statement of Claim are now more comprehensive and extensive than originally pleaded.

70 It has not been argued that at this trial I am bound by any legal views contained in the Court of Appeal judgment in **Williams [No 1]** As Kirby P (as he then was) said, the "many interesting and difficult points in law are much better resolved when the law can be applied to the facts which Ms Williams ultimately proves at the trial".

71 It is not unimportant to also mention that the only matter being determined in **Williams [No 1]** was whether in effect the action should go to trial. As his Honour also observed (at 515):

"She (Ms Williams) should have her chance to prove her case. She might succeed. She

might fail. It will then have been determined as our system of law provides to all Australians - Aboriginal and non-Aboriginal - according to law, in open court and on its merits".

72 I make no apology for the length of this judgment. In writing extensively I have done so deliberately. I am conscious that my judgment will be read not merely by the parties, the judges and the legal profession. I am conscious of the fact that it is also perhaps a social document. I am particularly conscious of the sensitive, indeed, controversial nature of the issues and that there are groups in the community that will be interested in this judgment.

The Trial

73 The plaintiff has been given every chance to prove her case in court. The case lasted almost a month, commencing on 19 April 1999 and concluding on 14 May 1999. But, for the efficiency of counsel (in a case where evidence was missing or not available), and their co-operation, the trial would have lasted much longer. Indeed it may have been a trial of indefinite duration. So much appears from the mode and manner of presentation of the case and by the presentation of considerable oral and written materials. There has been a high level of thorough preparation both in respect of the issue of liability and damages. There can be no doubt that considerable human and financial resources have gone into the preparation and trial of the action by the parties.

74 There are almost 1,000 pages of transcript. Numerous affidavits have been read in the proceedings. Many witnesses both lay and expert have been called. A vast amount of documentary evidence (many volumes) has been tendered on many different issues. There are over 350 pages of submissions.

75 Having regard to the issues raised, their novelty and that the present action is perceived to be some sort of "test case" as well as the fact that the matter is likely to go on appeal, whilst applying the laws of evidence, I have sought not to be unduly technical in respect of my rulings on evidence. This too accords with the approach adopted by both parties. Further, the case concerns matters arising from events occurring between 1942 and 1960 with "proof" of matters complicated by the natural effluxion of time. The rules of evidence whilst they have been applied, such was done so with tolerance and with some degree of permissible flexibility. It seems appropriate in the circumstances that an appellate court should have the full benefit of the evidence tendered and sought to be tendered. Both parties have been given every opportunity to put before me available evidence.

76 The trial of the instant action has been a difficult one. There is the problem of having in the present time to address issues in the context of social, moral and cultural standards of a different Australia with respect to events occurring so long ago in its past history.

77 In that context, it is appropriate for me to observe that the language of this judgment reflects the language of the evidence. Both parties accept that this must be so, even though, it is but stating the obvious. Thus Mr Hutley (T 23) accepted that at the time the plaintiff was born her mother was unmarried and that the plaintiff was accordingly "illegitimate". Additionally, there are references to certain persons being "fair-skinned", to people being "white in appearance" and to people being "half-castes". That is an example of language, reflective of the times and to be found in the evidence. The point I make is that in writing this judgment I acknowledge that some of the language used would not be regarded as appropriate in contemporary Australian society. Next, it is appropriate to remember that the court does not give effect to its own moral standards or values in deciding the case. It has no personal views of its own to carry out, or implement. The court

executes the law, its personal views or notions are irrelevant and are not to be set above the law. Indeed, as the judge my role is a strict legal one, that is to decide the law, decide the facts, apply the law to the facts and give a true decision.

78 Further on the issue of damages, in examining in close detail the plaintiff's life and evidence in relation to it, I should similarly record that I am not involved in any moral judgment. Such is totally irrelevant to the issues. The point to be made is that the plaintiff has brought the action, she claims damages including for her life's events and misfortunes and how they have affected her. These issues have been raised by her and hence need to be examined and scrutinised by the court as part of its consideration of her case. As it is, the plaintiff who makes allegations, she must prove them. It is the plaintiff who has opened up for necessary scrutiny her life and all its various incidents. They are to be therefore subjected to examination and scrutiny.

79 As has been said, the trial has been complicated by the fact that one is dealing with events that occurred so long ago complicated by missing evidence (oral and documentary), and by the unavailability of some clearly relevant witnesses who are deceased, or incapacitated, or unable to attend to give evidence. It is appropriate to observe that long delays or even prejudice associated with such provides no defence to the causes of action pleaded at common law. That said, delay and prejudice flowing from such, and laches are matters relevant to whether equitable relief can or should be given in the event that the plaintiff were to establish that a cause of action for breach of fiduciary duty was available, and breach has been established. The equitable "defences" of laches, prejudice and delay may deny an entitlement of equitable compensatory relief. These matters do not defeat the common law causes of action for negligence or breach of statutory duty if established. The courts have saved from the imposition of limitation provisions, complaints of breach of fiduciary duty: see **Williams [No 1]**; **Maguire v Makaronis** [1997] HCA 23; (1997) 188 CLR 449 at 463; see also the discussion by Justice Gummow writing extra judicially in **"Compensation for Breach of Fiduciary Duty" in Youdans (ed) Equity Fiduciaries and Trusts (1989)** at 75. A claim for breach of fiduciary duty may be subject to the equitable doctrine of laches; cf **Tito v Waddell (No 2)** [1977] Ch 106 at 250-251.

80 Mr Hutley whilst accepting that in respect of the fiduciary duty cause of action (if established), I could decline to give equitable relief based on a defence of laches, submitted that no relevant prejudice had been identified and that delay of itself was insufficient to establish a defence of laches (see T 782). It will only be necessary to thus address issues of laches, delay and prejudice in respect of the cause of action based on breach of fiduciary duty: cf **Orr v Ford** [1989] HCA 4; (1989) 167 CLR 316; **Fitzgerald v Masters** [1956] HCA 53; (1956) 95 CLR 420 at 433-434. There has been substantial delay and its effect on any equitable cause of action such as the present I regard as significant and considerable. The equitable cause of action for breach of fiduciary duty, will if available, be decided on less evidence than was available at the time that cause of action arose: see **Brisbane South Regional Health Authority v Taylor** [1996] HCA 25; (1996) 186 CLR 541.

81 In my view whilst a plaintiff may be able to avoid limitation problems at common law by alleging a breach of fiduciary duty based upon the same facts or circumstances relied upon to support common law counts, he/she cannot avoid the "defence" of laches or the consequences of delay (and prejudice) being separately raised in respect of the equitable cause of action for breach of fiduciary duty. Thus in my opinion where in a case such as the present, and assuming that there be an equitable cause of action available generally based

on the same or similar facts, or particulars, relied upon to support the common law counts, there is a strong case for amending the **Limitation Act** so as to make it apply not only to the common law counts but to the equitable cause of action as well. I believe such would address what appears to be an anomaly. Of course, were I to conclude as I have for reasons to be given, that there is no cause of action available for breach of fiduciary duty then there would be no need for legislative change. That said, an appellate court might hold a different view to that held by me.

82 Next I wish to mention the matter of evidence. I am deeply conscious when weighing the evidence that witnesses have been giving evidence of events that occurred many decades ago. In some cases the witnesses were children or young persons at the time the events they give evidence in relation to occurred. In other cases, the witnesses were mature adults. Much has occurred in their lives since the 1950's. They have been subjected to life's experiences and education in the interim. It has been said that human evidence shares the frailty of those who give it. It is subject to many cross currents such as partiality prejudice, self interest and above all imagination and inaccuracies. These are matters upon which the tribunal of fact helped by cross-examination must do their best: **Toohey v Metropolitan Police Commissioner** [1965] AC 595 per Lord Pearce at 608-9. I bear these matters in mind in assessing and evaluating the witnesses and the evidence.

83 This is a case where, as I have said, with the effluxion of time there are not only missing or dead witnesses, but some of the witnesses have filed affidavits but have been unable to give evidence: see eg Mrs Reid, Mrs Talbot and Mr Sattler. There was no evidence from the plaintiff's mother who the plaintiff met in 1973 and with whom she later lived. There is evidence that she was alive and in hospital in 1989. In making this observation I am not drawing inferences adverse or otherwise. I merely record the situation as one of fact. In this I have been very much left to infer from the evidence, the circumstances under which the plaintiff came under the control of the AWB, and even in some respects the circumstances relating to her transfer to Lutanda, as well as in respect of other matters.

84 It is common ground that the records at Lutanda, after the death of its former superintendent, have been destroyed. There are missing records or a paucity of material from the Crown Street Women's Hospital (where the plaintiff was born) and from the Aboriginal Children's Home at Bomaderry where the plaintiff lived from 1942 to 1947. There are no records from Hornsby Hospital or Hornsby High School. Dr Lovell (the GP for Lutanda when it was at Pennant Hills after 1950) is deceased. There are no records from him in respect of the plaintiff or otherwise. The original application form for admission of the plaintiff to Lutanda is missing. According to Mrs Middleton, records kept by Mr Murray in relation to Lutanda no longer exist.

85 The transcript (T 8) reveals that it was common ground that the records of the AWB were not complete, or were lost. Apparently there were no interrogatories administered to the Board, or at least none were tendered.

86 A matter to be also mentioned, particularly in respect of the evidence of former children (but not necessarily confined to them) is that a person's recollection including recollection of events may be distorted over time by various factors with a potential for error increasing with delay: cf **Longman v The Queen** [1989] HCA 60; (1989) 168 CLR 79 at 91, 108-109.

87 A tribunal of fact also can bring its own common sense and indeed experiences of life (subject to the principles relating to judicial notice) to bear on these issues. The tribunal of

fact is entitled to accept in whole or in part a witness' evidence: **Naxakis v Western General Hospital** [1999] HCA 22; (1999) 73 ALJR 782 per Kirby J at 793 applying **Leotta v Public Transport Commission** (1976) 50 ALJR 666 at 669. That is part of its fact finding role. I have regard to these matters as well in relation to assessing the reliability and credibility of witnesses, both those called and uncalled (but whose affidavits have been read).

Setting of events in the 1940's and 1950's and Contemporary Values

88 As I have said before, in 1942 when the plaintiff was born, Australia was at war having been at war since 1939. In the 1930's it had been in the grip of Depression, with all its hardships. The White Australia Policy was in place at the time. There was in the general community, a prejudice towards the Aborigines, as referred to in the **1939 Public Service Board Report**. That Report recommended that the "problem" of Aborigines and the community as recognised in the Australia Conference of 1937 was to be addressed by way of assimilation; see also inter alia the provisions of s 7(1)(a) of the amending Act of 1940. Thereafter, the stated policy of the AWB was that of assimilation and more particularly so in respect of part Aboriginal children who were "white" in appearance. Assimilation was not only a policy of the Board, but as I have said, there was a statutory duty in respect of that approach that had to be implemented. Irrespective of today's standards, it was felt in the 1940's that assimilation of Aborigines into the community was in the best interests of the Aborigines. This was the view of the legislature and of other political leaders of the era, presumably reflecting the values and standards, of the time.

89 In 1942, (and during the war years till 1945) the war effort had the priority in terms of demands on labour and resources. The AWB reports during the war years and post-war years reveal problems for the Board arising from staff and resource shortage also caused by the war. The priorities were not on the domestic front. Many families had been broken up because of the war. Many fathers were overseas in the military forces. The plaintiff's father was in fact said to have been a soldier (in the Sixth Division) when the plaintiff's mother became pregnant on New Year's Eve 1941.

90 The following exchange appears (at T 208):

"**HIS HONOUR:** We are putting this in the context that this case concerns not standards of the 1990s and 1990 perceptions. This concerns standards and contemporary values and perceptions and the like in the 1940s and early 50s. That will be remembered in this case.

HUTLEY: We have never made a submission to the contrary.

HIS HONOUR: We have to be very careful we do not look at 50s and 40s through the so-called enlightened or better educated or more knowledgable views of the 1990s. That would be error; wouldn't it.

HUTLEY: It would be.

HIS HONOUR: Yes, it would be".

91 The following further exchange later took place (at T 560-1):

"**HIS HONOUR:** I am concerned about the danger arising from a situation that clearly must be thought about, that I do not look at yesterday through today's eyes. Today's moral

standards and values and contemporary standards and values are not constant, they shift and so in a situation like this, where acts and omissions are alleged between 1942 to 1960, the claims have to be put into historical context, the context being standards and values at the time and not standards and values of contemporary Australia in the 1990's.

HUTLEY: At a theoretical level, we do not dissent from that. One has to attempt to do that and, with respect, we submit that there is and can be a tendency to believe that we were so much better than they were and that is something which one ought, as equally, guard against as saying they were so much worse than we are, as I cannot tell because I do not know."

92 Thus one is looking at the contemporary community standards of the 1940's and 1950's and not the standards that exist today. The subject of contemporary community standards was referred to by Brennan CJ in **Kruger v Commonwealth of Australia** [1997] HCA 27; (1997) 190 CLR 1 where his Honour said (at 36-37):

"... it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken".

93 See also Dawson J at 53-54; Toohey J at 97. Gummow J in **Kruger's** case also commented on this question of "standards". He said (at 158):

"The philosophy given expression in the specific provisions to which I have referred now may appear entirely outmoded and unacceptable. Nevertheless, in its time, the 1918 Ordinance expressed a response to what then for at least 80 years had been perceived, initially by the Imperial Government, as the plight of the indigenous inhabitants of Australia as a consequence of the expansion of European settlement and land occupation."

94 In **Williams [No 1]** Kirby P at 514 referred to "the passage of time and changing perceptions of right and wrong conduct" as presenting problems. As Powell JA said (at 520) "there will be the difficulty ..... in seeking to recreate for the benefit of the tribunal, some 50 years after the event what was the atmosphere of .... at the times when the relevant events are said to occur".

Remedies under the Law

95 The next matter that I propose to accept views upon perhaps touches upon community perceptions. The courts "cannot provide a solvent for every social problem or a remedy for every social problem": **Tucker v U.S. Department of Commerce** [1992] USCA7 412; (1992) 958 F 2d 1411 at 1413 cited by Gaudron and McHugh JJ in **Breen v Williams** (1996) 186 CLR 71. Their Honours further said (at 115):

"In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions."

96 Nor in my view can it be said that all human relationships problems, including those of nurture and nature can always be the subject of solution by law. Matters concerning their emotions, their level and content, happiness, and other natural relationships are not readily susceptible of resolution by the courts. Nor does the law accept that when misfortune occurs someone is necessarily to blame, or that there is a legal responsibility in someone to pay compensation or damages.

97 Some of the restraints on the function of the Court have been discussed by Mahoney JA in **Breen v Williams** (1994) 35 NSWLR 522 at 557-558. The function of the court is to apply the law, not to legislate for the change of it. It is the function of courts to decide cases coming before them according to law. It is not the function of courts to change the law by processes which are legislative not judicial. As was said in **State Government Insurance Commission v Trigwell** [1979] HCA 40; (1979) 142 CLR 617 by Mason J at 633:

"The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found."

98 In some cases it is the responsibility of Parliament to decide for example whether a common law rule should be replaced. Indeed, sometimes the solution may be wholly a political one and one beyond the jurisdiction of the court.

99 In determining what is the meaning of "reasonable" in the statement of the common law duty of care, perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect: **Maloney v The Commissioner for Railways (NSW)** (1978) 52 ALJR 292. In **Quigley v The Commonwealth of Australia** (1981) 55 ALJR 579, Stephen J (at 581) when discussing an employer's duty of care observed "But what will satisfy that duty at any particular time will depend upon the circumstances prevailing at that time".

100 The common law cannot provide a remedy for all life's accidents, which are the fault of no person. The point is well made in the dissenting judgment of Fullaghar J in **Commissioner for Railways v Anderson** [1961] HCA 38; (1961) 105 CLR 42. His Honour when speaking of "accidents" said as follows (at 58):

"I make one observation in conclusion. The word "negligence" has tended of recent years to lose all meaning. It is interesting to recall that Sir Frederick Pollock foresaw that this very result might follow as an indirect and unjustified consequence of the decision of the House of Lords in *Donoghue v. Stevenson (1)*. That very learned lawyer, immediately after the publication of the decision in that case, wrote a note upon it for the Law Quarterly Review (2). That note has been reprinted in the last two editions of Pollock on Torts. Towards the end of it the writer issued a warning against "untenable exaggeration" of the rule laid down in the case, and added "We still have to take notice that there are such things as inevitable accidents which are nobody's fault."

101 Further or alternatively, even where there is error, not every error is to be equated with negligent error giving rise to an entitlement to recover damages: **Giannarelli v Wraith** (1988) 165 CLR 543; **Public Trustee v The Commonwealth of Australia** (NSWCA 20 December 1995, unreported) per Mahoney JA at 29-30; **Barrett v Enfield London Borough Council** [1999] 3 WLR 79. If it were it otherwise, public authorities, welfare authorities, indeed charitable bodies might even restrict or qualify services which they are or might be willing to provide: cf **Romeo v Conservation Commission (NT)** (1998) 192

CLR 431 per Brennan CJ (a case rather involving a traditional category of negligence, in which individual responsibility was also examined in some detail). Even if there was error and I do not find any in the circumstances of this case, it would not in any event amount to negligent error, for reasons that will appear.

102 At common law, no action lies for, in effect, "bad parenting" or "bad upbringing", at least by natural parents: **Hahn v Conley** [1971] HCA 56; (1971) 126 CLR 276; see also **Attorney-General v Prince & Gardner** [1998] 1 NZLR 262. Thus for example, had the plaintiff stayed with her mother, and developed a disorder of the type alleged, it would appear that the plaintiff could not have sued her mother.

103 To impose a legal duty on a substitute for a non biological carer to provide maternal care of the type that a natural mother could or might be expected to ordinarily provide, apart from issues of practicability and realistic achievability, could involve imposing a higher duty of care on the substitute carer than that imposed on the natural mother. Thus there is an issue of whether in circumstances where a natural parent (mother) cannot be sued, a third party carer who has taken responsibility for bringing up a child which the mother is unable or unwilling to do, or cannot do, should be liable to be sued. Next, it is difficult to see how the law can always be expected to provide the solution to a all problems arising from life itself, from nature or nurture.

104 The case also raises issues as to whether the obligations urged are confined to situations where a child became a ward on the application of the mother under s 7(2) of the Act as opposed to a committal by a Children's Court order, under s 13A of the Act creating a "wardship". Indeed, the committal to a home (under s 11 of the Act) may be for a short specified period. A question may arise as to whether there is an alleged duty to provide a "mother substitute" only under s 7(2) but not under s 13A. It would perhaps be surprising if different duties existed qua a neglected or uncontrollable child under s 13A to those under s 7(2) of the Act. Next there are issues of non-delegable duty urged in the instant case yet under s 11A(1) there is the specific power to indenture or place a ward in employment of an employer. Again the AWB may place a ward in a home; board out a child under s 11(1) or place a ward in the care of a foster parent: see also s 11D and s 11E.

105 Next, the case raises issues that may, as well, have future impact in the area of parent/child relationships; foster parent/child relationships; adoption situations and in respect of children who were or are brought up in State, charitable, or denominational institutions or homes (voluntary and otherwise). Indeed, the decision is one that concerns the bringing up of all children, of parenting generally, irrespective of the child's race, sex, colour or creed.

106 As to different standards of society at different times, this may be illustrated by examples found in the evidence. Mrs Bull (a retired social worker) was called by the plaintiff. She was asked (at T 69-70) whether referral of a child to a Child Guidance Clinic in the 1950's (the matter of a Child Guidance Clinic reference was in issue) was a matter of last resort for schools, parents or carers. She said there was a lot of prejudice about psychiatrists and about psychotherapy. She thought on the whole that there was often a jeering attitude. "You know, sort of oh, you've got something wrong with your mind type of thing. So there was prejudice that might of operated to stop some people from having a go if you know what I mean". She accepted that at the time some people might have thought it might have done more harm than good in rearing a child of pre-teenage years to take them to a clinic with psychologists and psychiatrists rather than trying to deal with the situation in the circumstances in which they were living. This passage of itself suggest that counselling

had a role in the 1950's different to that in the 1990's.

107 Mrs Buxton was called by the defendant. She made a similar point. She gave evidence that in 1952 she was a qualified nurse with triple certificates in general, midwifery and infant welfare (care of babies from birth to kindergarten age). She was asked:

"Q. Where you lectured upon the importance of the mother of child bond"?

A. It was mostly difficult feeders and the care and feeding of the infant more than the mothering bond. That was not recognised I don't think for some years after that the very great importance of a mothering bond certainly not in my training time. Lectured more in the health of the infant and feeding of the infant. The Truby King form of training. We didn't have psychology lectures or those sorts of things in our course". (T 406-407).

The Plaintiff's Admission to Wardship at Bomaderry

108 The plaintiff submits that the plaintiff's mother had been a ward of the Board (251J) and was therefore either a full blooded (the probability) or a half-caste aborigine within the meaning of s 3 of the **Aborigines Protection (Amendment) Act 1918**. The defendants accepts that document (252J) records the plaintiff's mother amongst the "register of wards" of Aborigines Protection Board. Document (251M), an internal letter 22 February 1939 from the Secretary of the Board to the Matron of the Aboriginal Girl's Home Cootamundra (a home run by the Aborigines Protection Board) and seen and noted by Mrs T. English Inspector on 25 May 1939, records advice that Miss Casey will arrive at Cootamundra on 24th instant to "escort Dora Williams; CM, RO and BC to situations" which save for one person, were to be in Sydney and to see that arrangements were carried out. Clothing was to be provided for the girls. They were to be medically examined and a certificate to be obtained in relation to their present physical condition. The plaintiff's mother would at that time then have been fifteen years of age. The handwritten words "Girls were discharged as per your instruction being administratively implemented or departure from the Cootamundra home as per instruction. I do not find to mean the plaintiff's mother was discharged from the Board's supervision or control but rather from Cootamundra. Clearly the Board would not have intended, to use the plaintiff's expression, "let loose", the plaintiff's mother then a young woman at fifteen from the control of the Board, without her being placed in the hands of an appropriate person or in a employment situation. It does seem that such a "situation" had already been arranged in Sydney by the Board hence the escort.

109 The plaintiff's mother appears to have remained a ward of the Board until the age of eighteen. She was no longer a ward, having attained the age of eighteen, at the time of the plaintiff's birth: see s 3 of the Act for definition of "child" and "ward".

110 There is no precise information as to the mother's situation between 1939 and 1942 (ie between the age of fifteen and eighteen). However, I would infer that she worked in a "situation" type employment probably as a "domestic servant". The birth certificate reveals the mother's address as being at what appears to be a private residential address at North Sydney. This view is also reinforced by a history to Dr Waters recorded in his report of 22 October to which I will turn to shortly.

111 The plaintiff was born on 13 September 1942 at the Crown Street Women's Hospital to Dora Williams. The plaintiff's mother had been admitted to the Hospital on the day of the plaintiff's birth. She remained at the hospital for 29 days and was discharged on 12

October 1942. The Hospital's Admission Register, and other available hospital records reveal the plaintiff's mother as being aged eighteen and single. There is no reference to the father in that record.

112 The birth certificate does not record any details of the father. The only evidence in relation to the plaintiff's father is contained in the history to Dr Waters (22 October 1991) which I accept so far as it relates to her parentage. It is as follows:

"Ms Joy Williams was the daughter of an Aboriginal woman. Her mother was the youngest of five girls. At aged 7 (in 1931), Ms Williams' mother was removed from her family by the Aboriginal Protection Board and placed in Cootamundra Girl's Home. Ms Williams stated that her mother had never been allowed to speak her indigenous language and had been forced to speak English under the threat of having her mouth washed out with carbolic soda. Both maternal grandparents were Aboriginal from Cowra. Ms Williams father, an Irishman and a soldier in the 6th Division, was the son in the household in which her mother worked as a domestic servant.

The pregnancy with your client was the product of a sexual encounter at a New Years Eve party at her father's house. Her mother had a hysterectomy which left her sterile. Joy was removed and her mother stayed on to work as a domestic in private hospitals. Joy's mother apparently never told anyone of Joy's birth. She was also unaware of the hysterectomy and was not informed of this until later when she found out that she was infertile".

113 The mother and father never married. The child was illegitimate within the law. The plaintiff never met her father or his family.

114 Several points may be made by way of confirmation of this parentage history. The birth was about nine months after a New Year's Eve party. The War was on, and there was a Sixth Division. It is probable that the "situation" earlier referred to was a "situation" of like nature to a "situation" in a private home as a domestic servant. The mother did not apparently return to the home of the father's family.

115 The history to Dr Waters is not only supported by what I have just said but there are the independent and reliable pieces of evidence that the plaintiff's mother was "removed" from her family by the Board (she was included in the ward register), and that she was also placed in the Board's Cootamundra Girl's Home. The plaintiff did not give sworn evidence but she did swear in para 82 of her affidavit of 20 November 1996 that she was reunited with her mother in 1973 and that she had "found out that I was an aboriginal".

116 Of significance in the history recorded by Dr Waters is that "Joy's mother apparently never told anyone of Joy's birth". By this I take it to mean that neither her parents or members of her family nor the father's family or the father were told about the plaintiff's birth. There is nothing to suggest that the plaintiff's father (or his family) ever displayed interest in the pregnancy, the birth or in the plaintiff. What happened to him one does not know. There is nothing to suggest his family showed any interest. It is probable that the mother's pregnancy was unplanned.

117 At the time of the birth the plaintiff's mother was eighteen years and single and probably of limited or no financial means. There is nothing to suggest she had independent means, nor relatives or the personal capacity to raise or support the child. There is nothing to suggest she had any known relatives friends or otherwise in Sydney or at all who could help or assist her. There is nothing to suggest that she had other than the accommodation

in the private home where she worked or that after the birth she was welcomed back. There is reference in the history to her "staying on" to work as a domestic in hospitals and not returning to the father's home. This was a likely situation in the circumstances. In my view the plaintiff's mother was in the situation of being an unmarried single Aboriginal woman with an illegitimate child and with really no one to turn to for support, other than to the Board. She had been a ward with the Board since the age of seven up until the age of eighteen. It had looked after her, cared for her and raised her in its home at Cootamundra. There was no where else for her to go, or turn to for help, other than to the Board in a situation where she could not keep the plaintiff child for one or more reasons no doubt valid to herself. The absence of the father's name or the birth certificate supports this view. Who would or could best look after the child to the eighteen year old plaintiff's mothers knowledge (and she was living in Sydney) having regard to her many years spent with the Board? The irresistible inference is that it could only be the Board.

118 Indeed, it would seem to me that in the circumstances outlined that the Board when approached by the mother under s 7(2) was firstly willing to accept the plaintiff (and did accept her) and continued to accept her and treat her as an aboriginal child within the meaning of s 3 of the Act. The Board knew the "status" and Aboriginality of the mother who, had been in its earlier care and control. There is no evidence it knew of the father's "origins" at the time of birth, or was concerned about such. It acted upon the basis that it had, or would have jurisdiction over the child. She was the child of an Aboriginal as well. Nor is there any evidence as to the "appearance" of the plaintiff as a baby as and at her birth. However, as its 1941 report also revealed the Board had found difficulty in defining "half caste aboriginal" within the meaning of s 3 of the Act. In my view it was willing to accept in the circumstances the plaintiff as a "ward" and did so. Indeed, I consider the Board accepted the plaintiff as a ward upon the basis that she plaintiff was an Aborigine and/or the child of an Aborigine. The Board had the plaintiff's mother at its Aborigine Home at Cootamundra and knew she was an aborigine and treated her as such. Second, if the Board had not accepted the plaintiff's child, the mother not being in a position to keep her, there can be little real doubt that the Board could probably have been compelled to take the child under its control pursuant to Children's Court committal procedures then capable of being invoked under s 13A of the Act. The Board under this section assumes control of Aboriginal children if they are committed to it by the Children's Court. In the present circumstances the point is that had the Board not acted voluntarily it probably could have been required to take the child under the s 13A procedure. This is significant in that, if the with the plaintiff's arguments are good, then they would potentially apply in a situation where the Children's Court has made an order under s 13(A) including a possible order that a child be committed to a home. Further, if the plaintiff's arguments are valid then they would impose the same duties and obligations upon the Board qua a child ward not only in a s 7(2) situation but also where there has been a Court committal involving one of the situations under s 13A(1). The Board in the latter situation involving a committal would have no choice but to accept the child as a ward. This potential situation highlights some of the very early problems for the plaintiff in the case.

119 In my view in the circumstances there was but one practical option available to the plaintiff in the circumstances (including being in hospital for 29 days) where the plaintiff's mother was an Aboriginal woman with limited training or education and who did not tell any one of the plaintiff's birth, and where she probably had no relatives or friends who could assist in raising the child. She was without money or a job and probably homeless. She was in no position to keep the child and in my view turned to the Board under s 7(2). Indeed, the defendants accept that the only organisation in Sydney with which the plaintiff's

mother had a connection was the Board and its officer Mrs English.

120 In my view without options or choices available to her I infer, indeed, I find that the probability is that before 12 October 1942 the plaintiff's mother contacted the Board, (or this was done on her behalf) and having established contact the plaintiff's mother made application as the parent of the plaintiff child to admit such child to the control of the board under s 7(2) of the Act and that the Board having received the mother's application admitted the plaintiff baby to its control. Having been admitted by the Board to its control the plaintiff also became a "ward" within the meaning of s 3 of the Act. Once it admitted the child to its care, the Board itself had no practical option but to send the child to the UAM Children's Home at Bomaderry being in reality the only suitable home accommodation or place available for her reception. (See also the Public Service Board's Report 1940). Based upon the prior dealings with the Aboriginal plaintiff's mother including having her at its home at Cootamundra, the Board in my view would have had no difficulty in accepting the mother's application under s 7(2) of the Act.

121 The defendants' argue that there is no documentary evidence that the plaintiff was admitted to the control of the Board (which is perhaps not surprising after 57 years) and that there was no oral evidence on the issue. It is submitted I cannot make a finding that the plaintiff was ever admitted to the control of the Board. I reject this submission. I repeat I draw the inference that the Board took control of the plaintiff on or before 12 October 1942 at the mother's request whilst she was still in hospital. There are further reasons for this view. The date of the plaintiff's mother's discharge from hospital was 12 October 1942. The plaintiff arrived at Bomaderry Children's Home on 13 October 1942.

122 The Children's Home at Bomaderry had been in existence for many years prior to 1942. It was an Aboriginal Children's Home conducted by the United Aborigines Mission (who had a mission to evangelize the aborigines of Australia). The Aborigines Children's Home was apparently experienced in looking after and raising very young Aboriginal children from birth. Indeed there is evidence that as at 1930 the Home housed children of both sexes with the Board determining the policy in terms of the age up to which Aboriginal children could remain at Bomaderry. Up until 1947 when the plaintiff left the Bomaderry Mission appears to have communicated problems to the Board for the latter's consideration. The Board conducted general inspections from time to time, at least probably annually.

123 The United Aborigines Mission was a body that appeared to emphasise the importance of religion as and at the 1940's when they conducted the home at Bomaderry, New South Wales. Religious training and the teaching of religion and moral values was regarded as important by the Board and was considered important generally in terms of the contemporary standards of the 1940's and 1950's: cf s 11A(2) "religious instruction of a ward". This Home was conducted by the Mission as at April 1947 to look after and raise Aboriginal children. The staff in April 1947 at least included a Matron and Mission Sisters. Other staff also assisted including two full time assistants and two voluntary helpers. As to the relations between the Board and Bomaderry, the incomplete correspondence tendered reveals that the communication was ongoing communication between the Mission and the Board in respect of the operation of the Bomaderry Home. While Bomaderry Children's Home was run by the UAM, it was subject to the oversight and direction of the AWB. The staff at the home were employed by the UAM (see: Board memo to Director General Public Health - 29 October 1948). And the correspondence of the Board including Mrs English's report of 13 December 1948 often referred to and described the children as being "Wards of this Department".

124 Until 1930, the Home housed children of both sexes up to the age of fourteen. At that stage the AWB apparently determined as a matter of policy that the ages of children staying at the Home should be restricted to ten years. At this age the boys were removed from Bomaderry to be placed at Kinchela Boys' Home and the girls were removed for placement at Cootamundra Girls Home. The situation was reviewed by the Board in 1931, 1934 and 1938 but was not altered.

125 In 1945, at the request of the United Aborigines Mission, the Board considered the matter of extending the age of the children to stay at Bomaderry. The decision taken by the board consisted of extending the age for removal of girls to 12 years, but maintaining that the removal of the boys take place at the age of 10 years. Had the plaintiff not gone to Lutanda in 1947 then presumably in accordance with that policy the plaintiff would have been removed from Bomaderry at the age of 12 in 1954 and then transferred to the Board's Home at Cootamundra.

126 The correspondence in 1945 (when the plaintiff was aged three years) reveals that at the Bomaderry Home that girls of 10 years assisted in the caring of younger children such as getting them dressed in the morning, giving them other little attentions and assisted in taking them to and from the dining room. The boys also assisted in little tasks. Matron Darby considered that this help from the boys and girls not only helped the staff in work but was "helpful training for boys and girls". It is difficult to see how any valid criticism could be made of this.

127 It would appear that in 1946 for some months there were some staff shortages. The Board was requested to remove certain boys to Kinchela. The material suggests that placement and removal of the children was a matter for the Board with the UAM making the request for action.

128 In this respect and in others, the Board exercised oversight of Bomaderry. It carried out from time to time through its inspector (in some cases Mrs English) a general inspection of the Children's Home at Bomaderry: cf the General Inspection report of Mrs English in 18 June 1947). Indeed, the inspector could recommend transfers to the Kinchela and Cootamundra Homes and arrange for Sydney medical care for children at the home (s 14A) and arrange medical examinations. In one inspector's report to the Board Superintendent in referring to her inspection of the Aboriginal Children's Home at Bomaderry, dated 13 December 1948, Mrs English stated that at the time there appeared to be "a mistaken idea that because the children are wards of this Department the latter is responsible...". This view provides additional support for the view that the plaintiff was a "ward" of the Board, whilst at Lutanda.

129 The plaintiff was such a ward at Bomaderry from 1942 to 1947. In respect of the plaintiff herself the UAM was of the view, contained in a letter from the Secretary of the UAM, Miss Turner of 9 April 1947 to the Board to the then Superintendent of the Board, Mr Lipscombe, that the Board's approval was required to remove the plaintiff to Lutanda. The letter request that she be taken there without further delay subsequent to the Board giving that approval. On the question of removing other Aboriginal children of white appearance from Bomaderry, the Board considered that this too was a matter for it and was being considered: see the letter dated 22 April 1997 from the Acting Secretary of the AWB.

The Reports of the Aboriginal Welfare Board.

130 The Board additionally made consistent reference to the Bomaderry Home and other

Board run homes in their yearly reports throughout the period 1939-1960. During the years up to June 1939, the Board was known as the Aboriginal Protection Board. In the Aboriginal Protection Board's report of the year ended 30 June 1939, in which there was reference to the Board having to deal with diverse problems including prejudice on the part of the white community and reference to the objective end of complete assimilation of aborigines as well as to the resolutions relating to assimilation objectives passed at a conference of Aborigines Protection Authorities in 1937, there is recorded the following:

"At Bomaderry there is a Children's Home, conducted by the United Aborigines Mission and accommodating about 25 inmates, the maximum age of which is 10 years, after which they are transferred to Kinchella and Cootamundra. This home is partially supported by the Board, but staffed by the Mission to which the premises belong."

131 See also the report of the Board for the year ending 30 June 1940 where there is reference to Children's Homes and to Bomaderry.

132 The report of the Aboriginal Welfare Board for the year ending 30 June 1940 made further reference to adopting the policy of assimilation expressed in the APB's report ending 1939. The reference to the Children's Homes is as follows (at 1488):

"The care of Aboriginal Children committed to the Board's care because of cruelty , neglect or loss of parents is still regarded by the Board as one of the very important features of its administration. Many years ago a home was established for girls at Cootamundra and later an institution for boys at Kinchela on the Macleay River. In *addition* to these two home the United Aborigines Mission has established an institution for the reception of babies and very young children at Bomaderry on the South Coast".

133 See also s 7(1)(a) of the Act which also imposed an assimilation duty. The report noted that an average of twenty four children were maintained in care at Bomaderry, there being twenty one as at 30 June 1940.

134 In the Board's report for the year ending 30 June 1941 the following is recorded:

"Aboriginal children who have been committed to the Board's care as wards continue to receive affectionate care in the homes specially provided for their reception. The children thus committed have been the victims of unhappy circumstance., sometimes through the loss of parents or perhaps from conditions of cruelty, vice or neglect. The staff of the Homes receive these children with kindness and endeavour to bring happiness into their young lives."

135 As to the Bomaderry Home, the report notes that it is run by the UAM but is subject to inspection and oversight by the AWB. It continues (at p 1496):

"The Home is situated in a bush environment about one mile and a half from Nowra, and the children of school age attend the Bomaderry Public School. Medical and dental attention is given in an honorary capacity by local professional men.

Apart from a general oversight of the Home, the Aborigines Welfare Board contributes largely to its maintenance by supplying food and clothing for the children's use.

Upon attaining the age of ten years the girls are transferred to Cootamundra and the boys to Kinchela.

An average of thirty children was maintained at the Home during the past year."

136 The Board concluded its report by saying that the task of caring for the aborigines of this State is not an easy one, indeed it may be regarded as one of the most difficult to administer of all the social services. It is stated that the Board was doing their utmost with the funds at its disposal for the benefit of those under its care.

137 It is clear that as at 1942 when the plaintiff was born, the Board had established two homes under s 11at Cootamundra (Girls) and Kinchela (Boys). As a matter of practice the Board's wards that were very young wards were sent to Bomaderry. There was no other institution or place to which they could be sent although legally, had the Board wished, it could have sent them to it's Cootamundra Home or Kinchela Home. The one and only facility or place, in any real practical sense, available to which the plaintiff could be sent was to Bomaderry where there was in effect special provision for the care of Aboriginal babies and children of tender years. As much is confirmed by Mrs English's report dated 18 June 1947.

138 In its report ending 30 June 1947 which covered the period during which the plaintiff was transferred to Lutanda, the Board emphasised (as it did in 1946) that one of the principal features of its policy was the assimilation of aborigines, particularly those of lighter caste into the community. I have referred to the Board's difficulty in seeking to identify who was a "half caste". The report stated that legally the Board was not responsible for the protection and general welfare of those persons of mixed caste who do not possess a preponderance of aboriginal blood. With respect to the position of the plaintiff in this case, several points may be made. Firstly, the reference here is to suggested legal responsibility and not factual responsibility for persons without a preponderance of aboriginal blood. Secondly, there is no evidence that the Board acted strictly in accordance with this policy. There is no evidence to suggest that it never went beyond its mere legal responsibilities. Thirdly, in my view, as I have said, I consider that in the circumstances of this case the plaintiff was accepted without dispute as having a preponderance of aboriginal blood for the purpose of her being an Aboriginal child under s 3 of the Act and that she was accepted by the Board into its control under s 7(2) . The Board acted as if she did fall within the section and did not thereafter treat her or act as if she did not or even suggest that she was not a child of an Aborigine. The Board presumably exercised some discretion in determining who had the relevant preponderance of aboriginal blood an who was to be regarded as an Aborigine of full-blood or one who was a half-caste Aborigine, comprehended as it then was within the terminology of the time. The plaintiff was accepted to be within its power. Further, or alternatively, the Board should not now be heard to say the plaintiff was not a person within its jurisdiction or a "ward" under the Act.

139 The 1947 report dealt with Children's Homes in the following terms:

"An important duty of the Board, as laid down in the Aborigines Protection Act, is that it shall provide for the custody and maintenance of the children of aborigines. In practice, the Board assumes control of aboriginal children after they have been committed by the Children's Court as neglected or uncontrollable children. Frequently children are admitted to the control of the Board at the request of the parent or guardian. These applications are considered on their merits, and if the parents are found to be unable to exercise proper care of their children, the Board usually assumes control of their children The Board at present maintains two Children's Homes for the reception maintenance, education and training of the aboriginal children admitted to its control. These two Houses, namely, the Kinchela Boy's Training Home and the Cootamundra Girls' Training Home, have continued

to function satisfactorily."

140 In addition there was as mentioned the Bomaderry Home to receive babies and children of tender years.

141 The Board's report for the year ended 30th June 1948 enunciated the Board's policy as follows:

"Board's Policy

Assimilation of the aboriginal into the general community is the keynote of the Board's policy. When it is considered that 95 per cent of the so-called aborigines in New South Wales are half and light castes, whose former social fabric has been torn asunder by the onrush of Western civilisation, and who if left alone would have neither the traditional background of the aboriginal way of life nor the culture of the white man to stabilise and guide them, the need for this policy should be abundantly clear.

The policy has a positive aim, namely, to make the aboriginal a responsible, active, intelligent citizen.

The Aborigines Welfare Board realises the difficulties arising from a different mode of thinking, content of knowledge and emphasis on different values and ideals. It realises the aborigines inherit a different view of life, and that the value of our culture must be proved to them before it will be accepted. Again the burden of ostracism and the stigma of inferiority, which have been the aborigines' lot in the past, have left them with a deep-seated resentment which must be overcome if constructive reform is to be carried out.

In the past progress has been slowed by colour prejudice in the general community. With a betterment of the aborigines' conditions, it is hoped that prejudice will be lessened and the Board looks forward to the day when aboriginal and white will live together happily and harmoniously - an example to the world of how, by liberal and wise administration, this social problem can be solved".

142 I repeat again that in my view the evidence gives rise to the clear inference that the plaintiff's mother applied to admit the child to the Board's control pursuant to s 7(2) and the Board agreed to accept control of the plaintiff pursuant to such application and upon the basis it could do factually and legally as being a person within the Act and its jurisdiction. That is what I consider probably happened. It would be somewhat unreal to consider that the plaintiff was involved in Children's Court committal proceedings under s 13A of the Act with an order being made pursuant to s 13(7) of the Act. There is nothing to suggest why such a procedure might be involved where the plaintiff baby was with the mother in hospital for four weeks. It was hardly likely to be in such situation neglected or uncontrolled with s 13A(1), although this may well have happened had the plaintiff's mother not acted under s 7(2). Indeed, the defendant concedes that there is no evidence to support the view that a court order may have been sought under s 13A. It also follows that there was no trespass at Bomaderry because the AWB took control of the child on the mother's application under s 7(2) of the Act and thereafter the Board had lawful control over the plaintiff.

The Home at Bomaderry

143 On 5 July 1988 the United Aborigines Mission advised the plaintiff's solicitors that the Missionaries who worked at Bomaderry during the time of her residence (now deceased) kept few records maintaining only the basic essential details. The letter said:

"Our Mission workers are called by the Lord and supported by the people, back in the 1940's very little support was available, they came to fill a need that they saw and were not aware of the political influences behind the reason for the home. We firmly believed we were filling a need that the aboriginal people wanted."

144 For reasons that (including the "need" of the plaintiff), I will elaborate on, both here and in considering the lay witness evidence, I find that that need was in fact filled in a loving devoted, charitable religious way by the staff including Mission Sisters, in particular Sister Saville, no doubt in difficult circumstances involving the bringing up of other people's children in a home, including in wartime Australia, and in early post-war Australia.

145 The United Aborigines Mission was clearly a religious mission very much concerned with the Christian religion and its practice. I have already referred to the article by Sister Saville (16 October 1942). It was a place of intended good charitable works looking after the children, caring for them and in effect raising them with the Board's involvement as explained. Indeed in the United Aborigines Messenger, August 1, 1948 in an article "Children's Home Bomaderry" written by A. V. Darby there is a report upon movement of children from Bomaderry to Kinchela and Cootamundra. Prayers were offered for them. Reference was made to the fact that in 1947 the family was reduced to forty three and to the plaintiff's departure in terms:

"Joy, four and a half years, with us from the age of four weeks has been recently placed in another Home. We miss our little Joy: she loved the Lord, and often said so and Joy had an understanding beyond her years and often surprised us with questions and statements".

146 The evidence would suggest a caring religious atmosphere with the Mission seeking to do the best it could in the circumstances for the bringing up and protection of the plaintiff. Indeed, there is evidence that it was interested in advancing her interests to do the best for her and to monitor her progress. It appears to be that it was the UAM who initiated the suggestion in December 1946 that, because of her white appearance, that a more suitable environment for her would be Lutanda at Wentworth Falls. It was apparently considered in good faith that it would be better and more advantageous for her (by the standards and values of the time) being a girl of "white" appearance to go to a Home for white children at Wentworth Falls. It was apparently the UAM at Bomaderry who initiated inquiries at Lutanda for the placement of the plaintiff. It was the UAM who pleaded the plaintiff's case to the Board of which she was a ward (see letter 9 April 1947). One can infer that it was, with the best will in the world, seeking to protect and advance her interests because of feelings of compassion towards her. The Board agreed that it was in her best interests for her to go to Lutanda. Indeed one might infer that, so did the mother, who signed the Lutanda application. If the girl had not gone to Lutanda with the support of UAM and approval of the Board she would have remained at Bomaderry, and absent fostering or adoption, have stayed there till she got older and then been transferred to the Aboriginal Girl's Home at Cootamundra, where her mother had been a ward. There is no evidence the mother sought her restoration under s 11D(1)(h) or sought to have the plaintiff discharged to her care under s 11D(1)(i). Clearly she was in no position to care for her or look after her (see also the mother's letter to Miss English in December 1956). It is worth again noting that the mother had not told any one of the plaintiff's birth and so the question of relatives (the father's or the plaintiff's mother) being in a position to take care did not arise at all. Absent fostering (which could not be permanent) or adoption, the situation was one where the plaintiff was to be raised as a ward in an institution Lutanda, or the Aboriginal Children's Home Bomaderry followed by the Aboriginal Girl's Home at Cootamundra, and to the use the language of the time to be raised in effect as a "white girl" in those institutions. The

UAM Sisters considered that it was desirable she be brought up as a "white child" in a white environment as being more suitable ie children "should go to Homes with children of their own colour": letter 9 April 1947. The Board agreed, that it was in her interests to be transferred to Lutanda. It also accorded with its policy and accorded with the duty of "assimilation" imposed on the Board by s 7(1)(a) of the Act. In my view the collateral purpose of relieving pressure on accommodation was probably very much a secondary one.

147 As to the plaintiff's mother visits at Bomaderry. I accept that the plaintiff was visited by her mother at Bomaderry as she asserts in paragraph 6 of her affidavit (see also history to Dr Waters in October 1991). I have no reason to doubt that this history given to her by her mother is correct. I would also add that the Children's Home at Bomaderry was not a home established under s 11 of the Act, and s 13(1) of the Act did not apply. The plaintiff's mother was entitled to visit the plaintiff at Bomaderry and I find she did so between 1942 and 1947.

148 There appears to have been a warm affectionate relationship that arose between the plaintiff and her carers at Bomaderry, particularly one carer, Sister Saville (a photograph was tendered in evidence). I accept there was bonding and attachment to her after the plaintiff's arrival at Bomaderry and whilst she remained at Bomaderry between her and Sister Saville According to the history (which I accept on this point), after Joy was placed in the Bomaderry Children's Home, Dr Waters records the following history:

".... She has a number of early memories at Bomaderry which she described as "comfortable safe memories". She felt that someone was looking after me and she recalled being cared for at this time by several black women who were there. She also remembers being visited by a lady with a silver buckle "whom she now believes was her mother"."

149 There is evidence (not objected to) in respect of the relationship of Miss Saville with the plaintiff at Bomaderry. Miss Moorehouse (from Lutanda) gave evidence (at T 334-335) that she had not met Miss Saville but had heard that Sister Saville was a missionary in Bomaderry who through caring for Joy, was getting married and that Joy was one of her favourites. Miss Moorehouse that Sister Saville had thought that Joy should be given a chance in a good home and that Sister Saville had asked whether she could go to Lutanda. Miss Moorehouse said she was told this by Miss Sangwell at Lutanda.

150 In cross-examination (T 338-339) Miss Moorehouse said that Joy had told her "When Miss Saville got married, she should have taken me to be her little girl". She continued (at T 339) "She just thought that when Miss Saville married she should have gone with her to be her little girl". She was asked (at 339):

"Q. How often did she say that to you?

A. Oh, I didn't count, but I knew that's how she felt".

151 This evidence also points to bonding and attachment with Sister Saville. I accept Miss Moorehouse's evidence (see also para 9 of her affidavit of 3 December 1997). Miss Moorehouse gave the following evidence which I also accept (at T 362):

"**Q.** Were you told how many staff there were?

A. No, the only thing I know about it was that photo I had of Joy with Miss Saville and the little ones, but there could have been more, but I don't know how many more children, no.

Q. So you didn't know, for example, that one of the reasons that Joy was sent away from Bomaderry is because it was too crowded?

A. It wasn't too crowded, but this Miss Saville thought that Joy would have a chance to be assimilated - that's a bad word, isn't it? But they did think it would give Joy a chance to grow up in a good children's home where she would be well cared for and loved.

Q. But you weren't told that one of the reasons that they wanted Joy to be removed was because it was too crowded down there?

A. No, no, I didn't. I just know it was because Miss Saville was getting married and Joy was her favourite little girl.

Q. And you didn't know how many children were there?

A. No, and I never ever met Miss Saville, I just know that.

Q. And you didn't know how many staff were taking care of the children?

A. Oh no, I don't know. I could have found out, but the lady I would have asked died two years ago, so it was too late."

152 Mrs Buxton (nee Parker) gave evidence along similar lines which I accept. She said (at 399-400) that she knew "back then" that Joy had been at Bomaderry Children's Home prior to coming to Lutanda that "she had much paler skin than anybody else there and that she was transferred to Lutanda at Wentworth Falls because she looked so out of place amongst the black children".

153 The above evidence suggests a caring feeling and compassionate relationship, that she was cared for and looked after, perhaps even given special additional attention because of the particular interest with her by Sister Saville. Whilst the plaintiff was at Bomaderry she had such a close enough relationship with Sister Saville that she wanted to go with her as her little girl when Sister Saville left to get married. According to the plaintiff Sister Saville took her from Bomaderry to Lutanda at Wentworth Falls. Indeed, the relationship bond was such that the plaintiff also remembered her only visitors at Lutanda were Aunty Leila (Sister Saville) and Uncle Sid (Sister Saville's husband). In para 65 of her affidavit the plaintiff described visits to her when she was twelve and recalled getting phone calls every two years after Sister Saville moved to Western Australia.

154 There was in my view a particular bond of affection between the plaintiff and Sister Saville at Bomaderry, interrupted inter alia by Sister Saville's departure and desire to see the plaintiff placed in a "good home" at Lutanda. This was also a good faith act on the part of the Mission, particularly Bomaderry, to try to get the plaintiff transferred to Lutanda described as "a good Children's Home where she would be well cared for and loved". Sister Saville would not I believe have supported a transfer of a "problem child" without disclosing she was such a problem child, to someone especially her superiors as well as the Matron. If there had been a problem I am confident the Matron would have disclosed it to Mrs English or the Board at the time of discussing the transfer.

155 As to the plaintiff also being properly looked after at Bomaderry, the Board "generally inspected" Bomaderry. Mrs English's report of 18 June 1947 is revealing. The plaintiff was admitted to Lutanda on 16 April 1947 just shortly after the plaintiff left for Lutanda. There

was an inspection on 22 and 23 April, the subject of Mrs English's report of 18 June 1947.

156 The report reveals there were 43 children in residence. The plaintiff had left just one week prior to the inspection. She observed that the children were neat and tidy in appearance. She reported that when required the children were medically examined by local doctors and that their diet was adequate and nourishing. Recreational activities are well catered for. The staff numbers were also described.

157 The Matron reported to Mrs English that the conduct of the children was very satisfactory and that there were **"no problem cases"** [my emphasis]. I accept that what was being reported upon included that of the position of the plaintiff prior to her recent departure for Lutanda. The proposition of the plaintiff that technically the plaintiff was not covered by the description because she had just been transferred is not one that I accept. It would be strange if the only "problem case" had just left Bomaderry. For reasons that I will set out more fully in respect to the lay evidence, I find that the plaintiff was not problem child in any respects nor at Bomaderry displayed anything that showed a manifestation of any psychiatric or emotional disorder. I infer and find that at Bomaderry and when she left Bomaderry she was a normal child including in her behaviour. I find that she was in no way disturbed or showed signs of disturbed or abnormal behaviour and that this was the situation when she departed Bomaderry. I reject the plaintiff's submissions to the contrary. Importantly, a medical certificate was also mandatory for entrance into Lutanda (see the pro forma Lutanda Application Form). I infer that this practice was followed qua the plaintiff and a certificate given. I will return to consider these matters again when I consider the lay evidence.

158 In my view, a child such as the plaintiff who was transferred a week before the inspection with the assistance and support of Sister Saville, would probably have been a "non problem case" as described by the Matron and given the requirement for a medical certificate, also in good health.

159 Whilst there may have been some "overcrowding" at Bomaderry, the position appears to be that, as concluded by Mrs English in April 1947:

"This Home appears to be functioning in a satisfactory manner and to be serving a useful purpose in the care of Aboriginal Children of tender years."

160 In any event I find that any overcrowding did not diminish the care and proper support given to the plaintiff at Bomaderry by the UAM including in particular that provided by Sister Saville. The plaintiff has submitted that the report of Mrs English cannot support any inference that the conditions at Bomaderry (commencing in 1942 and including continuing one or three year till the war finished) were other than adverse to the plaintiff's emotional health. I reject this submission. I reject the submission that she was or appeared to be profoundly disturbed or disturbed at all. This submission is advanced by the plaintiff perhaps to support the evidence of Dr Katz, a medico legal expert called in the plaintiff's case, and Mrs Bull, a retired social worker, that the plaintiff was suffering a disorder of attachment and must have been displaying signs of that disorder when she was young. For reasons that will become clear, I reject the views of Dr Katz and Mrs Bull because of my findings on the lay evidence that no such behaviour is proved whilst at Bomaderry. Dr Katz's and Mrs Bull's views that there was or must have been a situation involving a disorder of attachment present some 52 years ago involves rejection of my findings and inferences from the evidence. They are views not in accordance with the facts as I have found them to be.

161 In respect of its case against the defendants in respect of Bomaderry, essentially all that the plaintiff submits should have been done was in my opinion, in fact reasonably done, namely, regular inspections of the institution and children in order that the AWB would be in a position to give an accurate history of the background of the individual child if and when the child was moved to another institution. The plaintiff has not proved or proved to my satisfaction what history was in fact given. I have already referred to some of the material. There is also the application form. The plaintiff's counsel submits that the plaintiff (residing at Bomaderry in 1947) should have been examined by staff of a Child Guidance Clinic in Sydney (at the age of 4-1/2 years) before going to Lutanda (Wentworth Falls) in April 1947 in order to determine her mental state and the risk of harm to which she was subject having regard to the circumstances of her maternal deprivation and the conditions of Bomaderry. I reject this submission. No such examination was reasonably required, practically required or called for. The child was in my view behaving as a normal child of her age.

162 Indeed, it is appropriate for me to repeat something I have said before. The Board's report for the year ended 30 June 1945 specifically referred to the previous five years being fraught with many to give contest to the plaintiff's position at time of birth in difficulties and restrictions in connection with the implementation of constructive and comprehensive policy:

"These war years have necessitated a curtailment of expenditure and an inability to proceed with a general programe shortage of manpower and availability of material. Furthermore plans for the development of welfare activity which would be consequent upon more adequate staffing had to be deferred because of inability to secure trained staff".

163 Indeed, in its 1943 report the Board noted that the war had depleted the Board's manpower and material resources causing a progressive policy to be differed. The war was impacting then upon the Board's man power and resources and upon its policies activities and operations and its capacity to "deliver" services. In 1946 the Board's report referred to the year under review presenting difficulties from the point of view of staffing owing to the fact that the curtailment of demands due to the war was only gradual.

164 With respect to the inspections of Bomaderry the Board's inspector saw the children and the accommodation. The Inspector acted upon received reports and information from the Matron(s). The children that were old enough were in attendance at public schools at Bomaderry. Further there is no evidence of any psychiatric problems with any of the other children at Bomaderry. There is no evidence led that the any of the children since the 1930's up till 1947 or at all who have been at Bomaderry (or even Lutanda) developed or had ever been diagnosed as having attachment disorders (or had developed attachment disorders) or mental disorders, or ever developed Borderline Personality Disorders. The Home had been operated for receipt of babies since 1930's and was still operating in 1940's. There was no evidence presented that any GP in the area diagnosed any emotional problems, medical problems of attachment or Borderline Personality Disorders for any children at the Bomaderry home.

The Plaintiff's Transfer to Lutanda

165 In April 1947 the plaintiff was transferred from Bomaderry to "Lutanda" Children's Home at Wentworth Falls conducted by the Plymouth Brethren. She remained at that Home in Wentworth Falls until 1950 when it moved to Pennant Hills. She stayed with the Home at Pennant Hills until discharged on 31 July 1960. This information was provided to the plaintiff in a letter from the then Administrator, David Bryant dated December 1984. The

plaintiff was advised in that letter that Lutanda had no school records but that the plaintiff had attended Hornsby Girl's School possibly in years 1955-1957. I accept that the plaintiff was probably educated to an Intermediate level. There is no evidence she suffered any detrimental problems with her education let alone received any adverse behaviour reports. I would note that a copy of the plaintiff's birth certificate and a copy of her mother's application for admission was enclosed. The plaintiff was advised that "no money was paid for keep" and that Lutanda "was unable to help with pocket money".

166 Had the plaintiff not been "transferred" to Lutanda in April 1947 then unless she was discharged under s 11D(1)(h) or 11D(1)(i) at the age of eighteen, then in accordance with the Board's policy, the plaintiff ward would probably have been transferred by the Board to the Board's Aboriginal Girl's Home at Cootamundra (a home constituted under s 11 of the Act) when she turned twelve years and probably would have remained there as her mother did till the age fifteen. She would whilst at Cootamundra, probably have been trained to perform domestic or similar work till the age of fifteen. Contrary to the submissions of the defendants the "transfer" in my view did not involve s 11D(1)(h) or (i) of the Act, or reflect, an implementation of either of those provisions.

167 The circumstances surrounding the child's transfer to Lutanda have been seriously disputed. It appears that by about December 1946 (when the plaintiff was aged 4 years) the plaintiff's complexion was such that the UAM Mission at Bomaderry were describing her as having the appearance of a white child. Sister Saville of the Mission apparently knew of Lutanda in circumstances I have discussed. In any event the Mission wrote to the Board (the plaintiff was a ward of the Board on my findings) in December 1946 about removing the "white child Eileen Williams". The decision to transfer or remove the child to Lutanda appears to have been one that the Board approved, indeed, consented to in its capacity, of having the plaintiff, as its ward under its control. The mother also consented to the transfer with full knowledge of where her daughter was being placed and probably with knowledge of the reasons therefore. I infer that the mother at the time (1947) probably also thought it was in her daughters interests in terms of the choices available to her. On the evidence it cannot be said that the plaintiff was denied any opportunity of being fostered or adopted. Further, there is no evidence that at the time of the plaintiff's transfer, or before, or even subsequent, that the mother even requested the Board to consider having the plaintiff adopted or fostered out.

168 Clearly there had been intervening correspondence because the Board responded as follows in a letter from the Acting Secretary of the Board dated 22 April 1947 to the then Secretary of the UAM in the following terms:

"Your letter of 9th April is acknowledged.

In connection with the child, Eileen Williams, I communicated with you about ten days ago regarding the transfer of this child to the Lutanda Children's Home, Wentworth Falls, and no doubt you have now received that communication.

Regarding the question of removing other children from the Bomaderry Children's Home, I have to advise that this matter is receiving attention. It is anticipated that Mrs Inspector English will be visiting Bomaderry Home at an early date and she will discuss this matter with the Matron of the Home."

169 Pausing at this point of time, it appears that between December 1946 and April 1947 there had been communication between the UAM and Lutanda about taking the "white girl"

plaintiff to Lutanda. This accords with the fact that Sister Saville knew someone there. I am also satisfied that somehow and by some means between December 1946 and March 1947 some communication was established with the plaintiff's mother. How she was located or by whom is not clear. Since Lutanda did not know her from previous dealings perhaps she was located either by the UAM or the Board or perhaps both. The plaintiff was a ward of the Board on my findings and on the probabilities the Board knew the plaintiff's mother's whereabouts.

170 The Board appears to have had to approve the transfer to Lutanda. It may have foreshadowed its willingness and approval as early as February 1947. In any event the Application for Admission to Lutanda Form (Vol A1 - p7) had already been stamped with the Chief Secretary's Stamp on 6 March 1947. The transfer took place on 16 April 1947.

171 The letter of 9 April attributes several reasons as to why the transfer was requested. First, the plaintiff child (aged four) appeared then to be a white person in appearance (in an Aboriginal Home for aboriginal children). Second, the home at Bomaderry was subject to strain to the extent it might close down. Third, by removal of the "white children" (and there were "four other white children who should go to Homes with children of their colour") the train on Bomaderry facilities would be removed as "well as the children being placed in a more suitable environment". Fourth, Sister Saville was leaving Bomaderry to get married. She knew of Lutanda, and believed it would be in the plaintiff's interests to be transferred there.

172 Taking the letter at face value at least from the point of view of the standard and values of the time, the UAM was of the view that infants such as the plaintiff and four other children who were "white children" would be in a better and more suitable environment if they were not in an Aboriginal Children's Home but in a Home for white children and in the case of the "white child" plaintiff in the white children's home at Lutanda. In my view in the case of the plaintiff, the Board was in clear agreement. The Board too had its own reasons. There was a policy of assimilation of Aborigines (to which I have referred) and inter alia, reflected in the duty imposed on the Board under s 7(1)(a) of the Act. Clearly it perceived it also to be in the best interests of the plaintiff to go to a Home.

173 That said, there was the problem of transferring the child who was then a ward to Lutanda, a home regarded as being one for "white children" under the **Child Welfare Act**. The plaintiff was a ward of the Board and not a ward under the **Child Welfare Act**. Nor did she ever become one under that Act. Indeed, to be placed at Lutanda did not required the plaintiff to be a ward under either of the two Acts. It seems to me that an arrangement was implemented as follows: The UAM suggested a transfer which was pursued by Sister Saville. The Board agreed to the transfer of its ward. I would infer that the mother's signature to the application form obtained before the transfer was required by Lutanda as a "formality" or administrative requirement to permit the transfer to be implemented. In my view this accords with the nature of the application form for admission and the different handwritings appearing upon it. The form is a pro forma form of the "Lutanda" Children's Home. The date of the application is not revealed. The plaintiff's mother's signature appears on it as applicant. That is not surprising for reasons stated. It appears that Lutanda required it as an administrative matter, as formality to permit of admission to the facility. The defendants argue that the application was by the mother and provides evidence that there has been a discharge of the plaintiff to the mother's care under s 11D(1)(h) and/or possibly (i) of the Act. I do not accept this submission. I find as a fact that the child was still a ward at the time of the transfer, the mother's signature was no more than a formal requirement probably sought by Lutanda for "administrative" purposes.

174 My reasons for so finding are as follows. There had been the occasional visit(s) to the plaintiff at Bomaderry but there is nothing to indicate that between 1942 and 1947 the mother sought the restoration of the plaintiff ward, or that she was in a position to do so, or wanted to do so, or was ready, willing and able to do so. Next, by signing the form in 1947, the mother knew her daughter was still a ward. There is nothing to indicate that she wanted her restored to her custody. Her signature to the document for admission of the child to Lutanda would support a contrary view. By so applying the mother was indicating she did not want the child restored to her care (nor had she on the evidence done so in the past). She indicated she wanted the child to go to Lutanda. She did not indicate she wanted to see the child.

175 A submission that the form evidenced a restoration of the child ward (as I have found) or even that the child was not even a ward) is thus one I cannot accept in terms of reality. The mother's role appears to have been a limited "paper involvement" one required at least by Lutanda to permit of admission to its Home. That such a view is the probable one is also supported by several other matters revealed by the application form itself. The form is a pro forma of Lutanda. It contained the following:

"Name of Guardian Aborigines Welfare Board

Address Bridge Street, Sydney

being Admission is sought "To take the child from the

Association of Aborigines as she is a fair skinned child".

176 The reference to guardian (whatever be the true legal description of the Board) made it clear that the Board "represented" (perhaps even "mistakenly") it was such. The stamp of the Board further supports the representation. I am satisfied that in reality the transfer from Bomaderry involved the Board. Next, the reference to whether the applicant is "to contribute fees" was deleted suggesting like at Bomaderry no fees were to be paid by the Board or otherwise. In my view the wardship under the **Aborigines Protection Act** established in 1942 continued on at Lutanda between 1947 and 1960. What I have said is consistent with the mother playing no more than in effect a "notional" formal signatory role in 1947. In my view the form is not evidence that the wardship had ceased.

177 In my view, the Board was involved in the placement of the plaintiff at Lutanda, approved the transfer for the purpose expressed in the application, participated in its implementation for the primary reason "to take [her] away from association of Aborigines as she is a fair skinned child". It is also a proper inference that the plaintiff was kept at Lutanda until 1960 for the same reason, which accorded with the view that it was a more suitable environment, and it was better for white children to be with children of "their own colour" and because no adoption or fostering option was in fact available. The plaintiff was sent there or placed there for the best of motives in accordance with law (as it then was) and for what was perceived for her to be the best protection and advancement and for her own good. If this had not been done at the age of twelve she would, absent fostering or adoption (and there is no evidence foster parents were available), probably have been sent to the Board's Aboriginal Home for girls at Cootamundra till the age of fifteen, and further remained as a ward till aged eighteen.

The Wardship of the plaintiff

178 In my view the plaintiff remained a ward of the defendant whilst at Lutanda from 1947 to 1960. She became a ward in September - October 1942 on application by her mother to the board to admit the plaintiff to the control of the board. The Board admitted the child and thereafter she became a ward. The Board has a duty to provide for the custody and maintenance of the children of aborigines: s 7(1)(c). The plaintiff was such a child. The duty to educate was removed in 1940. The Board also had a duty to exercise a general supervision and care over all aborigines: s 7(1)(e). In addition, it had an assimilation duty under s 7(1)(a) imposed by law. It was also its policy at all material times in practice after 1940. Under s11D (introduced in 1943 after the plaintiff's birth) the Board was given authority to do a number of things as referred to in that/these sections including in relation to custody. The Board not only had control whilst the plaintiff was a ward, it also had the authority to discharge a ward from "supervision and control" or direct the restoration of the ward to the care of his parent or another person.

179 When the plaintiff was transferred to Lutanda the child remained under its control and supervision albeit that the "custody" location was changed from Bomaderry to Lutanda. Her status as a ward was not changed. She did not cease to be a ward till 1960. There is nothing to suggest that she was involved in or visited the child at Lutanda (and in 1947 I infer by her signing the admission form that she knew where the child was being taken, namely, to Lutanda) or took any interest in seeing or communicating with her at all until 1956. Section 13(1) did not bar her from seeing the child or communicating with the child at Lutanda since Lutanda was not a Board home within the meaning of s 11 of the **Aborigines Protection Act**. The fact that the mother did not visit or make contact or seek to make contact in 1956 knowing that the child was at Lutanda, (having signed a form in 1947 in relation to her admission to Lutanda) also supports the view that the plaintiff ward status continued despite the physical location where the plaintiff was in residence of custody. Indeed, what the mother did from 1947 to 1956 is consistent with a view that she did not wish the child's status or relationship viz the Board to change from what it had been between 1942 and 1947 (when the child was at Bomaderry), nor did she wish to have the child returned to her care.

180 That the mother was not in a position to take back the care of the child or seek to have the child restored to her care between 1947 and 1956 is an inference to be drawn from her letter to the Board (Mrs English of the Board) in December 1956. This appears to be the same Inspector Mrs English who was with the Board in 1939 and who presumably knew or knew of the plaintiff and the plaintiff's mother. That letter when the plaintiff's mother was aged (36 years) is a sad letter. It reveals that the mother had no one to turn to other than Mrs English. The plaintiff's mother had been in hospital and could not afford to pay the bill. She had no money and was living with her sister. She was seeking a job at or near Condobolin with no success. She also sought help in obtaining a place on the Mission at Murray Bridge. The plaintiff's mother was in no position to nor sought the care of the child (in the same way as she had since 1942 or between 1947 and 1956). Physically and financially she was not in a position to do so.

181 Significantly the mother did ask Mrs English "could you please tell me if I could go and visit my daughter as I would like to see her now". Whether the mother had forgotten that she had consented to the child going to Lutanda or whether she believed any visit to her wherever she was required the Board's permission is not clear.

182 This is the only direct evidence from the mother of her wishing to see her child (and not obtain its care) at Lutanda since 1942. Even though the plaintiff's mother visited her at Bomaderry, there is no evidence that the plaintiff's mother sought to see her daughter

between 1947 and 1956. She knew in 1947 that the child was going to Lutanda. There is no evidence of visiting or communication (or seeking to visit or communicate) with the child at Lutanda or of contacting Lutanda direct (before or after the letter of December 1956). Whatever be the reason I find that the mother did not visit or communicate with the plaintiff at Lutanda between 1947 and 1960, it is important to note that there was no reason in law preventing her from doing so.

183 Criticism had been made by Mr Hutley of Mrs English's response of 28 December 1956 to the plaintiff's mother's letter. The mother's request about going to visit her daughter was in fact not dealt with by Mrs English. I do not impute bad or improper motives. Indeed one can well understand reasons why she would not have done so including the fact that the plaintiff's mother had not seen the plaintiff between 1947 and 1956 (nine years). Nevertheless, the letter was not followed up, and no subsequent request or contact appears on the evidence to have been made by the mother to Lutanda or otherwise.

184 In 1973 it appears the plaintiff met her mother for the first time through Link-Up. In 1982 she visited Cowra where her mother's family came from.

185 In my view the plaintiff was a ward of the Board from 1942 living firstly at the Mission Children's Home, Bomaderry till 1947 and thereafter living still as a ward at Lutanda from 1947 to 1960. As a ward she was under the control of the board. She was not fostered out after 1943 under the 1943 legislation. There is no evidence that any person sought to foster her, wished to foster her even on a temporary and not permanent basis. There is nothing to suggest that a suitable matching foster parent could be found between 1943 and 1960 for the plaintiff or at all.

The Lutanda Home

186 The plaintiff was a resident at Lutanda from 1947 to 1960. In 1930 the Lutanda Children's Home (church denominational home) was established at Wentworth Falls. It was established by two women a Miss F. M. Dalwood (known affectionately as "Aunty" and a trained school teacher) and Miss E. Sangwell. Miss Dalwood's brother was involved and associated in the provision of the Dalwood Health Home for Far West Children's Scheme. Clearly the Dalwoods were caring citizens with an interest in the welfare of children. Mr Dalwood was involved in the purchase of the property "Rennail" and provided part of the finance. The first children coming into its care were orphans. Later it took in other children. The home was thereafter co-ordinated by people of the Plymouth Brethren faith. Through their influence, the Home attached importance to religious values and training standards. A missionary vision was maintained.

187 In 1938, a Miss Atkinson from Tasmania joined the work. An assembly was commenced in 1944 (she retired in late 70s). In 1944 demands of the Child Welfare Department for a partial reconstruction occurred. Clearly from the very early days the then Child Welfare Department had some association with the Home and an awareness of its activities and the like. Consideration was given to building a new home at Pennant Hills. In April 1947, Miss Dalwood died. Before doing so, at the express wish of Miss Dalwood and at the invitation of the Trustees of the Home, Mr Murray accepted the position of Superintendent of the Home. The new Home was opened at Pennant Hills in 1950. Shortly prior to 1950 Miss Sangwell and a Mr Ritchie were married and they retired. About this time the Trust was reconstituted including a F. L. Sattler and F. G. Sattler. In 1955 the Home was incorporated as a "Non Profit Company". Mr Murray resigned in 1955. At that time Mrs Buxton (nee Parker) of Tasmania became Matron for three years. She was

succeeded by Mr Middleton taking on the role of Superintendent and Mrs Middleton. They brought in the words of Mr Sattler "fresh drive and vigour" to the Home. On their withdrawal in 1959 the position of Superintendent was filled by Mr Reid.

188 During the many years of Lutanda personal service was given by other employees with needs being often heavy and met with some difficulty. They provided charitable services and were unpaid. The Home was a denominational institutional home and was supported by volunteers from the Plymouth Brethren.

189 In 1950 the New Home was opened at Pennant Hills, a separate building for boys was completed in 1958.

190 For many years a band of ladies regularly visited Lutanda with help in domestic duties. Physical work was also done by helpers. The work being performed at Lutanda was perceived to have been very much as the implementation of the "Lords" work and support: "Lutanda Children's Home ... 1930-1960".

191 The Lutanda Children's Home produced Annual reports. The 1946 report referred to "drab and difficult days when faith was tested", and to the importance of religion and prayer. Miss Dalwood emphasised the finding of Christian homes and suitable employment for boys and girls as they reached the age of leaving Lutanda. The activities of the school, the support from outsiders was described.

192 Although Lutanda was not a home within the meaning of s 11 of the **Aborigines Protection Act**, tendered in evidence was a license dated in 1955 showing that Lutanda was a licensed placed within the meaning of Part V11 and s 28 of the **Child Welfare Act 1939**. A license under that section signified the approval of the Home as a place established for the reception of children under the age of seven years "apart from their mother or parent". It was not an institution within the meaning of s 49 of the **Child Welfare Act**. Section 28 was not a recent amendment. I infer that Lutanda had been licensed as such a place as at 1947 and thereafter. A child in order to be placed in the home did not have to be a ward within the meaning of s 4 of the **Child Welfare Act**. A child could be placed there by a parent without the child being a ward.

193 Mr Hutley accepts that Lutanda was a licensed place under s 28 of the **Child Welfare Act**, and that the Board had a power to board out a ward with the person in charge of any charitable home or hostel which would include Lutanda. This concession makes it unnecessary to strictly speaking explore the status of Lutanda any further. That the child was properly placed there is not in dispute. A child did not have to be a state ward to become an resident of such a place. It is not suggested that the plaintiff's status as an AWB ward (which I have found she was) changed to that of a ward under the **Child Welfare Act**. Upon receipt of an application for a license the Minister was required to cause an inquiry to be made and for a report to be furnished. A register was to be kept of every child that entered such a place pursuant to the license. Section 30 provided for inspection of the place by an officer accompanied if necessary by a medical officer to make an inquiry and report for the purposes of s 28 or to ensure compliance with conditions. Provision was made for cancellation of the license upon breach of the conditions. A register was to be kept of each child received into care

194 According to the Child Welfare Department Report 1955 (tendered by the plaintiff) as at 30 June 1955 there were 285 licenses in force under s 28 of the **Child Welfare Act 1939**. The number of licenses in force remained fairly static "particularly in regard to large

denominational homes". The 1955 report referred to District Officers regularly visiting both private and denominational homes. Lutanda was apparently a denominational home.

195 Indeed, I would infer that Lutanda was licensed under the **Child Welfare Act** at the time of the plaintiff's arrival in 1947 and for some years beforehand. It is hard to imagine the UAM (at Bomaderry) recommending as it did a transfer to Lutanda indeed even taking steps to secure a place at Lutanda unless it was licensed under the Act. Likewise, it is hard to imagine the AWB approving such a transfer of its ward other than to there custody unless it was licensed. The history of Lutanda shows it having had dealings with the Child Welfare Department: and the reference in 1944 to "demands by the Child Welfare Department for a partial reconstruction ... of Lutanda". Exhibit A1 at 251 f-h, also contains an extract from a register kept by Lutanda - see also reference to Regulation 46 of the **Child Welfare Regulations 1940**.

196 It cannot be said that these statutory provisions and licensing conditions are not of significance. The defendant's in oral submissions, made submissions to the effect that if "Lutanda" was "good enough" to be licensed by the Child Welfare Department it would have been good enough for the AWB. A great amount of time at trial has been devoted to the nature, quality and content of care at Lutanda where the staff (unpaid) attended to the care of the children including the plaintiff. On the evidence I find that the women carers did so with charity, trust, devotion, care and within constraints, with appropriate discipline (measured by the standard of the day), kindness and affection. The difficult task of bringing up the plaintiff and other children whose parents could not or would not or were unable to do so themselves was accompanied by religious instruction, support, appropriate discipline and dedication.

197 The license conditions indicated what was required to be done by a licensee, to comply with such. They should not be ignored. The 1955 license conditions reveal that the license that was issued specified the number of children who could be received under the age of seven years `apart from their mother or other parent'. Conditions of the license included conditions that each child be cared for to the satisfaction of the Minister for Public Instruction (who was also the Minister for Child Welfare) and that structures and buildings were to be maintained to the Minister's satisfaction. Additionally the person in charge was required to notify the Director of Child Welfare of any child meeting with an accident or becoming ill. If urgent medical care was required, the licensee was requested to give it to the child.

198 The number of children were controlled. The staff of the place had to be maintained at the number and with like qualifications as those specified in the license. Staff numbers and qualifications could not vary and the licensee had to satisfy the Minister as to the appropriate staff numbers and qualifications to obtain the license. The person in charge of the Home under the license had to maintain the qualifications specified in the applicable license. This too was an important matter in terms of the standard of care at Lutanda.

199 These are, inter alia, the conditions on the license. As I have said, the plaintiff entered Lutanda as a ward and remained there as a ward of the Board but in the custody of Lutanda. Lutanda was subject to the statutory provisions and conditions stated in their license. I do not find, qua Lutanda, that these license qualifications (probably on foot for many years) were breached at any time during the plaintiff's stay. I infer the conditions were complied with and that the relevant license conditions can be understood as objective proof of the conditions prevailing at Lutanda during the time of the plaintiff's residence.

200 Mr Hutley did not seek to make out a case based upon any activity of the Child Welfare Department in respect of Lutanda. However, he disputed the entitlement of Mr Barry QC to rely upon evidence of what the Child Welfare Department did or did not do in relation to its inspections of Lutanda. He submitted that there was simply no inquiry as to the conduct of Child Welfare Department. He argued that this situation arose from the way Mr Barry had conducted his case including either the rejection or non-pressing of certain materials in affidavits of Miss Moorhouse (at T 344), Mr Sattler (at T 145) and Mrs Simpson (at T 263). He argued that Mr Barry should not be entitle to rely upon what the Child Welfare Department did or did not do in relation to Lutanda and further particularly in terms of whether its activities could be said to be a discharge of the duty of the Board to the plaintiff. This said, it does not preclude me from referring to the Act, Regulations or conditions as the case may be and other objective matters. In fact it was Mr Hutley who tendered as part of his case the 1955 license or if I am mistaken, did not object to its tender by Mr Barry. Further, no objection was taken by Mr Hutley to certain evidence led in relation to Child Welfare Department inspections. I find no difficulty in dealing with this evidence, since the place being licensed, would presumably have been and was inspected. It would be surprising if it was otherwise.

201 Mrs Reid recalled that during her years (from about 1958 until the early 1960's) whilst at Lutanda she could recall inspectors from the Department of Child Welfare coming to Lutanda and observing the general operations of that home and how it was running. She said that they did not come to check on individual children and usually came when the children were at school. Miss Moorhouse in her affidavit referred to a Child Welfare Department Inspector attending Lutanda during the time that Miss Dalwood was at Lutanda (1930-1947). Mrs Middleton, who worked at Lutanda from 1956 until 1959, recalled inspectors from an unknown government department coming to inspect Lutanda. Miss Oxborrow had vague recollection of "welfare people" visiting Lutanda. In my view the evidence establishes that Child Welfare Officers or Inspectors probably visited Lutanda from time to time to carry out inspections.

202 I note also the plaintiff's concession that no complaint is made by the plaintiff as to the adequacy or otherwise of the physical facilities at Lutanda.

The Plaintiff's Affidavit Evidence

203 The plaintiff gave evidence during the course of the trial by way of an affidavit (dated 20 November 1996). The plaintiff affirmed a second affidavit by way of reply on the 20 February 1998 in which she reaffirms many of the previous allegations made in her primary affidavit. Her affidavit evidence is wide-ranging and covers many aspects of her life: at Bomaderry, at Lutanda and after she had left the care of Lutanda. It includes allegations, and appears, on a fair reading to have been prepared with careful consideration given to the matters referred to in it.

204 The plaintiff was not able to and did not give oral testimony on any of the matters contained in those affidavits, nor was she cross-examined on them. It benefits therefore to begin by setting out the plaintiff's affidavit evidence in some detail.

205 The plaintiff deposes to the following. The plaintiff was born at the Crown Street's Women's Hospital in Sydney on the 13 September 1942 under the name of Eileen Williams. Her mother as appears on the birth certificate was Dora Williams, then aged 18 years. The plaintiff's birth certificate does not show the plaintiff's father's name.

206 The plaintiff was informed and believed that a matter of hours after her birth she was removed from her mother under the instructions of the Aboriginal Welfare Board and soon after placed at Bomaderry Children's Home which was an institution run by the United Aboriginal Mission.

207 The plaintiff stayed at Bomaderry from 1942 until about April 1947. Whilst at Bomaderry, the plaintiff has memories of a lady who came to visit her. The lady wore a blue dress and a belt with a shiny belt buckle that was "shiny like marquisate". Later in 1973, having been reunited with her mother the plaintiff asked her mother whether she ever came to visit her at Bomaderry or Lutanda. The plaintiff's mother replied:

"Yes, in Bomaderry. I visited you there until one day I came back to visit you and the Matron told me you were sick and had to be taken to hospital in Sydney. That was the last I saw of you at Bomaderry."

208 Though unsure of the number of times she saw this belt buckle, the plaintiff has no other recollection of visits from her mother while she was at Bomaderry. I accept that the plaintiff was told by her mother that she visited her at Bomaderry and that her mother did in fact visit her there.

209 On the 16 April 1947, the plaintiff was transferred to Lutanda Children's Home, run by the Plymouth Brethren at Wentworth Falls. The plaintiff remembers Sister Saville taking her to Wentworth Falls and that at the time she was wearing a blue coat and a tartan skirt. The plaintiff gave evidence that all the other children at Lutanda who were there at the same time as the her were of European descent and white complexion. In her early years at Lutanda, the plaintiff believed herself to be a "white child and an orphan". The plaintiff was never told whether or not she was an orphan but thought she must be.

210 At Lutanda, the plaintiff alleges that all the children were given a number and that the workers at Lutanda called the children by their number and not their name. The plaintiff states that she was known as `Girl 4', having `Girl 4' sewn on her clothes and towels. The plaintiff relates on one occasion of meeting a girl from Lutanda many years later at University saying that "I could only remember her as Girl 1. She couldn't remember my name either but knew I was Girl 4".

211 The plaintiff alleges in her first affidavit that at Lutanda she was treated differently from other children. One passage deserves to be set out in full:

"While at Lutanda I was treated differently from the other children. I rarely went to private homes for Christmas and other vacations. At Christmas time I was often the only child left in Lutanda and one or more of the staff would remain to look after me or occasionally take me home. There were three Christmas times when Aunty Amy (one of the workers) took me to other workers' homes; one was in Adelaide, one in Tasmania and one in Melbourne. Over the lengthy period I was at Lutanda, there was a significant turnover of staff and other children. I became one of the longest term residents of the institution. I had no visitors except later on Aunty Leila visited me once every few years. I was never offered placement with other families. I suffered from periodic bouts of depression, particularly at times when the family and friends of other children came to see them. I felt that I was unwanted and that nobody cared."

212 The plaintiff alleges that at Lutanda she was raised to look down on Aborigines. This attitude she says was re-enforced through her education and through visits to La Perouse

"where we'd throw money and all the Aboriginal kids would dive in to pick it up... The Brethren used to have special collections of money for the Aborigines who `can't look after themselves and can't keep themselves clean'". The plaintiff states that at the time, as a result of this attitude, she used to cross the road so that she didn't have to walk next to or close to Aboriginal people.

213 The plaintiff deposes that religious practice at Lutanda consisted of Bible lessons at least twice a day during the week and all day on Sunday as well as regular Bible quizzes. The plaintiff alleges that punishment often consisted of learning a chapter of the Bible, standing in a corner and reading a Bible for one and a half hours and writing passages from the Bible over and over again. The importance and significance of religious instruction is itself a matter recognised and countenanced for example by the **Aboriginal Protection Act** at s 11A(2): see also the 1940 Public Service Board Report and the Board Report of 30 June 1947, indicating the importance of religion to the child under the control of the AWB.

214 The plaintiff recalls that she was not allowed to dance or play cards as dancing was "of the world". The plaintiff remembers also that she was not allowed to wear lipstick. On one occasion she remembers being caught for wearing lipstick. She states:

"I remember I was caught once with Ruth Christie when we had lipstick on. I must have been about thirteen or fourteen years old. We were coming home on the train and one of the workers saw us. I was punished for wearing lipstick. My punishment was that I had to stand in the dining hall in front of the other children as they processed in, naked. I had to stand there for about half an hour. Even now I can't wear lipstick because of that time."

215 The plaintiff remembers being constantly "passed over" for baptism by the Brethren. While the other children were baptised at around 13 or 14 years old and moved to the older girls home, the plaintiff remained in the main home with the young girls and finally, she states, moved to the boys home where she alleges that she had to look after them.

216 As part of the routine at Lutanda, the plaintiff states that every two weeks she had kerosene rubbed into her scalp to help protect against lice. When taking a bath, the plaintiff alleges that the girls had to line up naked with towels draped over their arms. The girls were then helped to bath by the senior girls in a high sided bath. Forms of punishment alleged by the plaintiff as occurring at Lutanda included "food deprivation" and on other occasions being forced to eat all her food as well as being denied the use of salt and pepper.

217 The plaintiff further alleges various forms of mistreatment at the hands of workers at Lutanda. She alleges that Sister Dalwood used to beat her when she was little:

"I can recall one occasion in particular when she took my pants and hit me with a stick and I wet all over the floor. I remember that time as does my friend Ruth Christie. It was near my birthday and I was given some jacks by the Home. Ruth, Phyllis and myself hid in the lounge room and were playing jacks. Someone heard us laughing. I was the only one who got dragged out and beaten. After that they gave me morphine to shut me up."

218 The plaintiff remembers that Miss Atkinson used to "lock me in the broom cupboard at Wentworth Falls with the mops and brooms. I couldn't reach the light switch." The plaintiff recalls that this punishment upset her more than the rest as she felt closer to Miss Atkinson that to other workers. Miss Atkinson used to let the plaintiff brush her hair.

219 The plaintiff further alleges offences by Mr Murray and Miss Simpson that they used to inter alia, assault the plaintiff physically. The plaintiff alleges that Mr Murray used to assault the plaintiff using a razor strap and that Miss Simpson used to assault the plaintiff using a butter pat. It should be noted that in the extensive hospital records from 1962-5 that no history of the plaintiff ever being subject to corporal or physical violence or punishment is recorded, nor is there in Dr Cooley's report of 1960 any reference to such a history. Likewise the parole officers report of Miss Barnett contains no such record. The plaintiff further alleges offences by Miss Simpson in the following terms:

"There was another occasion when Mildred Simpson threw me up against the bathroom wall and broke my wrist and collarbone. I was 11 or 12 at that time, that is 1953 or 54. I still have a scar from the nail that we hung our washers on. I was taken to the Plymouth Brethren doctor, Dr Lovell at his Beecroft Practice. That was my first introduction to morphine. From there I was taken to have my arm set at Hornsby Hospital."

220 The plaintiff further alleges offences by Mrs Buxton (nee Parker) in the following terms:

"Margaret Buxton (Parker), a worker, punished me for cleaning my glasses on my apron. She didn't like me cleaning my glasses on my apron as it scratched the glass and scrunched my apron. Several times she made me stand in the corner for hours facing the wall with my glasses in my hands and both hands behind my back. She also made me hold my glasses above my head on other occasions for 4-5 hours."

221 The plaintiff further alleges that she was often punished by being made to clean the bathroom with a tooth brush.

222 The plaintiff makes two primary allegations of sexual abuse which are set out in terms:

"One of the Pennant Hills Primary School teacher used to tell me to be at the school sometimes at 7:00pm at night and he used to take me for drives. He was interested in me and he would sexually abuse me. I remember coming back late one night after driving and being caught coming in. I got a horrendous beating with both the butter pat and strap used. I could hardly walk afterwards. I just remember being so small and wanting to run up to my hiding place."

223 The second allegation is set out in the following terms:

"Mr Reid was the superintendent after Mr Middleton. When Mr Reid came to Lutanda the superintendent's quarters moved from being upstairs in the main home to being in a cottage through the vegetable garden, up at the back of the property. Mr Reid never corporally punished me. He only ever sexually abused me. From what I can remember it happened about four times. Always in the storeroom. He used to ask me to "help carry something", usually biscuits. Once we were in the storeroom, he sodomised me with hands and his penis."

224 The plaintiff admits to having run away from Lutanda on a number of occasions because she was unhappy. The first occasion that it occurred was when she was in primary school, around about sixth class which would have been in 1953-4. On one occasion, when the plaintiff was 13-4, she ran away after having spent the afternoon with a boy who was a friend of hers. The plaintiff alleges that as punishment for running away she was put in isolation for a week. On this occasion she states:

"That's when I had to write `God is love' thousands and thousands of times. Every now and

then Mrs Middleton, the Matron, would come in to see if I had repented. In her view I hadn't and I'd have to keep writing. It was at that time that she said to me "You have mud in your veins". She also said things about my mother. Something like, "You're as bad as your mother" and something about my mother being "...drunk in the gutter". I cut my veins after that to see if there was mud in there like she said. I still remember the shock and the look I must have had on my face when she told me. From time to time after this incident, during my stay at Lutanda and on other occasions I cut myself to see whether the colour of my blood was different form that of the other children at the home."

225 The plaintiff alleges further occasions when she ran away because she found out that she was Aboriginal and because of her up-bringing felt that her Aboriginal blood made her bad. On some occasions it seems, the plaintiff attended at court for what the plaintiff says were occasions when she was charged with "Neglect, uncontrollable and exposed to moral danger." On each of these occasion she alleges that she was sent back to Lutanda and got a hiding and was put in isolation.

226 The plaintiff alleges that after she left school she had to look after the boys aged between 8-16 years old. The plaintiff alleges that she was the victim of a gang rape. She puts the allegation against certain unnamed boys in the following terms:

"I hated looking after those boys. They hurt me. There were two older boys who used to hurt me sexually. The other boys would hold me down. It would take about ten of them to hold me down. The workers were all up in the main house. I never told anyone except Aunty Leila (Miss Saville)."

227 The plaintiff remembers that her only visitors during those years at Lutanda were Aunty Leila (Miss Saville) and Uncle Sid who kept some contact with her. After the plaintiff was discharged from Lutanda on 31 July 1960, the plaintiff became employed at Parramatta District Hospital. She worked there for a period of months but no more than sixteen months. The plaintiff later worked at Bethlehem Nurses Club and at the Lorna Hodgkinson Centre as a nurses aide.

228 The plaintiff sets out her history after Lutanda in the following terms in her first affidavit:

"Soon after leaving Lutanda, I started associating with a lot of homeless people. I lived in many different places, mainly at the Cross. I started abusing various substances and became involved in various criminal activities and was convicted. I got pulled into a cult down at Kings Cross and did some awful things through that. A lot of people I was spending time with were involved in the cult also. The criminal offences I was convicted of are as follows: Offensive Behaviour 2.12.60, Offensive Behaviour 17.1.61, Larceny in a Dwelling (Victoria) 3.3.61, Attempted Bestiality 28.4.61. As a result of the last charge, I was in jail from 28 March 1961 until 2 November 1961. Between March 1962 and May 1965 I was admitted to Macquarie and Gladesville Psychiatric Hospitals on numerous occasions. From 1966-68 I lived in Papua New Guinea with Orest.

In my medical records from Macquarie Hospital, the entry dated 24.6.63 stated that "At the home she would deliberately do a misdemeanour so that a privilege she desired would be denied her. Wants continual punishment..." I do not recall ever doing things deliberately wrong for punishment. I may have done things for attention. Nothing I ever did pleased them at Lutanda.

From August to around October 1963 I was at Gladesville Hospital. I realised during that

time that they were priming me up for shock treatment so I shot through and one of the nurses arranged for me to get a job at Rainbow Lodge at Kurrajong."

229 The reference in the above passage to homeless people is not entirely accurate. There is evidence of the plaintiff's involvement with `bad' company including persons who were criminals and those who participated in black mass paganism including with Roslyn Norton: see the Parole Report of Miss Barnett dated 1 March 1962 and see also the Hospital Records as well as the plaintiff's criminal records in relation to the 1960 offence.

230 The plaintiff's first daughter, Julie-Anne was born on 4 September 1962 while the plaintiff was a patient at Macquarie Psychiatric Hospital. Julie-Anne was taken away from the plaintiff at the end of July 1963 though the plaintiff doesn't say by whom. The plaintiff states that as a result of this she became extremely depressed and cut her wrists.

231 The plaintiff's second daughter, Rachel, was born on 13 June 1967 in Papua New Guinea. The plaintiff returned with Rachel to Australia in November 1967 "after her father deserted us". At times the plaintiff states that she placed Rachel in the care of Lutanda. The plaintiff's son Ben was born on 7 August 1973. While at Lutanda, the plaintiff's mother did not visit her.

232 That was the extent of the plaintiff's primary affidavit evidence.

Submissions as to the effect of the Plaintiff's Evidence:

233 The nature of the plaintiff's evidence reveals a number of very serious allegations against the members and staff at Lutanda. The plaintiff relies on these allegations for the purposes of her case against the AWB. A number of submissions were put to the court on the use to be made of these allegations in the plaintiff's case against the AWB. It is necessary to set out some of these submissions since they seriously touch upon her reliability and credibility as a witness.

234 It should be noted that counsel for the plaintiff (at T 40) did not preface the reading of the plaintiff's affidavit with any comment as to its objective truth or otherwise. Specifically, counsel did not stress that the plaintiff's evidence or any part of it to be read by affidavit, was not to be relied upon as being objectively true. Indeed her affidavits were taken into account by the experts called by the plaintiff and treated by them as being objectively true.

235 In her written submissions to the court, the plaintiff dealt with the various allegations made in her affidavit evidence in two places. Firstly, the plaintiff made primary written submissions in which she addresses in a general way, the use to be made of her evidence. Secondly, the plaintiff prepared written submissions in reply in which the plaintiff deals with the use to be made of several specific allegations made in her affidavit evidence. It might be helpful to start with the submissions made in reply first.

236 The plaintiff submits (at p 26 of her submissions in reply) that allegations of sexual abuse including allegations of sodomy against a particular male at Lutanda and allegations of gang rape by boys at Lutanda cannot be pressed as the onus in **Briginshaw v Briginshaw** [1938] HCA 34; (1938) 60 CLR 336 cannot be met:

"As the plaintiff bears the onus of proving that the events occurred and as the plaintiff in these circumstances cannot discharge the onus, the plaintiff cannot properly submit that the Court can find that the incidents occurred."

237 In relation to the allegation that the plaintiff was made to stand naked in the dining room for having been caught wearing lipstick, Mr Hutley for the plaintiff notes (at p 28 of the submissions in reply):

"The inherent implausibility of the plaintiff's evidence about standing in the dining hall naked is powerful evidence of her disturbed mind. Were she consciously dissembling she is unlikely to have given evidence which is obviously incredible."

238 Turning to her principle submissions, the plaintiff notes (at p 81) that there are significant disparities between the plaintiff's evidence and that of the defendants' lay witnesses. These disparities, the plaintiff submitted, are to be explained on the basis of:

"(a) the plaintiff's lack of attachment;

(b) the plaintiff's age at which the incidents which she describes

occurred; and

(c) her psychiatric disturbance".

239 It is on this basis that the plaintiff submits that her evidence should be "taken into account in assessing the plaintiff's case". At page 81 of her submissions, the plaintiff states that:

"The fact that much of her evidence is "unreliable" should not lead the Court to infer that she is lying or that what is described is not what she genuinely believes to have occurred. Her [the plaintiff's] florid descriptions of punishment and abuse are themselves symptoms of a disorder."

240 At page 83 of her submissions she continues:

"The plaintiff gives florid, exaggerated and, at times, objectively untrue descriptions of punishment to which she was subjected (throughout her affidavit of 20 November 1996) whereas the other children at Lutanda who were subjected to the same strict moral code respond differently." [my emphasis]

241 Having detailed the plaintiff's psychological condition leading up to the giving of her evidence, it is submitted by Counsel (at p 86 of her submissions) that:

"If the factors referred to above are taken into account, the plaintiff's affidavit can properly be seen as a grossly distorted view of reality. Dr Waters was of the opinion that at the time she gave the history to him "she believed that that was the truth" (tr. 86 lines 42-47). The extent of the distortions are indicative of the extent to which the plaintiff was suffering from attachment disorder."

242 I assume here that the reference to attachment disorder refers to the plaintiff's assertion that she was suffering from an attachment disorder at the time the events complained of occurred and it is this attachment disorder and not the antecedent personality disorder that is the cause of these "distortions". Accordingly the plaintiff lists the following as examples of distortions put forward as being a result of her attachment disorder:

(i) the allegation (at p 86 of her submissions) that she was required by Mrs Buxton to stand

in the corner for several hours as punishment for cleaning her glasses and the allegation that she was made to stand holding the glasses above her head for 4-5 hours.

(ii) the allegation (at p 86 of her submissions) that the plaintiff was known by a number and not a name.

(iii) the allegation (at p 87 of her submissions) relating to Miss Simpson breaking her wrist and collar bone.

(iv) the allegation relating to being made to stand naked in the dining hall for wearing lipstick. This is described by the plaintiff in submissions (at p 87) as "inherently and obviously implausible"

(v) the allegation (at p 88 of her submissions) that the plaintiff was given morphine to shut her up after receiving a beating was called "incorrect".

243 The principal submission of the plaintiff is that these allegations, though not objectively true, represent and are evidence of a distorted recollection of events which are resultant from her suffering from an alleged order of attachment at the time of the occurrence of the events the subject of her evidence. I find there was no such disorder of attachment. Next, the concessions made in the preceding submissions are significant indeed. The concessions made about the proper approach to the plaintiff's evidence, that it was "unreliable" and it represents a distortion of the objective truth of the circumstances of the plaintiff's youth at Lutanda, and that the plaintiff presents often "objectively untrue" and "exaggerated allegations throughout her affidavit" reflect, in my opinion, deleteriously on the reliability and credibility of her evidence generally and in particular respects. While the plaintiff's concessions go only to a number of specific assertions in her evidence, for reasons I will expand on, I am convinced that the force of all these submissions also has a further consequence that the plaintiff's evidence should be read with care. The plaintiff's Counsel has addressed many significant specific allegations of the plaintiff conceding at the end of the day and in the face of contradictory evidence from Lutanda witnesses which I accept, that they are not evidence of the objective truth of Lutanda. However the consequences of the her concessions as to the use of her evidence stretch beyond merely those specific concessions. In my view they adversely affect her reliability and credibility save in respect of certain matters later identified by me.

244 During the course of the defendants' oral submissions I put a number of questions to the plaintiff's counsel as to the reliance placed by the plaintiff on her affidavit evidence. The following exchange is recorded (at T 721-2) with Miss Adamson for the plaintiff regarding the plaintiff's characterisation of Lutanda as a "cruel and violent place":

"**HIS HONOUR:** I tell you the plaintiff will be hard-pressed to make good that claim. To the extent that it is so asserted that there was a numbers regime I think there is difficulties on the evidence of the plaintiff there.

ADAMSON: Yes, for a person such as James Frame and many of the witnesses you have see it was obviously a very happy caring place. But your Honour has seen what we have put in writing as to the effect on the plaintiff.

HIS HONOUR: Maybe her perception is absolutely totally wrong and she is not reliable and credible on that at all for reasons which she stated.

ADAMSON: Her perception is not put forward in that regard as evidence of the objective truth of Lutanda.

HIS HONOUR: The objective truth seems to be almost one way, or at least in many respects.

ADAMSON: All the Crown witnesses thought it was a lovely place and felt that they were part of a family when they were there, that's correct. [my emphasis]

HIS HONOUR: Do you still make assertions of allegation of sexual abuse?

ADAMSON: In light of submissions we have put as to the plaintiff's credibility we can't put those and we don't.

HIS HONOUR: Indeed I think that is the most proper attitude, the allegations of sexual abuse just cannot run.

ADAMSON: Certainly not in light of the expert evidence.

HIS HONOUR: You concede that.

ADAMSON: Yes, your Honour.

HIS HONOUR: Indeed you have already conceded that. It is important when having this discussion that sometimes the concession be heard by many so there can be no doubt to the form of the content of the concession and what is conceded ie: that you don't maintain the allegation of sexual abuse.

ADAMSON: No, your Honour."

245 Again (at T 726), counsel for the plaintiff, Miss Adamson, clarified this concession by saying that "the allegations of sexual abuse" included all the allegations of sexual abuse asserted or alleged by the plaintiff in evidence:

"**HIS HONOUR:** So the allegations of sodomy, gang rape and sexual misconduct on the part of staff members, the sexual misconduct of staff members, they are not pressed any longer in terms of having occurred.

ADAMSON: That's right."

246 Subsequent to this, counsel for the plaintiff was singularly asked whether the plaintiff pressed the allegation relating to plaintiff being made to stand naked in the dining hall. Miss Adamson, counsel for the plaintiff replied:

"**ADAMSON:** No, that is not pressed and that is in our written submissions. I don't know that I wish to say any more than what appears in the written submissions.

HIS HONOUR: I wouldn't accept her on that.

ADAMSON: No it is obviously completely implausible and incredible and it is not put forward by the plaintiff by her counsel as being objective truth."

247 Counsel for the plaintiff was singularly asked whether they pressed the allegation

relating to the use of kerosene for the delousing of hair and about the allegation that the plaintiff was injected with morphine to sedate her. Counsel conceded similarly that neither was relied on as objectively true.

248 One final exchange is worth setting out between myself and Mr Hutley for the plaintiff. In oral submissions in reply the following exchange is recorded (at T 785):

"**HUTLEY**: I am looking at the discussion between your Honour and my learned junior at page 721 and 722 and I don't think it is any different with what I am putting to your Honour.

What we say is that I cannot and do not put that your Honour could find that some of the sexual matters had to do with sexual assaults.

HIS HONOUR: Let us hear the way you put it.

HUTLEY: Some of the matters which were the subject of contest from witnesses who denied specifically my client's version I would have thought likely to conclude that my client's version is wrong.

HIS HONOUR: An untruth?

HUTLEY: Untruth in the sense of being false, not perjured."

249 In both their written and in their oral submissions, counsel for the plaintiff concede that the plaintiff's evidence as to various allegations made in respect of life at Lutanda are not relied on as being to use their words, "objectively true". They are not put as being objectively true and, indeed, are conceded as being objectively untrue. Some matters, as are revealed above, are the subject of specific concessions as being untrue, while in general all matters are submitted as being in some sense distorted by the plaintiff's medical condition. They are relied on instead as being evidence of an attachment disorder suffered by the plaintiff at the time the events the subject of her recollection, occurred. This attachment disorder, it is submitted was subsequently to develop into a borderline personality disorder in the plaintiff's teens and later. In this respect much of the plaintiff's evidence is affected by the plaintiff's concessions. I reject each of these submissions.

250 It is appropriate to note that these concessions by the plaintiff are made in respect of events that occurred over 40 years ago. The plaintiff has had considerable latitude during the trial to tender evidence in support of her case. She has had every opportunity to provide evidence for her claims and I have taken an inclusive attitude to all evidence tendered. In this respect it is appropriate to note that, in relation to the allegations of sexual abuse, despite a number of visits by the plaintiff to Dr Waters between July 1991 and 1997, the first occasion of there being recorded allegations of sexual abuse was in October 1997. Dr Waters gave evidence that prior to that time the issue had not been raised even though it was usually something about which questions would have been asked by a psychiatrist in obtaining a history. Additionally, no allegations of sexual abuse were made during the eight or so visits to North Ryde Centre between 1962 and 1965. This was despite every opportunity to talk about it (see the extensive notes from the hospital).

251 In respect of the discipline and punishment of the plaintiff at Lutanda, a relevant history appears in the nurses notes at North Ryde in June 1963. The entry shows that the plaintiff reported that punishment at Lutanda consisted of learning a chapter of the Bible, standing in the corner and reading the Bible and the reduction of privileges. At no time does she

make mention of corporal punishment.

252 In respect of the care received by the plaintiff at Lutanda, the plaintiff told her parole officer, Miss Barnett, recorded in her report dated 1 March 1962, that she received good physical care but that the rather rigid behavioural requirements and sharp curtailment of school activities to a limited area motivated her from the age of twelve to run away from the home on several occasions. Miss Barnett considered (at p 3) that the plaintiff showed a marked absence of socially accepted moral standards, showed strong resentment towards any form of authority and had mistrust and bitterness towards the world which she believed had let her down. The plaintiff made none of the serious allegations to Miss Barnett that she made throughout her affidavit. She had every opportunity to do so. Nor did she make any of these allegations when she saw Dr Cooley from the Child Guidance Clinic in 1960. Again, she had every opportunity to do so. I also reject the plaintiff's claim that she received corporal punishment at Lutanda.

253 The plaintiff cannot, by such a forensic submission, avoid the result that in consequence of these concessions, the Court should receive the plaintiff's evidence with significant doubt as to its reliability and give such weight to it as in the circumstances is appropriate. I turn to my findings on the plaintiff's credit.

Findings in Respect of the Plaintiff's Evidence:

254 The plaintiff's submissions accept that there are significant disparities between the plaintiff's evidence on the one hand and that of the defendants' lay witnesses on the other. These disparities between the plaintiff's recollection of events at Lutanda and the objective reality of the situation are sought to be explained on the basis of the three matters mentioned in submissions, namely:

(a) the plaintiff's lack of attachment

(b) the plaintiff's age at which the events she described occurred;

and

c) her psychiatric disturbance.

255 The plaintiff goes on to submit that these matters should be taken into account when assessing the plaintiff's evidence. Indeed they have been considered by me. In considering them I have come to the conclusion that they do not have the effect urged for by the plaintiff and I reject the plaintiff's submissions.

256 The plaintiff gave a lengthy history of her upbringing and psychological health to Dr Waters in July 1991. At that time the preparation of this case appears to have been on foot. Dr Waters, whose evidence has caused me concern, knew he was being brought in to assess the plaintiff in connection with what he thought was a "stolen generations" test case. He said in cross-examination (at T 94) that he had read newspaper reports about this being one of the first "stolen generations" cases. Dr Waters gave evidence (at T 86) that he did not really believe that the plaintiff's evidence was the product of delusions. While some of the plaintiff's history may have suffered from vagaries of memory, he said that he believed that the history given by the plaintiff was what she believed to be the truth at the time it was given.

257 It was on the basis of the substance of this history that the plaintiff affirmed the contents

of an affidavit dated 20 November 1996 which has already been set out in considerable detail. There is nothing to suggest that the plaintiff did not know what she was affirming in the 15 page affidavit. Her evidence was well considered and detailed, and what was asserted appears, as I have said, to have been carefully asserted. These same remarks, in my view, apply a fortiori in respect of her further affidavit in reply affirmed on the 20 February 1998. That affidavit, in terms, affirms the allegations and evidence given in her principal affidavit. The affirmation of her evidence in her second affidavit is considered affirmation, with the plaintiff having given consideration to the various rebuttal affidavit evidence of the defendants' lay witnesses.

258 I do not accept that the plaintiff can seek to avoid the adverse consequences of incorrect assertions of such a considered nature. The affirming of incorrect allegations in this case by the plaintiff adversely impacts upon her credibility and reliability both generally and in particular respects. Further, this consequence cannot be avoided by the submission that the incorrect assertions are to be seen as a product of her illness and indeed further proof of her illness. First she has relied upon the allegations as objectively true. When proved otherwise she seeks to avoid the consequences of their rejection by the inventive argument that the unproved allegations are a product of a mental illness and or proof of it. I reject this forensic submission. Further, even were there to be alternatively a finding that the allegations are the product of a disorder (which as I have said I do not find), such would in any event, cast doubt upon the reliability of the plaintiff's evidence.

259 I specifically find that these distortions were not a product of an alleged attachment disorder (which she did not have). In so far as these conceded allegations are not correct or objectively true in the circumstances, the plaintiff cannot escape the consequences of such a finding in turn affecting her credibility and reliability generally. Some of those against whom many of these serious allegations have been made, as the evidence shows, are deceased or elderly persons. In the circumstances, they and Lutanda are entitled to a finding that preserves their good names and reputations.

260 The plaintiff has further sought to explain away some of these serious allegations by alternatively suggesting that if not the product of her borderline personality disorder, they are not pressed as true because they were not proved to the level of the **Briginshaw** (supra) standards. I reject that attempt by the plaintiff to explain away the "untruths" which I find impact on her credibility and reliability.

261 I do not find that the plaintiff lied in respect of these allegations. The fact that a witness is unreliable does not give rise to a view that a witness is lying. As I have said, there is a distinction between rejection or evidence of a person and a positive finding that a person deliberately lied: **Smith v NSW Bar Association** [1992] HCA 36; (1992) 176 CLR 256 at 268-9. I have not had the opportunity of seeing or hearing the plaintiff as she was unable to give evidence at the trial. The fact that, on the plaintiff's concessions, much of the plaintiff's evidence in respect of Lutanda is "unreliable" does not lead to the inference she was lying. It rather leads merely to the conclusion that in the circumstances what is conceded to be objectively untrue is not to be found as being untrue due to any one or more of the matters submitted by the plaintiff as the source of her distorted memory, namely her lack of attachment, her young age at the time the events complained of occurred or any alleged psychiatric or psychological disturbance. Not having seen or heard the plaintiff, the principles in **Abalos v Australian Postal Commission** [1990] HCA 47; (1990) 171 CLR 167 and **State Rail Authority v Earthline Constructions Pty Ltd (In Liq)** [1999] HCA 3; (1999) 73 ALJR 306 relating to the trial judge's advantage in appraising demeanour do not arise.

262 I stress again that the concessions made by the plaintiff were in respect of several but not all of the plaintiff's evidence. Much of the plaintiff's affidavit stands to be considered against the background of the whole of the evidence and I will turn to consider that in due course. Notwithstanding this, my conclusion is that the plaintiff's evidence generally, even where not openly conceded as being untrue, should be treated with care. I accept the submission of the defendants that the plaintiff's evidence should be looked at with some care, particularly when it is not supported by other evidence. The plaintiff (at T 726) conceded that, if I found that the allegations of sodomy, gang rape and sexual misconduct, having not been pressed as having occurred, were not the product of a disordered mind, then the affirming of those allegations could be utilised against her in respect of her credit and reliability. Since I find that they were not a product of a disordered mind, I find that these allegations reflect adversely on the plaintiff's credit and reliability including as a historian so far as she is a historian giving a history to be relied upon as both her evidence and by the medico-legal experts qualified by her to give evidence. That is my finding on the plaintiff's evidence.

263 Having said that, this does not alter my acceptance of the plaintiff's history as to her conception and parentage relayed to her by her mother and repeated to Dr Waters in 1991 and reflected in her affidavit. Nor does it alter my acceptance of the plaintiff's memory of life at Bomaderry as recorded in Dr Waters history and reflected in part in her affidavit or as to her dealings with Sister Saville and later Miss Atkinson. I also accept her history that her mother did visit her from time to time at Bomaderry, which is supported by her affidavit claim that when she met her mother, her mother said she had visited her at Bomaderry.

The Lutanda Witnesses:

264 A large quantity of evidence was tendered throughout the course of the trial both by the plaintiff and the defendants relating to the plaintiff's upbringing while she was at the homes, Bomaderry and Lutanda. That evidence consisted of affidavit evidence and oral evidence in some cases. Some witnesses, because of age or distance, were unable to attend and their affidavits were read in the proceedings. Many volumes of material, affidavit and otherwise, were admitted into evidence in respect of these matters. Included in the evidence were numerous affidavits sworn by witnesses particularly those involved with plaintiff whilst she was at Lutanda.

265 The affidavit evidence can be broadly separated into two categories. The first category of evidence is the evidence of the surviving adult members of the staff at Lutanda. The second category of evidence is evidence that comes from children who are contemporaries of the plaintiff and who, with the exception of one witness, Ms Christie, on whom the plaintiff relies, were all resident at Lutanda during all or some of the period of the plaintiff's care.

266 It is appropriate to set out some of the history of those who gave evidence. The plaintiff was admitted to Lutanda on 16 April 1947. At that time Miss Dalwood was in charge of Lutanda and worked as Matron. After her death in 1950, Mr Murray assumed the role of Superintendent at Lutanda, having done so at the specific request of Miss Dalwood just prior to her death. Mr Murray remained the Superintendent until replaced by Mr Middleton in 1956. Mr Middleton in turn held that position until 1959 when he was replaced by Mr Reid. The plaintiff was discharged on the 31 July 1960.

267 Miss Dalwood undertook in addition to the role of Superintendent, the position of

Matron from the time of the founding of Lutanda again until her death in 1950. Mrs Buxton (nee Parker) acted as Matron from 1953-6 having prior to that, worked at Lutanda as a housekeeper and as a carer for the girls. Evidence was given, which I accept, to the effect that Mrs Buxton was a qualified nurse. Evidence given in cross examination by Mrs Buxton was that she held three certificates in nursing at the time she was Matron at Lutanda, being general, midwifery and infant welfare certificates. Mrs Middleton was Matron between 1956-9 during the period in which her husband was Superintendent. Evidence was given, which I accept, to the effect that Mrs Middleton was a registered nurse during the period she served as Matron at Lutanda. Both Mrs Middleton and Mrs Buxton gave evidence by way of affidavit and in oral testimony.

268 At this point I should make some brief comments on the witnesses Mrs Buxton and Mrs Middleton. These two witnesses, particularly, on the plaintiff's case, were the subject of "strong" submissions as to their lack of reliability. The plaintiff made submissions (at p 103 of their written submissions) that the staff at Lutanda were, inter alia, prejudiced by racial bigotry, at least in the case of Mrs Middleton and prejudiced by religious beliefs which led them to "pseudo solutions" such as prayer, rather than psychiatric treatment. I reject this submission that these witnesses or any others were prejudiced in their attitude to the plaintiff because of racial bigotry or otherwise. I further reject the submission in respect of their being a preference of "pseudo solutions" as being totally unfounded. I will return to the particulars of the contest of credit with Mrs Middleton later. It need only be said here that I have had an extended opportunity of hearing and seeing these two witnesses, factors which I take into account in assessing their evidence. They were the subject of challenging and extensive cross-examination. They were cross-examined comprehensively about their attitudes and recollections and nothing I have seen leads me to disbelieve their evidence or to make a finding such as the one submitted. I feel that I can safely rely on their evidence.

269 Other carers also gave evidence. Mrs Milton worked at Lutanda from 1944-48 in performing general household work and in looking after the girls. Mrs Hancock worked at Lutanda looking after the care of the boys from about 1953 to 1955, part of that time also being spent as the cook at Lutanda. Mrs Talbot worked at Lutanda from July 1953 to November 1957. Initially she was in charge of the boys group but due to her previous experience in England with toddlers and babies she soon became responsible for seven young children. Miss Simpson was a live-in worker in Lutanda from December 1956 to December 1965 working in the kitchen and looking after the boys then later, the younger girls. She returned in 1956, then with her husband to work as a cook for a short period. These four witnesses gave evidence at trial by way of affidavit and all but Mrs Talbot gave oral evidence. I accept these witnesses.

270 In addition to these workers is the evidence of Lucy Moorhouse. Miss Moorhouse was placed into the care of Lutanda in January 1935 as a result of crippling arthritis suffered by her mother. She remained at Lutanda till she left in 1944 to pursue work. While working away from Lutanda she made a habit of paying visits each Sunday to Lutanda and thereby maintained a good knowledge of the work and operation of the Home. In 1954 Miss Moorhouse returned for a period of eight months to serve in caring for the children and to relieve some of the staff. The evidence showed that at that time she was a trained nurse. She worked, in part, in assisting Mrs Buxton with the care of the girls. Miss Moorhouse has subsequent to her time spent at Lutanda prepared documentation setting out the history of Lutanda including a history of relevant period of the plaintiff's residence. Miss Moorhouse gave evidence by way of affidavit and by way of oral testimony. In the delivering of her evidence Miss Moorhouse proved to be a highly credible witness and a genuinely compassionate lady. Her accurate memory and clear recollection was demonstrated in oral

evidence by her ability to accurately recall the detailed history of the relevant period and the people who lived at Lutanda during that time, some forty years ago. Her evidence is credible and reliable and I am satisfied that I can safely rely on it and I accept it.

271 Much has been said during the course of this trial and in submissions about the women who worked at Lutanda and who undertook the care of the plaintiff. In appraising these witnesses, in my estimation from what I have seen and heard of them, they appeared to me under examination and cross-examination as caring, devoted, considerate, religious and charitable women. They were unpaid or relatively unpaid workers, dedicated to their roles and to the task of bringing up other people's children in an institutional environment with all the attendant problems arising from that situation. In many cases they had practical training and were concerted in giving attention to their responsibilities. They sought to give warmth, dedication, trust, kindness, affection and protection to children in their care in undoubtedly difficult conditions flowing from the constraints of caring for a child in an institutional home. Discipline and religion was also appropriately provided.

272 Evidence was also given by other witnesses who were resident at Lutanda at the same time as the plaintiff. I will turn to each relevantly in due course. One further witness that needs to be mentioned in Mr Sattler. Mr Sattler was one of three witnesses in addition to the plaintiff who gave evidence by way of affidavit but did not give oral evidence in the course of the trial. Mr Sattler was appointed to the Board of Directors of Lutanda in 1948 and served in that capacity until 1981. He gave evidence, to which I will refer to in due course, on which the plaintiff relies to support several significant aspects of her case including her contention that she cut her arms in an act of self-mutilation during the period in which Mrs Middleton was Matron.

273 The evidence of the defence lay witnesses admitted at trial is in direct contrast to that of the plaintiff. In general, their evidence presents a distinctly happier and more favourable picture of life at Lutanda than that which appears on the plaintiff's case. The plaintiff presents a picture of life at Lutanda as, inter alia, a cruel and uncaring place. The plaintiff relies in part on the evidence of Mr Sattler and Miss Christie to support her view. For reasons that will appear, I do not accept the evidence of Miss Christie or Mr Sattler so far as it is inconsistent with the credible evidence of the defence lay witnesses. It was conceded by the counsel for the plaintiff, Miss Adamson, that the general weight of the defence lay witness evidence was that Lutanda was not like the plaintiff had described, as cruel and uncaring, but was considered by them as a caring environment akin to a family. In response to a question from the bench, counsel for the plaintiff Miss Adamson conceded that for people such as Mr Frame and many of the other witnesses, Lutanda "was obviously a very happy, caring place". Miss Adamson also conceded that all the Crown witnesses (who I do accept) thought that Lutanda was a lovely place and felt that they were part of a family when they were there (at T 721-2). Further to these concessions, which I accept, I would note that it is clear on the evidence that these witnesses specifically reject, in terms, all of the serious allegations made by the plaintiff.

274 In considering the issues in this case, I have had regard to all the evidence including that of the Lutanda witnesses. I have also had regard to the evidence of the plaintiff, which, as I have said, I feel it necessary to treat with some care. In fairness, in respect of a case of this nature, concerning events so distant for the witnesses giving evidence, I have had regard to the fact that recollection of childhood events may be distorted by various factors including the passage of time: **Longman** (supra). All this said, I find that the evidence of the Lutanda witnesses was generally credible and reliable and I accept it accordingly. In the present section I turn now to their evidence, which I have relevantly set out, and, where

necessary, I have made findings of fact on the various allegations made by the plaintiff based on the whole of the evidence.

Nature of the Plaintiff's Behaviour at Bomaderry:

275 One issue upon which both sides have made extensive submissions was the characterisation of the behaviour of the plaintiff during the relevant years of her stay at both Bomaderry and particularly at Lutanda. The plaintiff has sought to submit that the even while at Bomaderry, from the time when the plaintiff was one month old till she was four and half years, she was a "troublesome" child and known as such. The nature of this submission for the purposes of the plaintiff's case is set out in the following passage in the plaintiff's submissions (at p 36):

"Mr Sattler deposes to the circumstances that the plaintiff was known to be a "troublesome child" even before she arrived at Lutanda (see paragraph 3 of his affidavit). This is the only evidence of the plaintiff's behaviour at Bomaderry. The evidence of Dr Katz is to the effect that it is likely that the plaintiff had already suffered a disorder of the development of attachment while at Bomaderry and the childhood manifestations of the disorder were reflected in the form of troublesome behaviour."

276 This submission for reasons that appear is rejected.

277 It was also part of the plaintiff's case, indeed a significant part of it, that in light of her alleged troublesome behaviour and in consequence of these being "childhood manifestations" of disorder, the plaintiff should have been referred to a Child Guidance Clinic at an early stage or at least certainly during her stay at Lutanda. The expert evidence led in the plaintiff's case presents a scenario based on the effect of three possible hypothetical visits of the plaintiff to a Child Guidance Clinic being visits in 1947, 1953 and 1959. Evidence is presented in the plaintiff's case as to what the plaintiff would have done on those occasions had a visit been arranged, what the plaintiff would have said and what treatment would have resulted.

278 It is perhaps appropriate at this time to make fuller reference to the nature and history of Child Guidance Clinics as it appears on the evidence. The significance of a potential referral to a Child Guidance Clinic, on the plaintiff's case, is that after such a referral she would have received treatment which would have reversed her disorder which was undiagnosed and unrecognised by those who had her immediate care. The Department of Eduction/Public Instruction conducted Child Guidance Clinics in New South Wales and had done so since 1936. The Child Guidance Clinics developed from the practises of the School Medical Service. The history of the Child Guidance Clinic is found in the Annual reports of the Education Department. The 1952 Report of the Director General of Public Health (at Vol 18, p 4419) states relevantly:

"A scheme of medical inspection of pupils in all schools administered by the Education Department, and the majority of other schools in the state, is provided by the School Medical Service (a division or part of the Department of Public Health)... It may be said that the primary object of the School Medical Service is the medical examination of children to discover any departure from normal in the health of children, either physical or mental and to notify the parent or guardian accordingly in order that the child may be further investigated to determine the need for treatment... Treatment is accepted as responsibility (sic) of the practising medical profession."

279 There is no evidence that Lutanda ever received a notification of the type referred. There is no evidence that the plaintiff displayed at school a departure from normalcy in her health, either mental or physical, in the eyes of her teachers or in the course of a medical inspection. There is no evidence of adverse reports on her behaviour nor any reports that her education was suffering in any way.

280 The development of the Child Guidance Clinic was outlined relevantly in the evidence as follows. In 1936 the first Child Guidance Clinic was established in Sydney with a second following in 1939. By 1945 there were three Child Guidance Clinics in Sydney. In 1946 the fourth Child Guidance Clinic was established with a fifth being established in 1954. From 1946-48 some 2,000-2,500 new cases were seen annually and the Child Guidance Clinics, and between 1954 and 1957 some 1,700-2,462 new cases were seen by Child Guidance Clinics in Sydney. In 1953 of the total 1,757 cases seen at the four Child Guidance Clinics administered by the School Medical Service, 55% were referred by either the Children's Court or Child Welfare Department. Only 20% of cases were by personal application of parents and one seventh came "direct" on referral by the Department of Education through teachers and school counsellors whilst others came from hospitals and social agencies.

281 The 1974 Minister for Instruction Report indicated that Child Guidance Clinics number 1, 2 and 4 examined children upon referral from various sources which included the Child Welfare Department (including Children's Court), teachers, school medical officers, parents, other branches of the Department, Soldiers, Children's Education Board, NSW Society for crippled Children and other social agencies. No. 3 Child Guidance Clinic undertook the examination of boys admitted to the Metropolitan Boy's Shelter and to Yasmar Hostel as well as boys referred by the Children's Court.

282 The reports make clear that referrals could thus be by persons other than parents (or institutions), namely, teachers or school medical officers. In the instant case, there were no such referrals. The School Medical Services (after 1946 carried out under the control of the Director of Department of Public Health) had medical officers who visited children in the schools. The Education Department itself provided educational and vocational guidance tests. Careers advisers also provided services within schools.

283 Evidence was also lead as to the nature and operation of Child Guidance Clinics. Mrs Bull who worked at a Child Guidance Clinic as a social worker during the relevant period (one of a team of three being a psychiatrist, psychologist and social worker who staffed each Clinic) worked in one of the Clinics in which the attending child psychiatrist was a certain Dr Jennings. Mrs Bull gave evidence in relation to the operation and activities of the Child Guidance Clinics and of the role of a social worker in those clinics. The subject of Child Guidance Clinics and the role of the psychiatrist, psychologist and social workers was also discussed in Professor Dawson's book **"Aids to Psychiatry (1942)".**

284 Dr Ellard, a psychiatrist, also gave evidence. Though he was not a child psychiatrist, it is clear from his evidence that in the 1940's and 1950's, and indeed even some time later, there were relatively few specialist child psychiatrists. Psychiatrists who did specialise in child psychiatry at that time were mostly not in private practice but rather worked in the field of public health, such as in Child Guidance Clinics.

285 The Child Guidance Clinics that were in existence during the 1940's and 1950's were all located in Sydney. In the 1950's the population of New South Wales was said to have been about 3 million people. The AWB used the facilities of the Child Guidance Clinics for children under its control whether they lived in Sydney or in places remote from Sydney.

This occurred when a judgment decision was made by a responsible adult staff member that a child should be referred to a Clinic. One such referral, the evidence showed, occurred in respect of a child known as "K", to a Child Guidance Clinic in 1951-2 by the AWB because of a scholastic handicap.

286 I propose to quote further, and at some length, from the 1952 Report of the Director General of Health. I believe it accurately reflected the situation with respect to the nature and operation of Child Guidance Clinics. It also indicates the respective roles of the "team" members. The social worker's role is identified in terms of obtaining a detailed history from the "parent" with regard to the general family situation and obtaining material relevant to the common mental background including information regarding the child's physical and emotional development. It is important to emphasise that the source of the history is the "adult carer", who clearly has made value judgments and assessments of the child's behaviour.

287 The 1952 Report is in the following terms:

"There are four Child Guidance Clinics administered by this Service. One clinic is located at the Yasmar Boy's Shelter for investigation of boys referred from Children's Court. Girl delinquents are referred to the other three clinics. These latter clinics also accept cases referred from various sources in the community.

The clinics have continued to function along the generally accepted lines of child guidance clinic principles, as in former years. Each case is investigated by the psychiatrist, the psychologist and the social worker working as a team. The clinic officers undertake the investigation of children and give appropriate advice and treatment where necessary. Children are referred for various reasons, eg: maladjustment, delinquency, abnormal or asocial behaviour. Some of the cases referred to the clinic are not really suitable for clinic investigation, but due to lack of more adequate methods of screening this appears to be unavoidable at present.

In all clinics there is a waiting list, and because of this it is difficult to arrange appointments in terms of their urgency. It is apparent that consideration must be given to the establishment of additional clinics in the metropolitan area, and clinics also in the larger country centres. The situation could also be improved by the appointment of additional social workers to each clinic. Steps have already been taken in this regard.

All children are submitted to intelligence test suited to their age and maturity. Observations as to the child's personality and general demeanour are made by the psychologist in the course of these tests. The social worker obtains a detailed history from the parent with regard to the general family situation, and obtains material relevant to the environmental background, including information regarding the child's physical and emotional development. The psychiatrist, armed with information from the psychologist and the social worker, is then in a position to interrogate the child and interpret his problems to the parents in terms of suggested treatment and attitudes. Individual responsibility is encouraged in older children. "Follow-up" work is necessarily restricted by the limitation of the number of social workers, but it must be accepted as an important function of a psychiatric clinic. However, in many cases the social worker does make visits to the home and the school.

Parents and children are encouraged to revisit the clinic for further discussion and report as to progress. In some cases, where the child is more particularly involved emotionally and a

neurotic pattern is well established, parent and child report weekly for continuing therapy. In selected cases play therapy is used as a medium for diagnosis and treatment.

A pleasing feature is the continuing number of personal applications made privately by concerned parents, who are likely to be more cooperative in their attitude. The use of the clinic by medical practitioners is a further indication of their acknowledgment of the value of child guidance clinics. The wide range, as shown in the age group, provides a good cross sampling of a variety of problems and enriches clinical experience.

Boys are referred to the Yasmar clinic from the metropolitan and country Children's Courts. They are on remand, and the majority are detained in either the Yasmar or Albion-street Shelter. If they are not detained at a shelter they attend the clinic from their homes during the remand period. A small number not on remand are referred by the Child Welfare Department for diagnostic interviews and reports." [my emphasis].

288 Where there is conflict as to Child Guidance Clinics between Mrs Bull and Dr Katz, and the views expressed in the 1952 Report, I accept the contemporaneous evidence contained in the report. It should be noted that what appears from the 1952 report is that there were waiting lists for those who were considered by their carers to be in need let alone those who were not considered to be in need, such as the plaintiff.

289 There is no evidence that throughout even her stay at Lutanda, that any school teacher or School Medical Officer at any time made adverse reports in respect of the plaintiff's behaviour, or recommended or suggested that the plaintiff should be seen by a Child Guidance Clinic, or, indeed, should be referred for "help" or assistance to a Doctor, psychiatrist or anyone else in the behavioural science area. The practical, experienced and trained Lutanda staff, particularly the qualified and trained nurses, Mrs Buxton, Mrs Middleton and Miss Moorhouse, individually did not consider that the plaintiff's behaviour or conduct was such as warranted third party intervention whether by referral to the Honorary, Dr Lovell, or at all. They did not receive complaints in respect of adverse behaviour or suggestions from any school teacher or at all recommending either a Child Guidance Clinic referral or referral to another third party.

290 As to practical matters, I would note that whilst the plaintiff was at Lutanda from 1947 to 1950 a train trip to Sydney took some two an a half hours each way and Lutanda had no car. When at Pennant Hills, the trip to Sydney would have involved a walk of some distance to Pennant Hills railway station followed by a train trip to the city. Indeed, to have personally taken a child to a Child Guidance Clinic midweek would have involved the interruption of schooling for the plaintiff and presumably would have taken one carer away from the rest of the children for the day for no apparent reason on my findings. Nothing is said as to what a child who is a teenager might have thought about being taken to a Child Guidance Clinic to see a psychiatrist, psychologist and a social worker.

291 Returning to the plaintiff's submissions as to the plaintiff's behaviour warranting a referral to a Child Guidance Clinic, it is the plaintiff's case that evidence of her lack of attachment was to be found in her alleged troublesome nature even while she was at Bomaderry. Numerous witnesses were cross-examined extensively by counsel for the plaintiff, Mr Hutley as to the plaintiff's behaviour and it was put to a number of witnesses that the plaintiff was a troublesome child.

292 The plaintiff seeks to support this claim by relying, as I have said, on the evidence of Mr Sattler. Mr Sattler's evidence was that the plaintiff was troublesome and the most

difficult child he had ever known. His remarks come in the context of his recollection of the plaintiff's arrival at Lutanda. Mr Sattler states at para 3 of his affidavit sworn in November 1997 that he can recall when the plaintiff arrived at Lutanda in 1947 aged six years. It was his recollection that she was brought to Lutanda from a private home and was left at Lutanda by a couple who he said had had care of her. His recollection was that they sent her to Lutanda as they found her too troublesome. He didn't recall that she was brought to Lutanda because she had fair skin.

293 The facts of the plaintiff's arrival at Lutanda differ substantially from Mr Sattler's evidence. The plaintiff, as I have said, came not from a private home but was transferred from Bomaderry in 1947. At that time the plaintiff was four and a half and not six. Mr Sattler seems to be unaware, upon his recollection of events, that the plaintiff spent time at Bomaderry. Additionally, Mr Sattler did not recollect that one of the reasons for the plaintiff's transfer to Lutanda was that she was "fair skinned". In a letter from the then Secretary of the UAM, Miss Turner, to the then Superintendent of the Aboriginal Welfare Board, Mr Lipscomb, Miss Turner expresses her earnest desire to have the plaintiff, in her words, "a white child", transferred to Lutanda quickly. The application form for admission to Lutanda also suggests that the reason for the transfer was in accordance with the then policy of assimilation, "to take the child from association with Aborigines as she is a fair-skinned child". Mr Sattler seems genuinely unable to remember these details of why and from where the plaintiff was transferred to Lutanda. It is against this background that Mr Sattler makes his statement that the plaintiff was a troublesome child even before she arrived at Lutanda.

294 I do not accept his evidence that the plaintiff was known to be troublesome before her arrival at Lutanda and so accordingly I reject the plaintiff's submission that it constitutes proof of the plaintiff's disturbed state prior to her arrival at Lutanda. Mr Sattler's recollection about the plaintiff's arrival at Lutanda in material and significant respects is contrary to the established evidence that I have accepted. He makes no reference to Bomaderry and indeed I infer that his view of her behaviour, which I do not accept, is not based on any specific knowledge he had of her stay at Bomaderry. As I said, he appears, on his recollection, not to remember her stay there.

295 I reject also the suggestion by the plaintiff in submission that Mr Sattler's evidence is the only evidence going to the question of the plaintiff's behaviour at Bomaderry. In a report prepared by Miss English, an Inspector of the AWB, from visits taken on 22 and 23 April 1947, just one week after the plaintiff left Bomaderry, no mention is made of any children present or immediately past who were troublesome. I quote from her report dated 18 June 1947:

"The Matron informed me that the conduct of the children was very satisfactory and that there were no problem cases."

296 From Mrs English's report, it appears that the Home at Bomaderry was well respected in the nearby community to the extent that it received "gratifying financial support from outside sources". Her report presents a picture of a Home of clean, sufficiently fed and clothed children, making specific reference to their neat and tidy appearance. Mrs English was also generally satisfied with the good health of the children.

297 Notwithstanding the plaintiff's transfer to Lutanda one week earlier, the timing of the report by Mrs English, being in such proximity to the plaintiff's stay at Bomaderry, is such that I am of the opinion that is it reasonable for me to infer that the report reflects the

conditions prevailing with respect to the plaintiff at the time. The plaintiff was not a "troublesome" child in any sense of the word. As to the issue of behaviour, the Matron, as stated, told the Inspector there were no "problem cases". As to health, the children, were all generally in good health, food was nourishing and medical care was available. Where necessary, specialist medical treatment would be provided by the Board on the referral of the regular general practitioner. Indeed, the very application form for Lutanda completed on behalf of the plaintiff stated the need for a Doctor's Certificate to be obtained before any child is admitted into Lutanda. I infer that such was given. The plaintiff was accepted into Lutanda. Neither medically, nor in terms of behaviour, am I satisfied that the plaintiff was a "troublesome" child in the manner or of the type that under Dr Katz evidence is suggestive of a developmental attachment disorder. She was not disturbed in my view at all. She was, in my opinion, a normal healthy child at the time of the transfer.

298 I am made more confident in my view that the plaintiff was not "troublesome" by the very act of transfer itself. It was Sister Saville, a carer of the plaintiff at Bomaderry, and on all the evidence a loving and kind lady, who pursued the transfer for the plaintiff from Bomaderry to Lutanda. Sister Saville did so, it seems on all the evidence, in the plaintiff's best interests and, it is reasonable to infer, did so on the basis of her high regard for the child. It would be incongruous, given the attitude of Sister Saville in her pursuit of the plaintiff's transfer, to suggest that the plaintiff was nevertheless, a troublesome child. I infer that Sister Saville would conceivably not have taken the action she did if the child were so problematic.

299 It has to be borne in mind that a great motivation for Sister Saville's act of securing the transfer of the plaintiff to Lutanda was the very fact that Sister Saville herself was leaving Bomaderry. She sought the child's best interests for the future given the fact that she would no longer be available to personally care for her. There was in fact, as events turned out and for reasons which will appear, bonding and attachment and interaction between the plaintiff and Sister Saville at Bomaderry, until both left. I will return to this matter in the following section.

300 Of relevance, too, to this issue, are records from the UAM's regular publication, **"The United Aborigine's Messenger"**. A relevant section appears in the edition dated 1 August 1948:

"Joy, four and a half years, with us from the age of four weeks, has recently been placed in another Home. We miss our little Joy: she loved the Lord, and often said so: "I'm on the side of the Lord Jesus. I don't want to be on the devil's side." Joy had understanding beyond her years, and often surprised us with questions and statements."

301 From this extract it appears, in the eyes of the Matron, Miss Darby, that Joy was a good child who loved the Lord. It appears additionally, that she was an intelligent and bright child. No record is made of her being "troublesome".

302 All of this evidence weighs heavily in favour of the view, as expressed, that the plaintiff, in her time before arriving at Lutanda, could not legitimately be described as a "troublesome" or "problem child" such as to demonstrate to an observer that the child was in any greater need of care than any other child in care at Bomaderry. I am not prepared to accept that the plaintiff demonstrated at Bomaderry behaviour which to an observer obviously demonstrated a need for professional treatment. I find that there is no basis to suggest that the plaintiff was in need of or should have been referred to a Child Guidance Clinic either during her time at Bomaderry, nor, for reasons to be made clear, whilst she

was at Lutanda. To the extent that it suggests otherwise, I reject the evidence of Mr Sattler. Indeed I generally reject his evidence.

303 I also reject the evidence of Dr Katz to the extent that the plaintiff had a disorder of attachment including at Bomaderry. There in nothing to suggest any signs of there being such an attachment disorder. The plaintiff's case in respect of Bomaderry stands in the face of the evidence. I find that there were no symptoms or signs of a disorder of attachment at Bomaderry as suggested by the plaintiff's expert evidence. There was no warrant for referring the plaintiff to a Child Guidance Clinic in 1947 as again suggested by Dr Katz. His suggestion in 1999 doesn't accord with the facts in evidence of the circumstances as they existed in the 1940's. Further, it cannot be assumed that any hypothetical history given at a hypothetical visit to a Child Guidance Clinic or to an AWB staff worker on a visit had one visited, would be any different to that which is revealed on the facts and which I have outlined.

Nature of the Care received at Bomaderry:

304 I have set out extensively my findings as to how the plaintiff came to be at Bomaderry. I have also set out the evidence and my findings in relation to that evidence with respect to the relationship the plaintiff developed with Sister Saville and the care she received from Sister Saville.

305 The thrust of the expert evidence, to the effect that the plaintiff suffered from a deficiency in `attachment' at Bomaderry, is not supported on the plaintiff's case by evidence of the care or lack of care the plaintiff received whilst at Bomaderry. The plaintiff submits in relation to Bomaderry the following (at p 36 of her submissions):

"Aside from these documents concerning the entry and departure of the plaintiff from Bomaderry and correspondence relating to overcrowding at that institution and the inferences to be drawn from Mr Sattler's affidavit there is no evidence apart from the plaintiff's childish recollection as to her circumstances at Bomaderry. There is some expert evidence to which greater reference will be made below to the effect that the plaintiff's memories of Bomaderry, and in particular her memories of her mothers' visit there, may be in the nature of fantasy arising from the plaintiff's need for a mother."

306 I reject this submission that the plaintiff's evidence be given the meaning attributed to it by the expert evidence. Further, there is the other evidence as to her circumstances at Bomaderry which I have accepted. I have said already and repeat here that I find the history of the plaintiff give to Dr Waters in 1991 reliable where it records the plaintiff expressing feelings to Dr Waters that she had "comfortable, safe memories" of her time at Bomaderry and that she felt that "someone was looking after me". Further, on my findings, I have found that the plaintiff's mother did visit her at Bomaderry. This submission that I should read this lay evidence of the plaintiff in a way other than on its terms, as a form of fantasy is speculative. Such a submission instances the difficult task the plaintiff's evidence has presented me in this case.

307 Notwithstanding this submission, the plaintiff concedes (at p 40 of her submissions) that it does appear that the plaintiff formed some attachment to Sister Saville while she was at Bomaderry and refers to the plaintiff's own evidence in accepting this fact. This is a finding I make and have made on the evidence, that the plaintiff did form a bond and attachment with Sister Saville whilst at Bomaderry. The plaintiff appears to have trusted Sister Saville and found satisfaction and enjoyment in her relationship with her. Indeed, it is

a relationship it seems that was favoured by the plaintiff even later in life where she refers to writing letters to Sister Saville and to receiving visits and phone calls from her. I am further strengthened in my view of the attachment formed between Sister Saville and the plaintiff by the care and concern shown by Sister Saville, as I have mentioned, in assisting the plaintiff's transfer to Lutanda, a good faith act, legitimately undertaken by Sister Saville in the plaintiff's best interests.

308 This finding that the plaintiff received care adequate to achieve "bonding" between the plaintiff and Sister Saville is made notwithstanding any suggestion of overcrowding at Bomaderry. The care received from Sister Saville is shown by the plaintiff's own fond recollections of Sister Saville, both from her time at Bomaderry and afterwards. This finding that the plaintiff received "bonding" with Sister Saville strengthens me also in my immediate finding that the plaintiff did not have a disorder of attachment at her time whist at Bomaderry. I will return to the expert evidence at a later point to address further concerns with the plaintiff's submission in relation to the plaintiff's psychiatric history generally and with reference to her disorder of attachment.

The General Conditions at Lutanda:

309 The plaintiff was admitted to Lutanda on 16 April 1947. On the preponderance of the evidence that I accept it seems that generally at different times throughout the plaintiff's stay at Lutanda there were in the order of 30-36 children resident at Lutanda under its care. I refer to the evidence of Mrs Hancock, Mrs Tucker, Mrs Middleton and Mrs Oxborrow on this point as to an accurate recollection of the numbers of children in Lutanda at the relevant times. I accept their evidence.

310 Further on the preponderance of the evidence I accept, I find that at any one time during the period from 1947-60 there were probably six if not eight full time live-in workers corporately involved in the care of the resident children. The conditions of licence for Lutanda under s. 28 of the **Child Welfare Act** set out conditions with respect to staff numbers. The number of workers included the Superintendent and Matron, those who cared for the boys, those who cared for the girls, those who primarily served as cooks, those who primarily served in housekeeping and often a groundsman. In addition it seems that Lutanda and its residents benefited from the kind service of many volunteers over the relevant period, often people associated with the Plymouth Brethren church, who gave of their time and skill in various tasks such as ironing and mending. Mrs Talbot gives this evidence in her affidavit, which I accept:

"Each week two ladies from the Gospel Hall Waitara came and did some ironing and mending, and a gentleman came some weekends and mended the children's shoes. Other friends also gave their time, for example they gave children haircuts."

311 Indeed it should be noted that all the staff including the live-in staff worked in Lutanda on a voluntary basis. None of the staff received a formal salary. The construction of the new home in Pennant Hills, opened in 1950, came about as the result of numerous volunteers contributing to its construction. Even the original home in Wentworth Falls, founded by Miss Dalwood and Miss Sangwell, formed on little money and proceeded in its establishment for the most part by relying on charity.

Knowledge of the Plaintiff's Aboriginality and Alleged Discrimination:

312 The plaintiff in her evidence asserts that whilst she was at Lutanda, all the other

children at Lutanda were of European descent and white complexion. It has not been asserted, nor could it be, that Lutanda had a discriminatory policy of admission. Indeed, quite the contrary. Evidence given by Mrs Tucker (nee Frame) who was in care of Lutanda from 1952 and evidence given by Mrs Buxton was that Lutanda took into its care people from Asian, Polish and Dutch backgrounds. Similar evidence is given by Mrs Reid at para 3 of her affidavit and by Mrs Hancock at para 6 of her affidavit. More generally, admission to Lutanda seemed based, as originally intended by its founder Miss Dalwood, on the relevant need of the applicant. Mrs Talbot gives evidence in her affidavit, which I accept, in the following terms:

"To my knowledge there was never any element of racial discrimination in Lutanda's policy of accepting children. Lutanda accepted children needing care whatever race or creed. We endeavoured to provide a secure, caring homely environment for every child placed in our care."

313 On the preponderance of the evidence that I accept, I find that that indeed is what was achieved at Lutanda. Those endeavours were put into practise and implemented. Similar evidence, which I accept, is given by Mrs Reid at para 3 of her affidavit (13 November 1997), Mrs Hancock at para 6 of her affidavit (24 November 1997), Mrs Buxton at para 3 of her affidavit (2 December 1997), and by Mrs Simpson at para 3 of her affidavit (18 December 1997).

314 In light of the foregoing evidence as to the various ethnicities of children resident at Lutanda, the plaintiff's recollection that all the other children at Lutanda were of European descent and white complexion should not be accepted. The evidence presented as to the appearance of the plaintiff suggests that at the time the plaintiff resided at Lutanda her appearance did not make obvious to all her Aboriginality.

315 Mrs Morsillo, who was resident at Lutanda from 1943 to 1950 testifies that the plaintiff had a darker skin tone than the rest of the children at Lutanda but that she did not realise until much later that Joy was Aboriginal. Miss Moorhouse gives evidence (at para 9 of her affidavit sworn 3 December 1997):

"I can remember Joy as a youngster. She did not look like an Aboriginal. She had fair skin and hazel eyes. I am not sure if I knew at that stage that Joy was an Aboriginal."

316 Mrs Middleton who had charge of Joy when she was a teenager gives the following evidence (at para 4 of her affidavit sworn 16 December 1997):

"I am not aware of any other Aboriginal children, fair skinned or otherwise, who were at Lutanda. I cannot remember whether we even thought of Joy as Aboriginal ... She certainly did not look `real aboriginal' at the time. When she was very young, apart from her beautiful curly hair, she hardly looked Aboriginal at all - her skin was very fair. It was only as she grew older that she began to look more Aboriginal."

317 In cross-examination Mrs Middleton affirmed this evidence in the following answer (at T 224):

"**MIDDLETON:** I think in the back of our minds we realised she was from an aboriginal mission, but it wasn't easy to, sought of, identify her as an aboriginal, because she was fair, she had curly hair, she was a happy youngster. But as she grew older, from teenage on, she became more aboriginal in appearance."

318 Miss Goff gave evidence that her own skin was an olive colour and that another girl resident at Lutanda named Carol Wade also may have been Aboriginal although she says was not sure at the time whether she knew that the plaintiff was Aboriginal. Indeed it seems clear that a vast number of those resident at the time did not know of the plaintiff's Aboriginal ancestry during the plaintiff's youth. Mr Frame, Mrs Tucker, Miss Moorhouse, Mrs Talbot, Miss Milton, Miss Simpson, Mrs Morsillo and Mrs Godfrey all testify to not having known the plaintiff was an Aboriginal during the plaintiff's youth. Most compelling of all though is evidence of Mrs Helies who was the same age as the plaintiff and under care of Miss Lewin with the plaintiff. Mrs Helies by virtue of her age spent a great deal of time with the plaintiff whilst they were both at Lutanda. Evidence also indicates that she visited the plaintiff many times after she had left Lutanda while the plaintiff was still resident there. Mrs Helies gave the following evidence in her affidavit of 14 November 1997:

"I never knew that Joy was Aboriginal when I was growing up. Joy was just Joy - she was my friend. I cannot recall anything ever being said about Joy being an Aboriginal.

319 It is clear on the evidence, however, that some witnesses did know of the plaintiff's Aboriginality. Mrs Reid, Mrs Hancock, Mrs Buxton and Mrs Middleton all gave evidence that they knew of the plaintiff's Aboriginality. In each case though they deny that this knowledge led to differential treatment of the plaintiff because of her Aboriginality. Mrs Middleton gave evidence (at para 5 of her affidavit) that:

"However none of us ever treated Joy differently because she was an Aboriginal. I think that if anything Joy was actually favoured above the other children because she had been at Lutanda so long. When we thought of Joy I do not think that we thought of her as Aboriginal as such - she was just like any of the other kids."

320 I accept this evidence as well.

321 Indeed, it appears from the evidence that it was not general practice for the staff at Lutanda to discuss the background of resident children, whether in relation to the plaintiff or generally. Again a list of witnesses, including Mr Frame, Mrs Hancock, Mrs Tucker, Mrs Talbot and Mrs Oxborrow give similar evidence, which I accept, that generally the background of children was not discussed.

322 James Frame gave evidence that his family and background were not discussed with him till he was thirteen and that in general he knew little about the backgrounds of others as it never became a talking point. Mrs Tucker gave evidence at para 4 and 5 of her affidavit (30 November 1997) that the background of children was not openly discussed and that the workers at Lutanda never raised such a topic of their own initiative. What little she knew of the backgrounds of other children she said came from the children themselves. I note also that the evidence of general reluctance to discuss children's backgrounds is consistent with the affidavit evidence of Miss Christie in her affidavit affirmed 20 November 1996.

323 Against this view of the evidence is the evidence of Mr Sattler that it was common knowledge that Joy was Aboriginal because of her dark skin. Mrs Oxborrow also gives evidence to the effect that it was both common knowledge and accepted that the plaintiff was aboriginal though she was unaware of any racism at that stage of her life. Both Mr Sattler and Mrs Oxborrow, however give most emphatic evidence that even though they believed it was common knowledge that the plaintiff was Aboriginal, it never became a talking point amongst those resident at Lutanda.

324 In addition to the views of Mr Sattler and Mrs Oxborrow is the evidence of Miss Christie. Miss Christie did not live at Lutanda but on her own evidence lived half an hour's walk away. She attended school with the plaintiff and often visited Lutanda. Miss Christie gave evidence in two affirmed affidavits (20 November 1996; 22 February 1998) that she was always aware that the plaintiff was Aboriginal though it was never discussed. In her affidavit in reply she reaffirms this statement saying she knew "since we were very small".

325 Miss Christie's oral evidence in cross-examination discloses some confusion about the origin of her alleged initial realisation that the plaintiff was an Aboriginal. Miss Christie admitted, during the course of her evidence, to having, for personal reasons, engaged in a process of self-exploration and a revisiting of her past so as to better understand herself and her behaviour. In doing so, she testified that she has to her mind, succeeded in `disentangling' herself from much of what she terms her religious indoctrination. The witness shares with the plaintiff recriminations against her religious upbringing. For these reasons I find it necessary to act with caution in respect of her evidence. I have had the benefit of hearing and seeing the witness giving evidence and all my observations confirm my conviction to treat her evidence with utmost caution. One is left with the impression that her evidence is subject to revisionism. Having seen her and heard her, I reject her evidence and do not act upon it. Further, where there is conflict, I accept the Lutanda witnesses to which I have referred.

326 In light of the vast number of witnesses who testify to not knowing of the plaintiff's Aboriginality I do not accept the mere assertions by Mr Sattler, Mrs Oxborrow or Miss Christie that it was common knowledge that the plaintiff was Aboriginal. I do not accept them preferring the preponderance of other evidence to the contrary. The fact that several workers including Miss Simpson, Miss Milton and Mrs Talbot did not know of the plaintiff's Aboriginality coupled with a general reluctance amongst staff to talk about the background of children and coupled further, with the likely possibility that few workers knew, in detail, of the plaintiff's background and arrival at Lutanda, all suggest the plaintiff's Aboriginality was not common knowledge amongst the staff and children in Lutanda at the relevant time. That is the state of the evidence which I consider should be accepted.

327 Much was sought to be made of the fact that the plaintiff was not told about her background or about her mother. The plaintiff submitted in her written submissions (at p 103) that the staff at Lutanda were "affected by a code of conduct" which saw that no inquiries were made about the plaintiff's mother. There may have been good and valid reasons for not disclosing this information to a girl so young who was to their mind "fair skinned" in appearance and who had been placed there for her betterment and for the purpose of giving her chance in life. Indeed, one can but speculate as to how the plaintiff (in the 1950's) would have reacted to being given that information in those circumstances. What should also not be overlooked is the Board's general policy which was to assimilate the child in as far as, in the instant case, the child was a fair skinned child nor should it be forgotten that the Board was under a duty in respect of assimilating the child plaintiff under s. 7(1)(a) of the Act. I would observe in passing, even in the area of adoption, it was not until the 1990's that adoption legislation was changed to permit a child to know who his/her parents were. In the instant case we are dealing with the standards of the 1940-50's, and not the respective standards of the 1990's retrospectively applied. Knowing, the carers as I do from having seen them and heard them, if information was withheld, I infer it was done with the best of motives and for the best of reasons, namely the perceived protection of the child plaintiff.

328 Turning to another matter to do with the identification of the plaintiff, the plaintiff has

made allegations that she was known as Girl 4 whilst at Lutanda, that it was sewn into her clothes and that she was called by a number instead of a name. This allegation has been conceded as being a "distortion" by the plaintiff. I believe it is a "distortion" and that this matter can be dealt with shortly. The relevant evidence, which I accept, is that of Mrs Godfrey (nee Frame) who gives the following evidence in her affidavit sworn 11 March 1999 (at para 27):

"We were never called by number. We were called by name. But all our clothing was numbered . My clothing number was 5, but I was always called Jean. he numbering system was used so that we could keep track of our clothing."

329 I note as far as it is relevant that this evidence is supported by Mrs Hancock at para 14 of her affidavit (24 November 1997) and by Mr Frame at para 23 of his affidavit (26 November 1997). Mr Frame also gives oral evidence (at T 206) as to the fact that numbers were used for his towel rack and may have been used on his clothes. He gave evidence that he was never called by a number instead of a name. Mrs Buxton also gives oral evidence (at T 372) that numbers were used for laundry and shoes but that the plaintiff was always called Joy Williams. I accept their evidence.

Attitude to Aborigines:

330 I reject the plaintiff's allegation that she was taught at Lutanda to look down on Aborigines. Mrs Middleton gave evidence that the children were never taught to look down on Aborigines at Lutanda. In oral evidence she denied (at T 228) making differentiation between anybody, let alone Aborigines. Her attitude to Lutanda and the life lived there is best summed up in the following exchange (at T 224). Mr Hutley in cross-examining Mrs Middleton about a prior conversation that she had had with the plaintiff's solicitors:

"**HUTLEY:** Did they ask you this question, "Did Joy know she was an aborigine?" Do you recall being asked that question by these people?

MIDDLETON: No, I don't recall that.

HUTLEY: Do you recall, if you had said, "I don't know whether she knew", would that have been correct?

MIDDLETON: It could have been, because we did not talk about it. You know, it was just not even an issue.

HUTLEY: Did you tell anyone that, "No staff ever told her, because that would have been degrading her", referring to her aboriginality?

MIDDLETON I think I have to refer to the same thing that I have been saying; we knew she came from an aboriginal mission and we were, sort of, I suppose subconsciously aware that there was aboriginal in her, but it was never an issue and it was never emphasised or she was not - she was just one of us and I had my own two children there too."

331 I accept this evidence.

332 Mrs Buxton also gave evidence (at T 373) that the children were never taught to look down on Aborigines. She said that if there was any talk about Aborigines it would have been when the mission perhaps showed slides or someone visited. She said that the general teaching was that everybody was equal in God's eyes and everybody was loved by

God and certainly not to be looked down on. I accept the evidence of Mrs Middleton and Mrs Buxton. In doing so I reject the submission from the plaintiff that the staff were prejudiced by racial bigotry in fact or otherwise.

333 The evidence suggests that very little direct reference to Aboriginals was ever made at Lutanda. It seems that at best reference to Aborigines and Aboriginality was sporadic. Many of the those resident in care at the time recall being taught very little specifically relating to Aboriginals. Many remember only the words to a non-racial Sunday school song they were taught in which they were admonished to love all races. Mrs Hancock gave evidence that all the teaching at Lutanda was based on the Bible. All the other teaching was left to the schools to which the plaintiff and other children were encouraged to attend. I accept her evidence.

Visitors:

334 It seems common ground that the plaintiff had few if any visitors at Lutanda. The plaintiff's mother apparently never told anyone of the plaintiff's birth. She too had been under the Board's control from an early age. The father and his relatives were never involved nor showed any interest in the plaintiff's birth or her subsequent life. His name did not appear on the birth certificate. He was a soldier who may even have not survived the war.

335 In 1947, the mother knew that the child plaintiff was going to Lutanda having signed the form for admission. From 1947-1956 the mother showed no interest in contacting the child plaintiff, in visiting her or otherwise. In so far as Lutanda was not a home within the meaning of s 11 of the **Aborigines Protection Act**, the mother was entitled to visit the plaintiff without permission if she had had wished to do so. The evidence of Lutanda carers was that she would have been welcomed had she sought to visit the plaintiff.

336 It was not until 1956 when the plaintiff's mother, living in the country in adverse circumstance of health and financial well-being, contacted Mrs English, a then inspector with the AWB, that the mother, inter alia, sought to know where the plaintiff was and whether she could visit her. Mrs English did not advise on this matter, no doubt for reasons good and valid to her. As I said, the plaintiff's mother had not sought to contact the child plaintiff between 1947-56. Apparently no further attempt was made by the plaintiff's mother to see her or communicate with her and they did not meet again until 1973.

337 The evidence shows that the plaintiff did receive occasional visits from Aunty Leila (Sister Saville) and her then husband `Uncle Sid'. At some stage, when the plaintiff says she was 12, Miss Saville, then known by her married name, moved with her husband to Western Australia. After this occurred the plaintiff gave evidence that she received a phone call every two years from Sister Saville.

338 It is also common ground that at least one day a month was set aside for an open house to visitors. That was, according to Mr Frame and Mrs Middleton, the first Saturday of the month. Some children, like Miss Goff remember getting visitors fortnightly due to the persistence of her father in coming to visit with his children. Sadly, however, on the balance of the evidence, it appears that her experience and that of her siblings in having such a regular visitor was somewhat unique. This perhaps reflects the reality of the problem of being in an institution where, because of there being no parent, relative or friend available to care for the child, very few visitors are common or constant. Miss Goff's sister, Mrs Oxborrow (nee Goff) confirms this at para 3 of her affidavit sworn 6 January 1998 where

she says that she and her siblings were the only children at Lutanda who had a parent regularly visiting them. Of those children who had occasional visitors, Mrs Middleton gave evidence that even these children "would sometimes have no visitors for several months." No evidence was tendered to show the development of psychological damage to any of these other children in care at Lutanda during the period of the plaintiff's residence.

339 The plaintiff was clearly not the only one to suffer from the lack of a specific and regular visitor. The Frame family comprised of witnesses, Mr Frame, Mrs Godfrey and Mrs Tucker, as well as two other brothers, never received any visitors. The attitude of the staff at Lutanda to the subject of visitors and of children who did not receive visitors is set out by Mrs Talbot in two paragraphs, which I accept, from her affidavit sworn 9 December 1997:

"Visiting was usually on a monthly basis. Parents and relatives were welcome to visit their children and spend time with them. Many came regularly, but others never came and a number of the children including Joy never received visits. We always tried to make up to those children with little treats on the day, and by giving as much time to them as we were able.

The visiting of parents and relatives was encouraged by the Directors and Superintendent also the staff. We would spend any opportunity afforded us by the children's visitors to engage in meaningful conversations in an effort to try to help them understand just how important it was that they continue their contact with their children on a regular basis and what these visits meant to their children."

340 There is evidence that the staff at Lutanda endeavoured to promote the welfare of the children by facilitating visits by people from church who took an interest in the children. Those visitors who did come often remembered to bring gifts for those who had no visitors.

341 Evidence is given by Mrs Oxborrow (nee Goff), sister of Phyllis Helies (nee Goff) who had grown up with the plaintiff, that the plaintiff would occasionally join their family on an outing which occurred when her father visited. It was because this so boosted her morale that the staff at Lutanda allowed this to occur. The attitude of the staff of Lutanda to visitation, on the evidence, in one in which, though not actively searching for or enticing visitors to come and visit the children, they nevertheless did everything possible to preserve the opportunities for visitation that were available to the children. One clear example is Miss Moorhouse herself. The evidence shows that Miss Moorhouse regularly visited Lutanda although she did not have direct family there. She visited those who did not get visitors and often brought gifts for the children and for their birthdays.

Nature of the Plaintiff's Behaviour at Lutanda:

342 Evidence of the plaintiff's behaviour whilst at Lutanda is extensive. I will refer to some of the evidence I specifically accept. A number of witnesses were pressed in cross-examination as to the emotional state of the plaintiff. Miss Milton, who was a junior leader of the girls under Miss Lewin, was asked (at T 162) whether she recalls the plaintiff having any emotional problems. She said she did not. Mrs Middleton, a well qualified carer in my view, was extensively cross-examined (at T 230) on her observations of the plaintiff's emotional and mental health. When asked whether the plaintiff actions could be referable to her being a "disturbed child" she replied that the plaintiff wasn't a "disturbed child". When asked whether it had ever occurred to her that the plaintiff suffered from symptoms of a deprived childhood she replied, "No, emphatically no". Later in cross-examination Mrs Middleton (at T 235) was pressed as to whether she thought that the plaintiff needed professional help:

"**MIDDLETON:** No, and if you are talking about her being depressed, or anything like that, she was not a depressive type. She was a girl that succeeded, and she would go off and have a few hours on her own. But she would bounce back as good as ever."

343 I accept Mrs Middleton's evidence. I am not satisfied that the plaintiff demonstrated any emotional, psychiatric or psychological problem warranting reference of the plaintiff to a third party. I am satisfied that had such a problem been discernible to the carers they would have referred her to a third party or to Dr Lovell for assistance. Nor did the educational authorities, the plaintiff's school nor her school teachers make any report to Lutanda or any other recommendation expressing concern about the plaintiff's behaviour at any time during her stay at Lutanda, nor did any school authority apparently recommend referral to a third party such as a Child Guidance Clinic. More significantly, had the AWB been told anything by the Lutanda staff or through its representatives, if visited once a year or more and spoken to the Lutanda hands-on carers and or even the plaintiff herself, the position reported in respect of the plaintiff would not in my view have been other than as stated or understood by the Lutanda carers.

344 A number of witnesses were further pressed with respect to the plaintiff's behaviour being troublesome. The plaintiff through counsel submitted that I should find that the plaintiff was an extraordinarily troublesome child and an even more troublesome child than any other child at Lutanda with the exception of one child, Helen Frame, who was sent home from Lutanda to live with her parents. Turning to the evidence a proposition was put to Mr Frame that the plaintiff got into trouble more than anybody else. He replied that (at T 200):

"**FRAME:** To my observation, she was in trouble pretty regularly, but I couldn't say more than anybody else."

345 When further asked whether it was a fair description of the plaintiff that she was the naughty girl of Lutanda, he replied (at T 204):

"**FRAME:** Not remembering everybody that went through Lutanda, I could not honestly say. I wasn't a worker, I was 10 years of age. I couldn't come to that."

346 Turning to the workers, Mrs Hancock when pressed said she could not recall the plaintiff being in a lot of trouble (at T 215). Miss Moorhouse agreed with the proposition put to her (at T 356) that the plaintiff was by far the naughtiest girl at Lutanda. Her answer is qualified by the context of the questioning. It deserves to be set out:

"**MOORHOUSE:** Yes, well, you know lots of teenagers get very rebellious when you are teenagers and I know she was a naughty girl, but there were, you know, most teenagers get rebellious, they don't want to do what their mothers tell them.

HUTLEY: But she was by far the naughtiest girl at Lutanda, wasn't she?

MOORHOUSE: I think so, yes, but as I said, her misdemeanours were not elaborated to me."

347 From the context and preceding passages it seems clear that Miss Moorhouse was relying more on her impression of a general attitude held by the staff than on her own observations of the plaintiff. Not having had the misdemeanours elaborated to her refers to the fact that she is being asked about the nature of the plaintiff's behaviour having been a monthly visitor to Lutanda and not in relation to the time she spent working there. Indeed,

when asked about alleged violent behaviour of the plaintiff she replies (at T 375) that she wasn't aware of it as she wasn't there at the time.

348 Mrs Middleton described Joy (at T 234) as a "ringleader, or the stirrer, or whatever". When pressed (at T 230) as to the plaintiff being more trouble than the other children she replied:

"**MIDDLETON:** I suppose she caused us more concern than any of the others, because no matter what you did for her she always seemed to have her own way."

349 Later on the same page, when asked why she thought the plaintiff acted that way, she replied:

"**MIDDLETON:** That was just the way she was built. That was Joy."

350 Mrs Buxton, also a well qualified carer whose evidence I accept, gave evidence that in her experience the behaviour of the plaintiff was perfectly normal for a 10 to 12 year old. She gave evidence (at T 389) that:

"**BUXTON:** She would try me out, like any child, and when she eventually obeyed, that was fine."

351 When it was suggested to her that the plaintiff was more bad tempered than others, she said (at T 390):

"**BUXTON:** That didn't come through to me, but when you have got a group of children of any sort, you are going to have some more and some less disobedient, some more and some less sulky and so on. One accepted the fact that children were all different and accommodated it."

352 Mrs Buxton (at T 378) gave the further following evidence in examination in chief about the nature of the plaintiff's emotional and mental health:

"**BARRY**: When you were looking after Joy did you think that she was in need of any psychiatric treatment?

BUXTON: No.

BARRY: Why not?

BUXTON: She wasn't clinically depressed. She wasn't in need of psychiatric care. She was a normal teenager to my mind.

BARRY: Did you think that there was any need for outside intervention, by that I mean from a psychologist, of a psychiatrist, or a doctor, in relation to her management when you were looking after her?

BUXTON: No.

BARRY: Why not?

BUXTON: Because she was, to my mind, a fairly normal teenager. She was a little bit more moody sometimes, but that's normal enough. Children get moody in their teenage

years. She didn't stand out as a person who needed any of that.

BARRY: Did you think that you were able to manage her?

BUXTON: Yes."

353 Mrs Middleton and Mrs Buxton were very good and impressive witnesses. Both were trained and qualified nurses and had spent a great deal of time with the plaintiff observing her and caring for her. Mrs Buxton was a triple qualified nurse. I would observe in passing that when Mrs Buxton was trained in, inter alia, infant welfare, in 1949, she was not lectured on the subject of maternal deprivation.

354 I am not satisfied that any evidence of Mr Sattler, as set out above, impacts on the reliability of the evidence of Mrs Buxton, Mrs Middleton or the other witnesses who testify about the plaintiff's behaviour. Where there is conflict between Mr Sattler and Mrs Buxton or Mrs Middleton, I reject Mr Sattler. Mrs Buxton and Mrs Middleton were medically trained and their opinions, being contemporaneous and arising from their daily care of the plaintiff should be given great weight. I am satisfied on all of the evidence that the plaintiff was not an extraordinarily troublesome child whilst at Lutanda. I accept the defendants' submission that the overall effect of this evidence, while it showed that the plaintiff did present as a difficult child with some management problems, is that the plaintiff did not present as a child who required outside intervention. The plaintiff was in the care of experienced and trained carers. I reject the plaintiff's submission that the staff at Lutanda, and particularly Mrs Buxton and Mrs Middleton were prejudiced by religious beliefs into preferring pseudo solutions over medical assistance. The evidence suggests, and I accept this evidence, that both dedicating caring Matrons would have sought the assistance of the honorary Dr Lovell for a referral had there been a perceived need for it. There is no evidence and I do not find that the plaintiff suffered from any emotional, psychiatric or psychological problem or disturbance whilst at Lutanda which warranted reference of the plaintiff to a third party like a CGC for observation, treatment or therapy.

355 I repeat that whilst at Lutanda at no time was apparently a report made by the educational authorities at the plaintiff's school or by any other teacher expressing concern about the plaintiff's behaviour nor was any direct referral to a Child Guidance Clinic or any other third party suggested or made by them. Had such a visit to a Clinic occurred I am satisfied that the history given to the clinic by the staff at Lutanda would be not substantially different from that given by the witnesses Mrs Buxton and Mrs Middleton in the instant case, namely, that the plaintiff was not unduly troublesome and was not clinically depressed, nor suffering from any psychiatric problem or disturbance.

Care and Treatment of the Plaintiff at Lutanda:

356 The plaintiff alleges that she was treated differently from the other children while at Lutanda. It should be noted that in particularising this allegation the plaintiff does so by referencing such things as rarely going to private homes for Christmas and other vacations, being "often the only child left in Lutanda" at holiday times, being one of the longest term residents at the Home and generally having no visitors. I will turn to these matters in turn. She also makes reference to not being offered placement with other families by means of adoption and fostering out. I will return to this matter separately in the following section.

357 It should be clear from the preceding section that the fact that the plaintiff did not receive visitors was not a matter unique and particular to her alone and could not and is not

the subject of any charge that the plaintiff was discriminated against. It was simply not in the hands of the carers at Lutanda to ensure visitors, nor could the defendant AWB ensure visitors. It cannot be suggested on the evidence that the plaintiff was in anyway disadvantaged or discriminated against because of this general practise.

358 The history of the plaintiff's care at Lutanda is presented in her evidence as being both unusually long, the plaintiff spending some thirteen years at Lutanda in the face of her best recollection that other children only spent up to five years at Lutanda, and unusually prejudiced in the care she received. The plaintiff makes the statement that she often felt unwanted and that nobody cared.

359 At all points, the whole of the evidence seems to be against the plaintiff's claim. It seems appropriate at this point to lay out the evidence of the history of care received by the plaintiff whilst at Lutanda before turning to consider the particular matters alleged by the plaintiff.

360 When the plaintiff came into the care of Lutanda in 1947 she was placed in the care of Miss Lewin. Miss Moorhouse gives the relevant evidence (at para 5 of her affidavit):

"By the time Joy came to Lutanda Miss Lewin was the person who cared for the little ones. She was a sweet gentle lady, who did not enjoy good health, the little ones loved her. This was Miss Lewin's sole responsibility. Joy was one of the five children under the age of seven that Miss Lewin cared for. I can also recall another child Phyllis Goff, who was about Joy's age and whom Miss Lewin cared for. She was a real mother to baby Phyllis, aged three and a half, and later Joy, who was aged four and a half, when she joined us. Miss Lewin was a very gentle lady."

361 Miss Lewin, on the evidence, provided a loving environment for both Phyllis and Joy. Phyllis Helies (nee Frame) who was, with the plaintiff, one of the youngest at Lutanda and in care of Miss Lewin remembers her fondly. Her words clearly convey a distinct and different version of the care she received under Miss Lewin than that asserted by the plaintiff. Mrs Helies swore in her affidavit (at para 2) the following:

"In my early year at Lutanda Joy Williams and I were the youngest children there. Miss Lewin ("Aunty Kath") took care of Joy and me. I loved Miss Lewin dearly, she was the closest thing I ever had to a mother."

362 Mrs Helies' sister Mrs Oxborrow (nee Frame) also gave evidence concerning the care received by her sister under Miss Lewin. In her affidavit sworn on 6 January 1998 (at para 2) she refers to Miss Lewin as the "sweetest, kindest and dearest lady I have ever known". Mrs Oxborrow recalls that Miss Lewin kept in contact with both the plaintiff and her sister even after Miss Lewin left Lutanda. Mrs Helies also gives evidence that Miss Lewin would often take her to visit the plaintiff even after both Mrs Helies and Miss Lewin had left Lutanda.

363 Evidence was also given by Mrs Milton, who was the assistant to Miss Lewin, of the care and attitude of herself and Miss Lewin towards the plaintiff. Mrs Milton said (at T 158) she loved the plaintiff and that Miss Lewin had the same attitude as her. When asked what kind of a person Miss Lewin was, Mrs Milton replied, "A beautiful lady".

364 No mention is made of Miss Lewin in the plaintiff's affidavit, nor is mention made of the care received from her. This is naturally contrasted with the responses of Mrs Helies, who being around the same age as the plaintiff, shared in the same care at the hands of Miss

Lewin and, not only remembers her, but remembers her as the closest thing she had to a mother.

365 The plaintiff was also in care of Miss Atkinson for part of her time at Lutanda. The plaintiff makes much of this relationship in the course of her submissions. The plaintiff submits by way of expert evidence, which I have set out more fully elsewhere, that Miss Atkinson was the best, indeed the sole person identifiable who could have served to overcome the plaintiff's deficiency in attachment when young. Relevant passages from the affidavit of Dr Katz deserve to be set out. At para 41 of his affidavit 13 April 1999, he states:

"41. A reasonably competent child psychiatrist or child mental health professional would have realised that the presence of Sister Amy (Miss Atkinson) provided a therapeutic opportunity for reversing the disorder of the development of attachment from which Ms Williams was suffering. Such a person would have recommended to the person who accompanied Ms Williams to the consultation and through that person to those administering Lutanda that encouragement should be given to the development of the relationship between Sister Amy and Ms Williams. Such a person would have appreciated that a bond between Ms Williams and Sister Amy may have been established which was sufficient to fulfil the need identified in my earlier affidavit and have prevented the psychological consequences of the lack of attachment." [my emphasis]

366 Mrs Bull gives similar evidence at para 6 of her affidavit sworn 12 April 1999:

"6. A reasonably competent social worker at a Child Guidance Clinic, on receiving the history set out above, would have appreciated the following had Ms Williams been referred to the Clinic in 1953 or thereabouts:

(m) Since Ms Williams had identified Ms Atkinson as the person to whom she felt closest, it was likely that the attachment which was likely to be of greatest benefit to Ms Williams was an attachment with Ms Atkinson;

(o) It was desirable that Ms Atkinson, if she were willing, should be involved in Ms Williams treatment in any way possible and that she receive some counselling from the staff of the Clinic when she came with Ms Williams for weekly appointments. The effect of this involvement would be to put Ms Atkinson in the role of surrogate mother to Ms Williams." [my emphasis]

367 It is the plaintiff's evidence that she was closer to Sister Amy Atkinson than to any other person at Lutanda. The plaintiff has expressed fondness for her and has specified actions like being allowed to brush Miss Atkinson's hair as symbolic and demonstrative of the caring relationship the two shared. Further, it is the plaintiff's submission that such activity of encouraging a relationship between the plaintiff and Miss Atkinson and of placing her in the position of a surrogate mother would have in the words of Dr Katz "prevented the psychological consequences of the lack of attachment." I have a number of problems with this submission.

368 Firstly, it does not follow that because Miss Atkinson generally demonstrated care for the plaintiff that Miss Atkinson would necessarily be ready, willing or able to pursue the role that the plaintiff has urged in forming an attachment with the plaintiff or that there could or would be ongoing attachment of the plaintiff with her.

369 Lutanda was a Home staffed by volunteers, albeit caring volunteers, of which Miss

Atkinson was one. There was not a relationship of employment between Miss Atkinson and Lutanda or between Miss Atkinson and the AWB that could form the basis for the AWB to encourage a continuous relationship between the plaintiff and Miss Atkinson of the type suggested. Further, the plaintiff led no evidence as to the willingness of Miss Atkinson or other carers to engage in the travel so as to accompany the plaintiff to a Child Guidance Clinic, in respect of which I have found no such visit was warranted.

370 I am also satisfied that Miss Atkinson provided a significant level of care for the plaintiff and provided some attachment, interaction and bonding in fact. On three occasions she took the plaintiff alone on interstate trips to visit with friends at Christmas. Her specific and special concern for the plaintiff was significant. Yet it does not follow that a relationship of the type suggested by the expert evidence was wanted, desired or possible on Miss Atkinson's behalf with all the responsibilities that would go with that relationship, nor was it practicable in all the circumstances.

371 Secondly, and following from the first point, it might perhaps be reasonably perceived as running contrary to common sense and understandings of human nature, human personality and emotions to suggest that such a relationship of bonding and attachment could be formed merely on a desire or by compulsion, however well-intentioned, of third persons to the relationship. There is evidence in Dr Bowlby's WHO Report of 1951 (a significant report in the plaintiff's case) that bonding and attachment involves learning to know and trust a person, and involves a warm, intimate and continuous relationship between the child and mother or permanent substitute in which both find satisfaction and enjoyment. It is by no means inevitable, given the best intentions in the world, that a relationship of bonding of the type and scope suggested by the expert evidence was at all possible on a temporary or permanent basis between Miss Atkinson and the plaintiff. There was simply no evidence, indeed, such an issue may not even be justiciable given that the many and various factors which precipitate in the forming of such a bond are inevitably and naturally complex. Any bonding or attachment would involve mutuality and would presumably require that the plaintiff too is ready, willing and able to participate in terms finding satisfaction and enjoyment. In all this I say nothing as to the difficulties in a practical sense of time or emotion of a carer seeking to undertake such a role when responsible for a number of children in an institutional setting.

372 Thirdly, while Miss Atkinson remained at Lutanda for approximately the full length of the plaintiff's stay it is not suggested that Miss Atkinson could not leave Lutanda at any time, her work their been voluntary and charitable and unpaid. Indeed, the evidence was from Miss Moorhouse that Miss Atkinson regularly took a "furlough" or holiday, at least every year to return to Tasmania to visit her family. Starting in 1953 it seems she took an extended furlough. The possibility of her departure seems to have been largely ignored in the basic assumptions employed by Mrs Bull and Dr Katz. In a Home, carers come and go. Mrs Bull in response to this line of questioning said that knowing Miss Atkinson could leave and did leave for a period in 1953 would not change her views set out in her affidavit. With respect, I do not accept Mrs Bull's views expressed, inter alia, to accommodate a different factual situation assumed by her and similarly by Dr Katz.

373 Fourthly, the evidence was that Miss Atkinson was an elderly lady, somewhere in the order of seventy to eighty years of age even at the time of the plaintiff's arrival at Lutanda in 1947. Mrs Hancock gives evidence that whilst at Lutanda between the years of 1953-6, Miss Atkinson was in her 70's possibly getting close to 80. Miss Moorhouse gave evidence that by the late 1950's Miss Atkinson did not assist full time with the care of the children but assisted by arranging morning tea and other smaller jobs. If it be accepted on the state of

knowledge presented in the work of Dr Bowlby that there was a need for a permanent mother substitute, it seems, with respect, that Miss Atkinson was not suited to that role.

374 For these reasons, although I am satisfied that the plaintiff received favourable care, and experienced attachment and bonding with Miss Atkinson as she did from Miss Lewin, I cannot accept the implicit assumption of Mrs Bull and Dr Katz that a continuous and special relationship of bonding was reasonable, practicable or even possible between the plaintiff and Miss Atkinson. Such cannot in life or in nature be compelled, although it might otherwise occur.

375 Turning to the matters particularised by the plaintiff in her allegation that she was treated differently, the evidence clearly shows that a number of children, possibly the majority of children regularly remained at Lutanda over Christmas and during holidays such that, contrary to the plaintiff's evidence, the plaintiff was never left alone there. Miss Simpson in her affidavit sworn 15 December 1997 gives the following evidence:

"Most children would remain at Lutanda over Christmas. Joy would never have been the only on left at Lutanda. We never had a totally empty house over Christmas or the holidays (except if we went to Toukley). Christmas was lovely at Lutanda. On Christmas Day, early in the morning there were "stockings" filled with small gifts, and in the afternoon there was a Christmas tree and gifts for all the children."

376 Mrs Talbot has similar fond memories of Christmas time (at para 25 of her affidavit sworn 9 December 1997):

"As I remember most if not all of the children spent Christmas at Lutanda with us, including Joy. To my knowledge she was never left alone whilst others were away. I have a vague recollection of an occasion when Joy was taken by Miss Amy Atkinson for a holiday in Tasmania. She was going to visit some people there, who were interested in her, whether this was at Christmas time I cannot recall. I remember we all went on vacation to Toukley to camp near the Tuggerah Lakes. We all enjoyed the water and beaches there very much, including Joy, with happy memories for all."

377 Mrs Middleton gives evidence that she remembers not some but most of the children remaining at Lutanda over holiday periods. Children would return to their families if their families were willing to take them in. For the rest of Lutanda their would be Christmas trips to Toukley by children and staff such that "it was just like moving Lutanda."

378 Mrs Buxton in her evidence-in-chief emphatically denied that the plaintiff was ever left at Lutanda on her own over Christmas. Responding the plaintiff's recollection that she was often left alone she replied in the following terms (at T 373):

"**BUXTON:** Definitely wrong. Very few children went away either because they had no one to go to. Some went to visit homes where they were invited. At Christmas time there was always a crowd of children and we had a beautiful Christmas tree, toys, ham and everything that made Christmas special for the children. She was there around those times."

379 In accordance with Mrs Buxton's evidence it seems clear that at times children did go to private homes for the holidays but, again, this was rare. Miss Moorhouse gives evidence that during Joy's teenage years people did take some children for a holiday and that they selected the child but that this was rare and most remained at Lutanda and went to Toukley. James Frame gives evidence that some children went home with their family and some

were taken into families by those who volunteered to have them, usually from the church. On most occasions he can remember staying at Lutanda over Christmas though he remembers that he spent one Christmas with a family at Tamworth.

380 On this evidence I find and draw the inference that the plaintiff was never the only child left at the Home over Christmas and other holidays. The plaintiff's evidence on this matter also cannot be regarded as representing the objective truth of her experiences at Lutanda. Her recollection of events goes against the whole of evidence which suggests that there were group holidays at Christmas time and that relatively few children ever spent holidays away from Lutanda.

381 As to the plaintiff's claim that she was one of the longest term residents at Lutanda, it is a matter of fact that she was resident there from her admission on 16 April 1947 until her discharge on 31 July 1960, a period of just over thirteen years. The simple fact is that this was unavoidable and reflected the realities. It further reflects the fact that the child plaintiff had no other known or interested relatives at the time of her birth. Other than having the plaintiff spend a significant time at Lutanda, the only other practical option for the care of the plaintiff would have been a transfer to another Home or to the Cootamundra Girls Home for Aboriginal children where girls would have been sent from Bomaderry when they came of age to be transferred (absent finding foster parents or being adopted). I will turn to my reasons in due course, but it should be noted at this point that I do not find that the plaintiff was denied any opportunity or chance of being fostered out or adopted. It is not to be supposed that the plaintiff's removal to another home would not have caused their own significant disruptions to her life and education.

382 On the evidence it is clear that while the plaintiff was at Lutanda for a number of years she was not the longest resident child nor the only child resident there for a considerable number of years. Mr Frame gave evidence that he left Lutanda when he married at the age of 21 after spending seventeen years at Lutanda. Mrs Tucker (nee Frame) stayed at Lutanda for 11 years. Miss Moorhouse was resident at Lutanda for 9 years as was Mrs Godfrey. Various other witnesses gave evidence of being in Lutanda for 6 and 7 years. It is undoubtedly true that these periods of years overlapped so that at any particular time the plaintiff may well have been the longest term resident but it would seem from the evidence that this not because she was the only child who spent considerable time there.

383 Again it is worth noting that no evidence was led to suggest that any of these other children developed personality disorders or other psychiatric disorders despite their long stays at Lutanda. The concession has already been made by the counsel for the plaintiff that for many like James Frame, Lutanda was a lovely place to live and a family for them. James Frame it should be remembered was there for longer than the plaintiff and never received any special visitors.

384 It seems from the evidence that the plaintiff's longevity at Lutanda was a source of some benefit to the plaintiff. Mrs Middleton gave evidence that, if anything, Joy would have been favoured above the other children because she had been at Lutanda so long. Mrs Reid, who was Matron during the last years of the plaintiff's stay at Lutanda, and whose husband was Superintendent from 1959 onwards said (at para 6 of her affidavit 13 November 1997):

"Joy was not treated differently from other children at Lutanda. If anything Joy was favoured over the other children at Lutanda and I can recall other children complaining about this. At one time, not long before Joy eventually left Lutanda, my husband and I arranged for Joy to

learn the piano because we thought she had musical talent. Of course the home could not afford to allow all the children to take music lessons, so my husband paid for Joy's lessons out of his own pocket. He thought that Joy had a nice voice and she should be encouraged ... Often Mr Reid was invited to speak to other churches and he would sometime take Joy and a couple of other girls along with him and sometimes she would give solo performances at these churches."

385 Indeed the plaintiff's own evidence suggests that she benefited from extraordinary attention and privilege being taken interstate at Christmas time by Miss Atkinson on no less than three occasions being to Adelaide, to Tasmania and to Melbourne respectively. Miss Moorhouse gives evidence that these were privileges, long trips and music lessons, that no other child received. There is also evidence of special treatment flowing to the plaintiff because of her presumed orphan status. Under the false impression that the plaintiff was their only fully orphaned child, Mrs Buxton says the plaintiff was treated with `special love, care and gifts'. Mrs Middleton gave evidence that special time at prayer meetings was set aside for those like Joy who "was by herself" and that those who attended would often bring things for Joy. When parcels of charity arrived from the churches Miss Middleton said that things would often be earmarked specially for Joy. Evidence given by Mrs Talbot at para 19 of her affidavit (9 December 1997) as follows in representative of the approach taken to the plaintiff:

"To my knowledge Joy was always treated the same as all the other children in everyway. She was included in every activity and given the same care, support and affection as the others. I never witnessed anything that would have suggested otherwise."

386 Having looked at the allegations contained in the plaintiff's affidavit, on all the evidence of the plaintiff's treatment at Lutanda and having in mind the state of the law and the conditions attendant when the plaintiff was admitted into Lutanda, I am not satisfied that any prejudicial approach or discriminatory action was taken by the staff of Lutanda against the plaintiff of the type alleged by the plaintiff. Nor am I satisfied that any of the children in care of Lutanda acted in such a way or held such an attitude. Many, including Mrs Helies who had grown up with the plaintiff, considered her a good friend. Given the objective facts that the children's background was not discussed at Lutanda, that the plaintiff's Aboriginality was not common knowledge and that many children, like the plaintiff, had little external family attention, it is inconceivable and I find as a fact that the children did not treat the plaintiff differently because of her Aboriginality or for any other reason. In the words of Mrs Morsillo at para 5 of her affidavit (6 January 1998), as far as the children were concerned, they were "all in the same boat".

Adoption and Fostering and the Potential for Maternal Deprivation:

387 As I have said, it was further alleged by the plaintiff that she was not offered placement with families for the purposes of adoption or fostering out. This is one of the matters particularised in her assertion that she was treated with discrimination. An important allegation in the plaintiff's case is that in respect of adoption and fostering, as well as generally, the AWB failed in its duty "to exercise reasonable care to protect the plaintiff from the foreseeable risk of mental injury brought about by the conditions in which she was reared and continued to be reared at all times from 1942 onwards". In expert evidence it has been suggested that it is by means of maternal deprivation and due to a deprivation of attachment, that the plaintiff has suffered mental injury. When assessing the validity of the plaintiff's claim that she was denied, inter alia, adoption and fostering, and thereby suffered maternal deprivation, one must bear in mind both the objective circumstances and the state

of the law as it was at the time the plaintiff was in care at Lutanda.

388 Under the **Aborigines Protection Act** there was no provision for adoption of a "ward". There was no counterpart provision to the adoption provision of s 9 of the **Child Welfare Act**. As regards the matter of adoption of a child in New South Wales, the provisions of Part XIX of the **Child Welfare Act** applied. Application had to be made to the court or the Minister (s 163). The court was required to make an order. Section 167 prevented the making of an order unless the court was satisfied of a number of matters set fourth in s 167 including (d) that the mother consented to the adoption of an illegitimate child. The court could order dispensation from compliance with consent obligations if it was just and reasonable to do so. At common law there was no power to adopt. As to adoption generally see **Attorney-General v Prince & Gardner** (supra).

389 The view adopted by the Board (in a memorandum 17 September 1945) was that the Act "did not provide for the outright adoption of an Aboriginal child or ward of the Board". Such a view was expressed in connection with a child LL (DOB May 1943) then resident at Bomaderry Children's Home. In respect of this child who was likewise to the plaintiff of fair appearance, it appears that by arrangement with the Department of Child Welfare (July 1946) the AWB was informed that the Child Welfare Department was prepared to proceed on behalf of the child "LL" to have the application of a Mrs B to adopt the child LL approved. Mrs B appears to have been of European descent and prior to being approved to adopt LL was subject to n inspection as to her suitability and home life.

390 The evidence would suggest that the AWB would not as a matter of "policy" or of duty under s 7(1)(a) of the Act participate in the adoption of a fair-skinned child to other than persons of European descent. I find on the state of the evidence that the plaintiff was not at any time denied any chance or opportunity of being adopted.

391 With respect to the fostering out of the plaintiff, it should be noted that prior to the 1943 amendments there was no express power to foster, nor do I consider that there was an implied power. In 1943 the **Aborigines Protection Act** was amended to permit of boarding out or the placing of a "ward" in the care of foster parents. By this amendment the position of a child ward under the **Aborigines Protection Act** was thereby brought into accord with the general position of a child under the **Child Welfare Act**.

392 The plaintiff was born in September 1942. By October 1942 the plaintiff had already been admitted as a ward to the only available and suitable home being the UAM Aboriginal Children's Home at Bomaderry. At the time of the plaintiff's birth, the express power of fostering out children to foster parents did not exist and the child plaintiff could not have been fostered. In any event accepting as I do the history that the plaintiff's mother did not tell her relatives of the birth of the plaintiff, and accepting the disinterest of the father (assuming as a soldier at war he was still alive) and his family, there was no prospect of the plaintiff being fostered with relatives or with the father or his relatives.

393 Even in respect of the fostering of a ward under the Act after 1943, no permanency with any foster parents could be guaranteed even assuming such a suitable person could be found. Apart from the absence of equivalent provisions of ss 9 and 10 of the **Child Welfare Act**, there were the provisions of s 11D(1)(h) and (i) of the Act relating to the Board's authority. Foster parents too could hand back the care of the ward. Fostering, like adoption, was a matter of some factual and legal complexity and difficulty. In 1952 the Board in a letter to the UAM indicated its policy. I quote:

"The policy of the Aborigines Welfare Board in relation to the maintenance and training of Aboriginal children favours the system of boarding-out, rather than placing them in an institution. It is felt that the aboriginal child reared as an integral part of a family, either white or aboriginal, gains a better chance of ultimate assimilation. In any case, training as one of a family group has a more beneficial effect on the character building of the child than the conditions of life usually associated with an institution."

394 As in the case of adoption, in respect of children considered to be too fair there were placement problems confronting the AWB due to its standard policy at the time of assimilation and perhaps the provisions of s 7(1)(a) of the Act. For example, in a memo of June 1954, Mrs English observed "M, who was brought to this office today is too fair to be placed either in Kinchela Home or with aboriginal foster parents" [my emphasis]. In consequence of his appearance, this child, M, was placed in the Burnside Homes and was later moved to the Salvation Army Boy's Home. There is nothing to suggest that he was not available for suitable fostering, or that potential suitable foster parents were even interested in fostering him.

395 Nothing is said in the plaintiff's case as to whether aboriginal foster parents, assuming such were available, were interested in fostering such a fair child in any case. There is also evidence that in the Aboriginal Newsletter in the 1950's the Board was actively seeking the assistance of the aboriginal people in generally fostering children. Indeed there were problems from time to time of there not being enough foster parents available in the community to foster under the **Aborigines Protection Act** or even under the **Child Welfare Act**. There is no evidence touching upon difficulties in fostering (or adopting) at different ages, or as a child got older.

396 There were also problems of matching potential foster patents with a ward for the purposes of fostering. I doubt that the matter of potential maternal attachment would even have been thought of as a consideration in the 1940's-50s in the case of fostering under the Act or the **Child Welfare Act**. There were, as I have said, more considerable practical difficulties with respect to fostering. How one could determine in advance whether there would be an attachment or bonding to a foster parent or adoptive parent (or a staff member in the alternative) is not explained by the plaintiff's experts. There were, it appears, enough difficulties in finding suitable foster parents with appropriate fostering skills: see also the **Regulations and Schedules [1944]** and thereafter as to foster care requirements. Indeed in his 1946 and 1947 Reports, the Minister for Instructions referred to the fact that fewer and fewer citizens were willing to foster children. In his 1950 report he referred also to the fact that there were increasing numbers of children who were unsuitable for placement with foster parents.

397 I find that the plaintiff was not denied any chance or opportunity of being fostered whether permanently, temporarily or at all. There was no real or practical choice in the present case, but to have placed the plaintiff at Bomaderry and then transferred her to Lutanda, and presumably retaining her for her own benefit at Lutanda. There is in any event no evidence on the plaintiff's case that the plaintiff was not considered for fostering or was considered not suitable for fostering. There is no evidence that suitable foster parents could be found in the instant matter for fostering the plaintiff for short or long periods. There was no evidence offered to show that, assuming potential foster parents had come forward, that they would have come forward for good and proper reasons or that they would have been considered suitable to be foster parents for the plaintiff. Importantly too, given the plaintiff's assertion of the her deprivation of attachment and of her maternal deprivation, even had there been an acceptable and suitable foster family, who was willing to accept the

plaintiff long term, there was no evidence offered to demonstrate that there would have been the attachment or matching with the plaintiff that the plaintiff asserts she was denied. It is all speculative theory.

398 In any event the deprivation of "attachment" or "maternal deprivation", which it is alleged on the plaintiff's case that the plaintiff experienced, would not necessarily be solved by fostering or adoption. As much is stated in the 1951 World Health Organisation Report prepared by Dr Bowlby and tendered in the plaintiff's case. In that report Bowlby points out, quite significantly, that even in a "good institution" carers can come and go and attachment can be often broken. Additionally he notes that "house mothers" in institutions or even devoted foster parents may not have the same sense of obligation to a child which all but the worst parents possess. He made the point that often when other interests and duties make demands on the foster parent, the foster child takes second place and "the child has therefore a right to distrust them". In so saying, he countenances that the fostering relationship may in fact quite legitimately be one characterised by some mistrust and not the open mutuality that would seem to be required to facilitate a relationship of the type sought by the plaintiff.

399 Indeed, the potential impossibility of achieving bonding or attachment (quite apart from the problems of providing proper nurture) is illustrated in evidence by Dr Waters (at T 133-4) where he discusses the practical consequences associated with the fostering of a child at four and a half and at eight. He states:

"**WATERS:** What we know, even form the research, even in cases where that happens [when children at the age of four and a half are taken out of one home and adopted or fostered into another home] by virtue of the death of the parents where they appear to have had good parents up until the age of four or so, is that those children are more likely to be disturbed as adults. They are not as likely as if it occurs at the age of eight, for instance after eight years of satisfactorily being a happy family member."

400 What appears from Dr Waters testimony is that even at the age of eight, there can be no guarantee that the risk of deprivation of attachment can be eliminated so that it would not later mature into a more severe mental disorder. Whether a child by accident or choice is left without a bond with a parent seems to make no difference. This seems to illustrate the very problem raised by Dr Bowlby, that often it is outside of one's control to ensure a stable bond. Bonds can be broken for many reasons whether it be within a family home with "good parents" or in a good institution with attentive carers.

401 The evidence of Dr Waters also raises the issue in the present case of the situation had the plaintiff been left with her mother, on the assumption that the plaintiff's mother could have been ready willing and able to retain primary care of the child plaintiff. I quote from his cross-examination (at T 133-4):

"**BARRY:** If the child, for example had been left with a mother who was unable to cope for reasons of alcoholism or otherwise and the child had been given with its natural mother a disturbed upbringing, the child could also develop a personality disorder of the kind you believe the plaintiff has?

WATERS: That's correct.

BARRY: You observed in relation to the plaintiff's mother that the Kenmore records demonstrate a very long history of alcoholism?

WATERS: Yes

BARRY: So that if that be true and if the plaintiff had remained with her mother, she could well have developed the same condition that you had diagnosed in any event?

WATERS: If the mother had been alcoholic at the time this child was young, yes."

402 It is known that in 1989 the plaintiff's mother was alive but at Kenmore Hospital where Dr Heimer, a psychiatrist, was treating her (see his report Exhibit 3 - 15 December 1989). Of significance is the history of the plaintiff's mother given by Dr Heimer (at para 2 of his Report):

"For most of her life she has been a heavy user of alcohol, with alcohol related problems being a significant part of her current problems, that is moderately speech cognitive impatient with disorientation in time [sic], short term memory recall, her gait abnormal etc. In 1983 she had hallucinations and delusions that persisted for some time after the alcohol was ceased. Probably a diagnosis of schizophrenia, although alcoholic hallucinosis would be more accurate."

403 A point to be made on this evidence is that if the plaintiff remained with her mother, she could also have suffered maternal deprivation or had inadequate bonding and attachment (or none at all). In such a situation, the plaintiff would not have able to sue her mother in respect of these same alleged disorder: see **Hahn v Conley** supra. On the plaintiff's case it is perhaps submitted that the plaintiff may sue a third party carer for not providing that, which her mother may not have been able to provide, and cannot be sued for.

404 It appears that no guarantee of proper maternal care and attachment sufficient to guard against later mental illness can be guaranteed in any circumstances. On the facts of this case it is open to find that even had the plaintiff been left with her mother, there could be no guarantee of attachment or bonding with the plaintiff. Likewise, Dr Waters was asked in cross-examination whether, assuming the plaintiff had formed a satisfactory bonding relationship with Miss Atkinson, that relationship was of a sort which would have assisted her in her psychological development. He replied (at T 134):

"**WATERS:** It would have reduced the risk of an adverse outcome. It wouldn't guarantee that there would [not] be an adverse outcome, but it would reduce the risk, yes."

405 It would seem clear that, given the facts of this case, there could have been no assurance of the plaintiff receiving suitable maternal care or attachment, even involving a natural mother.

406 The point remains that adoption or fostering would not in any event have solved the plaintiff's problem in the instant matter. She has alleged she was discriminated against on the basis of not being considered for adoption or offered places for fostering. She was not. I reject that submission for the reasons given and in light of the state of the law and the attendant policy of assimilation of the Board including that under statute. I find also, that the risk of potential maternal deprivation could not reasonably or practicably be guarded against or that any risk could with the exercise of reasonable care be eliminated.

Allegations of Abuse:

407 I have already noted that the allegations of sexual abuse made against various people,

the allegations of abuse against Mrs Buxton and the allegations against Miss Simpson are not urged by the plaintiff as being evidence of the objective truth of life at Lutanda. The plaintiff has urged that they be treated as evidence of a disorder of attachment. As indicated, I have rejected that submission and found that it was not a product of any psychiatric disorder. I have dealt with that submission and with the consequences of its rejection as it relates to the credit of the plaintiff and the reliability of her evidence. I repeat here also what I said earlier that I find that these events alleged by the plaintiff did not occur. Several allegations however remain to be considered, there having been no specific concession by the plaintiff that they were not true. I turn to consider them.

408 With respect to the allegations made against Miss Dalwood, Miss Atkinson and Mr Murray, it should be noted that Miss Dalwood and Mr Murray are now deceased with the present condition of Miss Atkinson unclear on the evidence before me. In any case none of these people gave evidence at trial or were present to face the plaintiff's allegations. The evidence was that Miss Dalwood founded the Lutanda home out of her genuine concern for orphaned and needy children. She ran the home in the role of Superintendent and Matron for just short of 20 years and was replaced in those positions only after her death in 1950. Miss Moorhouse gives Miss Dalwood credit for "handling her very well" and said she was a person who appealed to her sense of humour. She gave evidence at para 4 of her affidavit sworn 3 December 1997 that Miss Dalwood was a very tolerant lady who taught everyone to have pride in their work and was a great motivator, but she was strict and could be remote.

409 The evidence was that Miss Atkinson loved and cared for the plaintiff. On her own evidence Miss Atkinson demonstrated intimate care for the plaintiff. Mrs Buxton gave evidence (at T 375) when asked whether she was a cruel type of person, Mrs Buxton replied that she was a "very kind gentle quiet lady." Likewise (at T 212), Mrs Hancock describes Miss Atkinson as a "very gentle loving old lady" and that she and the plaintiff were quite close in their relationship.

410 The evidence from Mrs Buxton (at T 375) was that Mr Murray never used a strap as a routine form of punishment as is alleged by the plaintiff at para 43 of her affidavit. Again it is worthy of noting that no allegations of corporal punishment were made to Dr Cooley in 1960 or in any of the extensive hospital records from 1962-5. Likewise, no allegation of corporal punishment appears in the report of the parole officer, Miss Barnett in 1962. Miss Moorhouse described Mr Murray in evidence as a "wonderful man" (at T 358) and a "real gentleman" (at T 339). Mrs Godfrey, who came to Lutanda in 1952, described Mr Murray (at T 303) as "the gentlest man I think I have ever known". Mrs Hancock described Mr Murray as a real English gentleman (at T 217).

411 The plaintiff's allegations against these people are not supported by independent corroboration. Given the evidence of these witnesses and given that I have already expressed a need to treat the plaintiff's evidence with care, I am satisfied that the plaintiff is not objectively correct in respect of the matters alleged in her affidavit as occurring in respect of these three persons. In saying so I have regard to the inability of those who are deceased to rebut the allegations made against them. In the light of my findings as to the reliability and credibility of the plaintiff's evidence, I reject these allegations of the plaintiff.

412 With respect to the allegations against Miss Simpson that she assaulted the plaintiff by throwing her against the bathroom wall such that she broke the plaintiff's arm and collarbone, these are conceded by the plaintiff as being distortions and not objectively true. I find that the plaintiff's evidence was not objectively true on that count. Mrs Tucker gives

evidence (at para 21-2 of her affidavit sworn 30 November 1997), which I accept, that:

"I can remember that Joy's arm was broken in a fight with my sister Helen. There was a raised path (about fifteen inches high) leading outside from on of the back doors. Only one side of the path had a railing on it. Joy and Helen were having a physical fight as they were coming out the backdoor and they both fell over the unguarded side of the path.

I can also remember Joy breaking her collarbone one day when we were walking in a paddock with Mr Murray. There was a fallen tree that was wet and slippery. Mr Murray told us not to climb on it. Nevertheless Joy and a few other girls did so. Joy slipped on the trunk and broke he collarbone."

413 With respect to the allegations against Mrs Buxton, these are conceded by the plaintiff as being distortions of memory. I am satisfied on the evidence that the plaintiff's memory on these matters is not objectively true. As regards the allegation that the plaintiff was given morphine, I reject that submission. I accept Mrs Buxton's evidence (at T 374) that no child was given morphine, that it was a narcotic and was not kept in the medical cabinet at Lutanda. I find that she was never given morphine.

414 With respect to allegations against Mrs Buxton that she made the plaintiff stand with her hands over her head for 4-5 hours, the plaintiff concedes that these are distortions (at p 86 of submissions). I find the plaintiff is not credible in respect of that allegation. The allegation was put to Mrs Buxton in examination-in-chief by counsel for the defendants, Mr Barry QC, and the relevant passages from the plaintiff's evidence read to her. When asked whether she did as was alleged she replied (at T 375):

"**BUXTON:** I may have made her standing the corner, but the usual time would have been fifteen minutes, twenty minutes at the most, certainly not five hours.

BARRY: With your nursing background, would it have been possible for a child to hold his hand over his head for four or five hours?

BUXTON: Definitely not. I think it would be very detrimental for a child to have stood there for half an hour."

415 Mrs Buxton was the subject of intense cross-examination in which it was sought to persuade me to reject her evidence. Notwithstanding this, the length and intensity of the cross-examination has given me the opportunity of seeing and hearing Mrs Buxton in the witness box and I am persuaded as a consequence of this that she is an honest, reliable and credible witness. Mrs Buxton's evidence as indicated above is clear and I accept it.

416 With respect to the allegation that the plaintiff was caught and punished for wearing lipstick, I reject as unreal and incredible the allegation by the plaintiff that she was made to stand naked in the dining hall as punishment. I have already referred to the plaintiff's submission on this matter (at p 28 of their submissions in reply), specifically, that the plaintiff concedes that this allegation is "inherently implausible". With respect, I agree. I agree with the submission of the defendants that this "bizarre description does not appear consistent with the values and beliefs of a Christian home in Pennant Hills in the 1950's". The plaintiff offers no independent corroboration of this allegation. Indeed, even Miss Christie, whom the plaintiff alleged was in her presence at the time she was caught wearing lipstick does not corroborate her presence. She gave evidence that it was a "horrible, horrible incident" but that she was living at Epping at the time and would not have been at

the Home when the plaintiff was punished. None of the other witnesses reference it. I am prepared on the material before me to find as a fact, and I do find as a fact, that no such incident occurred.

417 With respect to allegations made against Mr Reid, those are not submitted as being objectively true. I reject these allegations and I also reject the submission that this allegation is one founded on or the product of any psychiatric disorder or consequence thereof. They are serious matters as alleged, and the plaintiff as I have already said, should accept the consequences as it impacts on her credit and reliability from them being first asserted and then being openly conceded as being untrue.

The Assertions of Self-Mutilation:

418 The plaintiff has submitted that I should find on the evidence before me that the plaintiff engaged in acts of self-mutilation, namely that she cut her arms. The plaintiff gave scant evidence on this matter of cutting her arms. She claims that Mrs Middleton the Matron made observations about her having mud in her veins. From time to time after this incident, during her stay at Lutanda and on other occasions, she said that she cut herself to "see whether the colour of her blood was different from that of other children at the Home."

419 The plaintiff accepts that there was significant dispute about whether the plaintiff engaged in self-mutilation. The plaintiff's submission particularly involves resolving a conflict between Mr Sattler and Mrs Buxton. The contest of credit between witnesses in respect of whether the plaintiff cut her arms consumed much time during the trial and is of great significance to the plaintiff's case. The plaintiff does not resile from her assertions that she cut her arms. These assertions are pressed and the plaintiff has made strong submissions on the evidence before me to persuade me that the plaintiff should be believed on this matter.

420 In addition to the plaintiff's evidence, the plaintiff in her submissions has placed heavily reliance on the evidence of Mr Sattler to assist her case. Mr Sattler, as I have said, served on the Board of Directors of Lutanda from 1948 till 1981. An affidavit from Mr Sattler (sworn November 1997) was prepared on behalf of the defendants. His affidavit was read in the plaintiff's case. Mr Sattler gave evidence that he recalled that the plaintiff cut her arms on a number of occasions and that he remembered having seen bandages on the plaintiff's arms. The cuts, he said, were superficial and never warranted outside intervention. The plaintiff relies on this to support her argument that the plaintiff engaged in self-mutilation.

421 The evidence led by the defendants on this matter primarily comes from Mrs Middleton and Mrs Buxton. Mrs Middleton was Matron between 1956 and 1959 when the plaintiff was aged 14 to 17 years. Mrs Buxton was Matron immediately preceding Mrs Middleton, from 1953 to 1956 when the plaintiff was aged 11 to 14 years. Both Mrs Middleton and Mrs Buxton were trained nurses at the time when they held the position of Matron at Lutanda. Mrs Middleton, in her affidavit sworn 16 December 1997, said that she could not remember Joy cutting her arms at any time. She could not remember saying or hearing any other person say that Joy had mud in her blood. She said (at T 235) that the cutting of the arms by the plaintiff never happened while she was at Lutanda and that such a thing like that would stand out in one's mind for their entire life. She said there was never any indication of that type of behaviour.

422 Mrs Buxton also testified (at T 397) that she never knew the plaintiff to cut her arms. She gave evidence that she alone kept the key to the medicine cabinet and would have

had the responsibility to bandage the plaintiff's arms, had the plaintiff done what she claims, but that at no stage did the plaintiff cut her arms. She says emphatically (at T 398):

"**BUXTON:** I am being perfectly honest, and there was no cutting of her arms in my time."

423 Mrs Middleton (at T 237) gave further evidence that had the plaintiff cut her arms she would have immediately taken her to the hospital. Such an action as someone cutting their arms, she said, would have raised to her concerns about their emotional well-being. Had such a thing happened with the plaintiff, she would have been taken to the hospital or to Dr Lovell for referral for further help.

424 In cross-examination, Mrs Middleton was questioned at length about a conversation which she had with two then law students from the Kingsford Legal Centre in September 1994. When pressed on the matter, Mrs Middleton said she could not recall the conversation. Mr Hutley put to her that she had said various things during that conversation. It was suggested that she said, inter alia, words to the effect that, "Nowadays they seem to enjoy knowing they have it in their veins?" and, "The records said that she was aboriginal, but let's face it, they are different to us." She denied saying these things. I admitted evidence of these two then law students, now solicitors, Miss Collier and Miss Levy over objection.

425 The plaintiff claimed that Mrs Middleton had, by these remarks, made prior inconsistent statements. In his lengthy submissions, Mr Hutley submitted that, on the basis of Mr Sattler's evidence and on the added basis of the evidence and recorded notes of Miss Collier and Miss Levy, that I should find that Mrs Middleton should not be believed on matters concerning racial discrimination (or the alleged absence thereof) or when she makes self-serving statements. The plaintiff further submitted that Mr Sattler should be believed over all the other witnesses including Mrs Buxton and Mrs Middleton on the issue of the plaintiff cutting her arms.

426 For the reasons that appear, I reject these arguments and the basis for such. I further reject Mr Sattler's evidence so far as the plaintiff seeks to rely on it in respect of her allegedly cutting her arms. I have already commented on parts of Mr Sattler's evidence in relation to the plaintiff being a "troublesome child". His evidence contained significant errors as against the objective background of the plaintiff's arrival and residence at Lutanda. The evidence of Mr Sattler was wrong in relation to his recollection of how the plaintiff came to be at Lutanda and about where the plaintiff resided before coming to Lutanda. As I have said, he was not involved in the daily care of children at Lutanda. He was on the Board of Directors and the evidence from Mrs Godfrey (at T 314) was that Mr Sattler made visits once a month to Lutanda over the period of his directorship. Mrs Morsillo gave evidence (at T 210) that Mr Sattler was `interested' in the home but was not deeply involved in the day to day running of Lutanda as, during the time Lutanda was at Wentworth Falls, Mr Sattler lived in Sydney. It should also be said that Mr Sattler, as opposed to Mrs Buxton and Mrs Middleton is not medically trained. Unlike Mrs Buxton, he was not directly responsible for the medical care of the plaintiff. It was the Matrons, in this case Mrs Buxton and Mrs Middleton, who were in the best position to know whether the plaintiff cut her arms. I accept their evidence that the plaintiff did not cut her arms and for the reasons already stated I do not accept Mr Sattler on the issue of the plaintiff cutting her arms.

427 I find that, in light of my findings as to the evidence of Mr Sattler and in respect of the evidence of the plaintiff, the plaintiff did not cut her arms whilst at Lutanda. This in turn

carries with it the consequence that the medical evidence of Dr Katz and Mrs Bull to the extent that it relies upon the views of Mr Sattler as to the plaintiff cutting her arms, should not be accepted.

428 Having said that an additional factor convinces me of the unreliability of the evidence offered on behalf of the plaintiff with respect to the assertion that the plaintiff cut her arms. In material respects the evidence given by the plaintiff and by Mr Sattler seems to vary in respect of the nature and timing of the plaintiff allegedly cutting her arms. The plaintiff asserts (at para 57 of her affidavit affirmed 20 November 1996) that the incidents of cutting her arms began after a conversation that she had with Mrs Middleton. During the time Mrs Middleton was at Lutanda between 1956-1959, the plaintiff would have been between the ages of 14-17 years old, making the plaintiff's age at which that conversation happened no younger than 14 years. Upon the evidence of Mr Sattler however, the incidents of cutting of the plaintiff's arms in para 18 of his affidavit sworn in November 1997 began from time to time after the plaintiff was ten years old. That would have placed the start of the incidents of self-mutilation during the time in which Mrs Buxton was the Matron, not Mrs Middleton.

429 The approach taken by the plaintiff through counsel to these differing recollections is found at p 98 of the plaintiff's submissions where she states:

"In the case of all witnesses except Mrs Buxton the force of the denials must be judged by reference to the limited opportunity afforded to the witnesses of observing the behaviour which occurred for some time after the plaintiff turned ten. The true conflict in the evidence is between Mr Sattler on the one hand and Mrs Buxton on the other." [my emphasis]

430 To the extent that plaintiff prefers the evidence of Mr Sattler and asserts a conflict of his evidence with Mrs Buxton, I unhesitatingly accept the impressive Mrs Buxton. Having seen her and heard her, I thought that she was a witness who was reliable, credible and seeking to tell the truth as I believe she did. She was a qualified carer devoted to the welfare and advancement of her charges. I find on Mrs Buxton's evidence, the plaintiff did not cut her arms during the time when Mrs Buxton was Matron, or indeed at all.

431 Alternatively, assuming a conflict between the evidence of the plaintiff and Mrs Middleton in respect of the plaintiff cutting her arms, I accept the evidence of Mrs Middleton over that of the plaintiff. In submissions, Miss Adamson for the plaintiff stated that the attack made by the plaintiff on Mrs Middleton's credit is in respect of "one issue only and that is to do with racial differentiation or discrimination". The submission was to the effect that her views prevented her from recognising the import of the plaintiff's behaviour and that it blinded her in her assessment of the child's behaviour. I reject these submissions.

432 I reject the submission of the plaintiff that I should not believe Mrs Middleton in respect of racial discrimination or where she makes "self-serving" statements. My impression after seeing Mrs Middleton was that she was a credible and reliable witness trying to be helpful and not seeking to be evasive or over defensive. My overall impression was that this 77 year old lady had been a responsible dedicated carer (including a nurse) to numerous children including the plaintiff and that she did not merit the somewhat objectionable criticisms made of her. I consider that her overall recall was good and that she was trying to be and was being forthright and honest in her testimony. Upon the basis of the evidence of Mrs Middleton, I find that the plaintiff did not cut her arms during the time that Mrs Middleton was Matron or at all.

433 In respect of the evidence of Ms Collier and Ms Levy, the evidence of Ms Collier was

that she perceived this present case as one having racial overtones. She said that as a new student allocated to the case at the Kingsford Legal Centre she knew that it was a "stolen children" case. Before she saw Mrs Middleton she was aware of the allegations of physical and psychological abuse being claimed and which have subsequently been admitted as not objectively true. She had never previously prepared witness statements or trained in interview techniques. The notes taken by her did not always reflect the questions to which answers were given and her recorded answers were in summary form.

434 The so called record of interview (an inaccurate description) was not sent by Ms Collier to Mrs Middleton to sign and confirm. The record of interview was not a transcript of what was actually said. The evidence shows that two people sat down at one and the same time to compile a document based on separate memories and separate notes. Ms Levy likewise did not send the `record of interview' to Mrs Middleton. She too understood Mrs Middleton to be an important witness and that the present case had racial overtones. My impression was that the interview, the preparation of the notes and the record of the interview was perhaps "somewhat amateurish", that was my note at the time.

435 From what I have said, I am satisfied that nothing in the evidence of Ms Collier or Ms Levy persuades me to reject Mrs Middleton's evidence. Having seen and heard Mrs Middleton who I regard as an impressive witness, I prefer her evidence to that of Miss Collier and Miss Levy. I find in general that the evidence of Mrs Middleton is reliable and credible. I accept the defendants' submission that the evidence of Ms Collier and Ms Levy is to an extent unreliable. If I am wrong in this finding and even if there were remarks about Aborigines made by Mrs Middleton in conversations, that of itself does not alter my view that Mrs Middleton's evidence is generally honest, credible and reliable and can be safely acted upon. Nor would it suggest to me that this generally credible lady would have allowed her views, as suggested in the plaintiff's submissions, to blind her to her professional responsibilities or make her unconscientious in her duties in caring for the plaintiff.

Summary of Conclusions of Fact:

436 The plaintiff's case really fails on my findings of fact and on the lay evidence.

437 The defendants submit that the plaintiff's placement at Bomaderry for control of custody by the AWB was lawful, being with the consent or at the request of the plaintiff's mother; that the plaintiff's legal guardian was at all times the plaintiff's mother; that the transfer of the plaintiff to Lutanda was with the consent of the mother; that the transfer to Lutanda was in accordance with the Board's statutory duty; that the transfer was for the purpose of giving the plaintiff a better chance in life than if she had remained at Bomaderry. The plaintiff concedes that the above conclusions of fact "are appropriate". Accordingly I make such findings.

438 The defendants submit that Lutanda was a caring environment and staffed by persons who honestly acted in what they perceived to be the best interests of the plaintiff. The plaintiff submits that this conclusion cannot be made with respect to the plaintiff's experience having regard to the attachment disorder. I reject the plaintiff's submission and consider that the finding urged by the defendants should be made.

439 It is appropriate for me to make some list some further findings of fact flowing from the evidence I have just outlined. I make the following further findings:

1. That the defendants in placing the child at Bomaderry was not acting improperly or

negligently;

2. That the defendants placed the child at Bomaderry as a matter of policy or further or alternatively this was the place where it was reasonable and practicable for the child to be placed to be cared for and raised;

3. That, under the legislation, the Board had no adoption power. It had no fostering power until 1943. In respect of fostering, no permanency could be guaranteed even assuming the availability of suitable and "matching" foster parents at any time;

4. That at no time was the plaintiff at Bomaderry (or later at Lutanda) denied the chance of adoption or of fostering;

5. That at no time did the plaintiff's mother consent to any adoption of the plaintiff;

6. That, whilst at Bomaderry, the plaintiff's mother visited her on occasions. This finding is based on the hearsay account of the plaintiff to Dr Waters in October 1991, in turn based upon my acceptance of her claim of what her mother "told" her;

7. That at no time did the plaintiff's mother seek to obtain care, custody or control of the plaintiff or restoration of the plaintiff to her;

8. That whilst at Bomaderry the plaintiff formed a particular attachment and bond with a UAM sister, Sister Saville who displayed to the plaintiff particular individual attention care and affection;

9. That Sister Saville and her colleagues on the staff were devoted caring and "loving" adults voluntarily working in a home or institution environment doing the best they could in caring for children generally including the plaintiff;

10. The defendants had no staff employed at Bomaderry but oversaw Bomaderry including having at least annual general inspections and perhaps more by its officers;

11. That there was no evidence that Sister Saville or any member of the staff at Bomaderry was ready, willing or able to participate in forming any permanent attachment to the plaintiff and that it was unreasonable or not practicable to require that any such person could be expected to do at all. Nor could the defendant AWB (or the UAM) be expected to require such a staff member or any person to form a human relationship of the type suggested by the plaintiff, whether permanent or temporary. I find that, quite apart from any suggestion by the plaintiff's experts that a permanent or temporary mother substitute should have been available, not only did reasonable care not require it, but there is no basis for concluding that such a hypothetical mother substitute of the type and with the qualifications and credentials described by the experts was available at the UAM Mission at Bomaderry in NSW or even that with reasonable care, such a person could be found during the relevant period;

12. That notwithstanding this, if bonding and attachment involved learning to know and trust one individual and the presence of a warm, intimate, continuous relationship, that that is what the plaintiff in fact experienced with Sister Saville at Bomaderry, and followed up with to an extent, actual bonding and attachment with Miss Atkinson at Lutanda;

13. That during the plaintiff's stay at Bomaderry form 1942-1947 the plaintiff displayed no abnormal or unusual behavioural problems or disturbance that would indicate the need for

external assistance or intervention. I infer and find that her behaviour was normal and that nothing occurred warranting her referral for any conduct or behavioural problem to any "third party" for advice or attention;

15. That at the time of the plaintiff's transfer to Lutanda the plaintiff was intelligent, religious and, I infer, well behaved and apparently a "normal" child;

16. That in 1947 her behaviour was normal for a girl of her tender years with nothing untoward in it marking or suggesting that she was not a normal child, displaying no abnormal, troublesome or unusual behavioural or psychological other problems or problems indicating a disturbed child;

17. That at the time of her transfer to Lutanda a medical certificate as to her health (as required by Lutanda upon admission in 1947) was probably provided before she was admitted to Lutanda;

18. That the transfer to Lutanda was not improper or negligent but was done in good faith also in the perceived interests of the plaintiff and for her benefit. It was also a transfer approved by the Board because of then current policy and legislation and because it shared their view that in the plaintiff's interests that she be transferred;

19. That there was no reason to take the plaintiff to one of the few child guidance clinics in 1947 at or about the time of the plaintiff's transfer to Lutanda or shortly thereafter and that reasonable care did not require such;

20. That at the time of the transfer the plaintiff was and remained a ward of the Board as she had been pursuant to s 7(2) of the Act. That she remained a ward as such until when aged 18 in 1960 she was no longer a ward by virtue of her age under s 3 of the Act;

21. That Bomaderry was a caring environment and that in the circumstances she received love, attention and care being the "next best thing" to being raised by her won mother had she been willing and able to do so;

22. That the plaintiff in fact received some attachment and bonding whilst at Lutanda including from Miss Atkinson;

23. That had the plaintiff been taken to a child guidance clinic in 1947, 1953 or 1959, no psychological or psychiatric condition would have been diagnosed and no treatment by way of counselling or otherwise, for an indeterminate period or otherwise would have been recommended nor would advice have been given to find a surrogate mother;

24. That Lutanda was a licensed home pursuant to s 28 of the **Child Welfare Act**;

25. That Lutanda was a caring home staffed by dedicated, qualified caring child carers who sought to give "of their" best in the upbringing of the plaintiff;

26. That even though the defendants did not visit the plaintiff at Lutanda as claimed, the evidence showed that Child Welfare Act Inspectors did visit Lutanda from time to time. That the AWB, even if it had visited the plaintiff at Lutanda "at regular intervals" or at least "once a year" in the plaintiff's early years as is alleged was required in the plaintiff's case, the AWB's assessment would not have been any different to the assessment of the Lutanda carers. That had they visited Lutanda they would have acquired no more information than was recalled and revealed in evidence by adult carers and would have acted upon such

and taken no further action;

27. There was no failure by Lutanda staff or more particularly the AWB staff to take reasonable care in all the circumstances;

28. Further or alternatively, although no action is brought against them there was no "negligent" error on their part which could or would constitute, in any event, breach of any independent duty on the part of the AWB;

29. Further or alternatively, that even had the plaintiff been interviewed by a Board representative, the representative would have acted no differently to the way the Lutanda carers or the school authorities acted;

30. That even if the plaintiff had been hypothetically taken to a child guidance clinic in 1947, 1953 or 1959, or at any time, the hypothetical history given by the adult carers (who on all the evidence did not feel a need to take her anyway) would have been to the effect that her behaviour was normal and not perceived to have been otherwise than as stated above and not abnormal or revealing signs of any psychological or psychiatric disorder;

31. That had the plaintiff been taken to a Child Guidance Clinic at different ages as suggested by Dr Katz (though I find there was no reason to do so), it would be highly speculative to suggest what she would have told them. It would be mere surmise. Her affidavits affirmed in 1990's provide no reliable guide to what she would have said;

32. That had the plaintiff been taken to see a Child Guidance Clinic before 1960, no diagnosis of any psychiatric disorder would have been made or treatment commended, whether by counselling on return visits or otherwise;

33. That it has not been established that it was reasonable or practicable to find a permanent (or temporary) surrogate or substitute mother for the plaintiff in the circumstances.

Expert Evidence

The Law

440 The modern attitude towards expert evidence is less exclusionary than it has been in the past. The position is now also dealt with under s 76 and s 79 of the **Evidence Act (NSW)**. That said, where experts who are called differ in terms of competing theories, care should be taken to also assist in avoiding that the focus of the trial shifts from evidence of the facts in dispute to conflict between the competing theories of the various experts.

441 An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. When one is speaking on matters of human nature and behaviour it is also appropriate to remind oneself of the observations of Lawton LJ in **R v Turner** (1974) 60 Crim App R 80 when he said (at 83):

"The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does".

442 Matters within the range of human experience such as general questions as to credibility and reliability of witnesses (subject to special exceptions) must be determined by the assessment of the jury (or judge): **Smith v The Queen** (1990) 64 ALJR 588.

443 The expert's paramount duty is to assist the Court impartially. Judges and juries decide cases, not experts. The tribunal of fact, whether it be judge or jury in any particular case, makes the findings of fact. The question of whether there was or was not negligence at the end of the day is one alone for the court as the tribunal of fact. Whether there was a failure to exercise reasonable care is a question of fact. What is reasonable care must be judged in the light of all the circumstances. What is reasonable is also a question of fact exclusively preserved for the tribunal of fact alone. Causation too, is an issue of fact for the tribunal of fact to determine by reference to "common sense".

444 In terms of admissibility of an expert's opinion, the position at common law is that relevant expert or opinion evidence is admissible with respect to matters about which ordinary persons are "unable to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience": **HG v The Queen** [1999] HCA 2; (1999) 73 ALJR 281 per Gaudron J at 288-289. Sections 76 and 79 of the **Evidence Act** provide that evidence as to opinion, and evidence of opinions, to be admissible, needs to be brought within the exception provided by s 79.

445 As the judgment of Gleeson CJ in **HG** reveals (at 288), there is a need on the part of trial judges to ensure that opinions of expert witnesses be confined under s 79 to opinions which are wholly or substantially based upon their specialist knowledge. As his Honour said:

"Experts who "venture" opinions (sometimes merely their own inference of fact) outside of their field of specialist knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact finding maybe subverted".

446 It may be that an expert's opinion when properly considered, may not on proper analysis, be based wholly or substantially upon that expert's specialist knowledge, but rather upon a combination of speculation, inference, personal and second hand views as to the credibility of the plaintiff and a process of reasoning which goes beyond the field of relevant expertise: see **HG** at 287 per Gleeson CJ.

447 When considering and evaluating the expert's opinion it is appropriate to bear in mind the observations of Kirby P (as he then was) in **Ahmedi v Ahmedi** (1991) 23 NSWLR 288. His Honour said (at 291):

"An expert's opinion is only as persuasive as the facts upon which it is based. Many are the cases in which expert opinions must be rejected because the factual hypothesis upon which they are based are not made out in the evidence: see generally **Ramsay v Watson** [1961] HCA 65; (1961) 108 CLR 642; **Paric v John Holland (Constructions) Pty Ltd** [1985] HCA 58; (1985) 59 ALJR 844 .... Just as many opinions have been rejected because of the inadequacy of the facts to support if courts do not have to accept an expert's opinion simply because it is voiced by a person with expert qualifications. Courts and parties before them are entitled to test the opinion expressed, scrutinising the premises upon which it is based and evaluating its internal logic".

448 Further, the principle which requires the Court to accord appropriate weight to the trial

judge's assessment of witnesses he or she has seen and heard, applies equally to expert witnesses, particularly when they are in conflict: **Ahmedi** per Clark JA at 299, see also Mahoney JA in **The Public Trustee v The Commonwealth of Australia** supra.

The Expert Evidence in this Case

449 At trial, expert evidence was led by the plaintiff as to the nature of the plaintiff's psychiatric history and as to the development of her primary condition of Borderline Personality Disorder. Expert opinion evidence was offered as to the psychiatric experiences of the plaintiff as far back as 1942 and forward throughout the period until 1960. Consultant psychiatrists, social workers and treating psychiatrists were all called in the plaintiff's case. Expert evidence was also led by the defendant. The expert opinion evidence sought to trace the cause of the plaintiff's psychiatric condition and to give evidence about the symptomatic signs of disorder which, the plaintiff submits, should have been obvious warning signs to the defendant of the onset of the plaintiff's disorder. Opinion was given about the state of psychiatric knowledge that was known at the time, especially in relation to the effect of maternal deprivation on a child. It was said by the plaintiff that the knowledge was at such a state of advanced learning during the 1940's and 50's that the defendant should have known the effect of maternal deprivation on the plaintiff and acted accordingly. Opinion was also given about the possibility of reversing the onset of the plaintiff's condition if the plaintiff had been given treatment that the experts asserted should reasonably have been given in the circumstances, or would have been given at a Child Guidance Clinic if such help had been sought.

450 The expert evidence presented in this case has caused me considerable concern and difficulty in terms of its proper analysis and its acceptance. I have various reservations about it in a number of respects. Indeed, the more frequently I have read the material, the more discomfort I feel with many aspects of the expert evidence relied on by the parties and particularly the plaintiff. Some general comments can be made.

451 The events in question in the instant case occurred, as it is clear, over a period of some eighteen years between 1942-60. This eighteen year period itself started fifty seven years ago and finished some thirty nine years ago. The evidence of the lay witnesses which I have described addresses that period and addresses the factual events as they concerned the plaintiff. The lay witnesses lived with the plaintiff. They were contemporaneous witnesses, present and aware of the events going on around them with respect to the plaintiff and with respect to the care and treatment she received. I have made findings of fact in relation to their views. Generally, as I have said, I find the Lutanda lay witnesses who gave evidence to be credible and reliable. I have also made findings in respect of the evidence of Mr Sattler and the plaintiff herself and have found, on the preponderance of the evidence, that their evidence is not reliable as regards the objective reality of life at Lutanda. In addition I have made findings of fact in respect of the plaintiff's upbringing and life from 1942 to April 1947. I have made adverse findings on the reliability and credibility of the plaintiff including in respect of significant matters at Lutanda. Where there is conflict between the lay evidence that I have accepted and the interpretation of such by the experts, I accept the lay witnesses.

452 The expert evidence in this case is offered in hindsight, and reflects in some ways a retrospective analysis of events and consequent diagnoses of the plaintiff's condition going back as far as 1942. The opinions of the experts in the plaintiff's case further proceed on an acceptance of the evidence of Mr Sattler and the plaintiff who, I have said, I do not find reliable in material and significant respects. I repeat again the concession by the plaintiff in

submissions (at 81) that much of the plaintiff's evidence is "unreliable" in the sense of being not objectively true.

453 Broadly, I reject the plaintiff's expert evidence because its acceptability is undermined by reason of the absence or inadequacy of facts to support the views expressed. Pursuant to my findings in respect of the plaintiff's evidence and the lay evidence generally, the assumptions and underlying hypotheses of the plaintiff's expert opinion evidence fails. Ultimately, in my opinion, the factual basis on which the plaintiff's expert evidence is expressed is not made out and those expert opinions fall on the facts. In this respect I refer particularly to the evidence of Dr Katz and his opinions about the plaintiff's medical condition including whilst resident at Bomaderry from 1942-7, and to the evidence of Dr Waters whose opinion is relied upon by the plaintiff, and indeed by other experts, as establishing that the plaintiff suffered from a borderline personality disorder by the time of her late adolescence. I have made findings of fact including that the plaintiff had no disorder, no manifestations of any disorder nor presented herself as being "disturbed" whilst at Bomaderry or Lutanda. The threshold foundation for the experts' opinions disappears for these reasons in particular.

454 Further or alternatively, I have difficulty accepting the expert opinions in so far as I have found that the plaintiff's experts have not taken into proper consideration in expressing their opinions, the plaintiff's turbulent experiences and conduct between 1960-2 (or subsequently) and the report of Dr Cooley in 1960. This material includes a psychiatric assessment of the plaintiff by Dr Cooley of a Child Guidance Clinic at the very time that the plaintiff contends the plaintiff's condition of Borderline Personality Disorder crystallised. The findings of that report, adverse as I find they are to the plaintiff's case, were not considered by the plaintiff's experts or not satisfactorily explained. The material relating to the plaintiff's conduct and history during the years immediately following her discharge from Lutanda, not adequately pressed in consultation with the plaintiff and not considered in his assessment of the development of the plaintiff's psychiatric condition, is a further reason for my not accepting the plaintiff's expert evidence. The plaintiff's history from 1960-62 takes on particular significance given the reliable report in 1960 of Dr Cooley who furnished a contemporaneous psychiatric assessment of the plaintiff.

455 Thirdly, a matter of significant concern to me has been the submissions made by the plaintiff in respect of the lay evidence. Despite the findings of fact which I have made by reference to the lay evidence it is submitted by the plaintiff, and one is left with the distinct impression on the plaintiff's case, that the lay evidence should be interpreted and findings should be made so as to accommodate the experts' opinions. These opinions themselves are based upon hypotheses and assumptions as to the psychiatric antecedents or psychiatric aetiology of the plaintiff's disorder and as to the correct interpretation of historical fact and past events. In effect, in one sense, the submission is that the lay witnesses' evidence should be rejected or perceived as perhaps a misinterpretation of the actual nature of the plaintiff's conduct or behaviour as observed from time to time, to the extent that it does not fit comfortably or cannot be reconciled with the experts views on the development of the plaintiff's psychiatric condition. This submission perhaps in part reflects an approach involving, post hoc reasoning, in order to mount the argument that certain findings of fact should be made in order to give effect and accommodate the conclusions as to the plaintiff's psychiatric condition.

456 The case for the plaintiff is further advanced, in part, by the experts on the basis of what, in retrospect, was conduct said to be reasonably expected from the defendant in all the circumstances. While I have already said that the factual basis for their views was not

made out, a further point to be noted is that it is for the Court to determine what is reasonable in all the circumstances. The evidence of the expert is not binding on it nor should it, by mere appearance of authority, seek to subvert the proper process of fact finding which the tribunal of fact is required to and responsible to undertake on the evidence: **HG** (supra)

457 Finally, and generally, the court is not to be bound by opinion expressed as expert opinion merely on the assumption that it carries a weight of "expert" authority. Opinion evidence too must be reasonable and specific, not vague and imprecise: **Ahmedi**. The court must test the evidence including its reliability.

458 As I have indicated I have reservations, indeed, some discomfort in accepting the expert opinions on liability (and damages) as urged in the plaintiff's case. I have also had significant difficulty in accepting the evidence advanced by the experts as to what is it is suggested was required by way of reasonable care in the 1940's and 1950's, based (as their opinion is) upon matters of failed assumptions and hypotheses not accepted by me and upon the state of knowledge in the 1940's. These are but some of the difficulties I have been faced with with respect to the expert evidence in this case.

459 I will return to these issues in due course but it is appropriate first to set out some of the history of the psychiatric assessments made of the plaintiff and to deal with the issue of Dr Waters' "retrospective" diagnosis and opinions.

Dr Cooley

460 In September 1960, the plaintiff was assessed by Dr Cooley of the Child Guidance Clinic (No. 4) in the context of preparing a report for a criminal proceeding in which the plaintiff was involved. The report was made pursuant to an order from the Children's Court. At the time the plaintiff was aged 17 years and 11 months of age. Dr Cooley was a well known and well qualified child psychiatrist. It appears that Dr Cooley was a person known to the witness Mrs Bull during Mrs Bull's training. Mrs Bull gave evidence in the plaintiff's case on the basis of work she had done as a social worker in a Child Guidance Clinic. Dr Cooley was a colleague of a Dr Jennings who (according to Dr Ellard, who was called in the defendants' case) also worked in a Child Guidance Clinic, and who delivered an important paper in 1953 on the subject initially addressed by Dr Bowlby in 1951, namely, on issues of attachment and bonding. I am satisfied that accordingly, Dr Cooley probably was as at September 1960, up to date with knowledge in her area of speciality including information contained in DSM-1TM (published in 1952) as well as with the views of Dr Bowlby and Dr Jennings on maternal deprivation.

461 In her report of 1 September 1960, Dr Cooley, according to Dr Waters, made no diagnosis with respect to the plaintiff of any psychiatric disorder. Nor in her report does she indicate that the plaintiff had then, or at any other time in her life, demonstrated signs, symptoms or a history of one. Her report makes no reference to Sociopathic Personality Disorder, to any disorder of attachment or to any other disorder. Her report was made following the subjection of the plaintiff to a series of tests, presumably considered appropriate in Child Guidance Clinics including a Binet intelligence test. The report was also made subsequent to the plaintiff giving her history to Dr Cooley. Indeed her report does not suggest that during the plaintiff's history the plaintiff was subject to any of the numerous incidents of corporal punishment or sexual abuse that have been the subject of allegations in this trial and are found in her subsequent history given to Dr Waters. This is significant in two respects. Firstly, perhaps, it lends some further and independent support

to my findings in respect of the lay evidence that I have accepted and which I have also found to be reliable and credible. Secondly, this history given by the plaintiff in 1960 provides some indication of what indeed may have been said and of what conclusions may have been reached had the plaintiff made a hypothetical visit to a Child Guidance Clinic in the years 1947, 1953 or 1959, or indeed at any time prior to 1960, as is alleged should have been done in this case. I also observe that as regards the situation at Lutanda, the history that was given to Dr Waters in 1991 and thereafter is different to what was told to Dr Cooley in 1960.

462 I propose to set out the report in full:

"This girl was seen at the above Clinic on 30th August.

Joye (sic) seemed to have a resigned attitude, which at times gives way to the underlying resentment, about her illegitimacy and lack of home and relations and her own lack of success and self-esteem. She has little motive or hope for constructive satisfaction.

There is a history of resentful behaviour for some years at the Lutanda Home. Her own discontentment and emotional problems seem to have interfered with adjustment in employment.

Joye was rated on the Binet as average in general intelligence. She cooperated but lacked persistence. She gave as her Vocational Choice live-in domestic work in the country. This may be a possibility, if she is placed in a home where standards are not too high and class distinction not too obvious. She needs the help of an adult who can given her genuine interest and understanding. She may have some artistic talent (drawing or music) or interest that could be used to give her satisfaction."

463 In the context of this case, this report is significant, in that, as I have already mentioned, it was made at or around the time it is urged on the plaintiff's own expert evidence that the plaintiff's condition of borderline personality had crystallised. For example, Dr Waters (at T 135) gave evidence that he felt comfortable in expressing the view that the plaintiff's Borderline Personality Disorder was manifested by the plaintiff's adolescence or at least by the time she was eighteen.

464 I am satisfied that Dr Cooley was an experienced Child Psychiatrist, one of the few in New South Wales who worked in a Child Guidance Clinic during the period relevant and significant in this case. It was conceded by Dr Waters that Child Guidance Clinic psychiatrists would have seen more children in practice than a private psychiatrist treating children and would have had a high level of experience in diagnosing psychiatric problems associated with children. Dr Ellard, who trained in Australia in the 1940's and 50's and whose views I accept on historical matters, said that there were relatively few such speciality Child Psychiatrists and those who were specialists were found in public health. The evidence was that these clinics were busy and that they had waiting lists.

465 I am satisfied that Dr Cooley was a doctor of integrity and fully aware of her obligations and responsibilities and I find no reason to assume that she would not have fulfilled her duty to the court or to her client in ensuring that her report was correctly prepared and accurately made. The report was, as I have said, made pursuant to a series of tests which would also perhaps suggest that a child psychologist was involved. Presumably a social worker and a psychiatrist was also involved in obtaining the history as appears in the evidence of Mrs Bull. Even assuming this is not so, this does not alter my views as expressed. Importantly,

Dr Waters conceded that Dr Cooley was an expert in the field when she made the report in 1960 and that the report did not appear to record any "diagnosis of any psychiatric disorder at all". I will return to the views of Dr Waters on the report of Dr Cooley in a moment but it is appropriate if I first set out his position as to the history of the plaintiff's mental health. I accept what is recorded in Dr Cooley's report and that the absence of recording of psychiatric disorders (past or present) was because in her opinion there was probably none to be found.

Dr Waters

466 Dr Waters was called by the plaintiff and gave evidence by way of testimony, by way of affidavit and in a series of reports. Dr Waters was born in 1948. He completed his medical degree in 1971 and further completed a Diploma of Psychiatry from the University of Ottawa in 1977. Dr Waters became a Fellow of the Royal Australian and New Zealand College of Psychiatrists (FRANZCP) in 1982 . He became Foundation Professor of Child and Adolescent Psychiatry and was Professor of Psychiatry, University of New South Wales from 1985-1996.

467 In his affidavit (sworn 9 March 1999) he said that he first saw the plaintiff on 16 July 1991 for the purposes of preparing a medico legal report. He saw her from time to time thereafter and prepared reports dated 22 October 1991, 13 May 1993, 19 November 1996 and 22 October 1997. He saw her again on 23 February 1999. Significant in his report of 1991 and in his evidence are the views and history given to him by the plaintiff which are largely consistent with the plaintiff's affidavit evidence.

468 In his report dated 22 October 1991, Dr Waters concluded, by way of retrospective analysis, that the plaintiff was suffering from a Borderline Personality Disorder between 1962-5. He arrived at this "retrospective" diagnosis after reviewing records of the plaintiff's stay at Macquarie Hospital during the period of 1962-5 to which hospital she was admitted for care in respect of her mental health during that time. Dr Waters in 1991 was also, as I have said, privy or became privy to the plaintiff's full psychiatric history up until 1991 and which later was to be a significant basis for the plaintiff's affidavit evidence.

469 Dr Waters' "retrospective" diagnosis is made in respect of a period beginning just two years after the report of Dr Cooley. In evidence (at T 135) he goes further to suggest that the plaintiff's Borderline Personality Disorder had crystallised by her late adolescence. His diagnosis would thus put him in conflict with the findings of Dr Cooley in 1960. On his oral evidence it is clear that his considerations and his reports were not prepared with reference to or knowledge of the views of the well-qualified Child Psychiatrist Dr Cooley. From his oral testimony it is clear that Dr Waters did not know until cross-examined on the matter that the plaintiff had been assessed in 1960 by a child psychiatrist from a child guidance clinic. He was not aware that that report indicated that the plaintiff had no psychiatric disorder and that Dr Cooley did not think one was present. Dr Waters was, as I have said, unaware of this report during the preparation of his four reports tendered at trial and during his evidence given in examination in chief.

470 In Dr Waters' report of 22 October 1991, he referred to the series of the plaintiff's hospitalisations between 1962-5. He said (at 8):

"In retrospect, and after having reviewed contemporaneous hospital records, it appears that the correct diagnosis was substance abuse disorder and borderline personality disorder."

471 The contemporaneous hospital records to which Dr Waters made reference refer repeatedly to diagnoses in terms of sociopathic personalities, prostitution and sexual deviations. The plaintiff had eight admissions to the North Ryde Psychiatric Centre between 25 March 1962 and 26 May 1965. They provide information of considerable value to the Court in terms of assisting it in arriving at a decision on all the evidence. It is for me to give appropriate weight to all of her history and admissions as well as to the expert views, both current and past. The following summary is taken from a report to the plaintiff's solicitors (dated 15 June 1989):

"Re: Joy Eileen WILLIAMS - 13.9.1942

The above named has had 8 admissions to this hospital dating from 25.3.1962 to 26.5.1965.

Details of her admissions are as follows:

1. 25.03.1962 - 08.12.1962

2. 01.01.1963 - 21.02.1963

3. 18.05.1963 - 14.08.1963

4. 28.08.1963 - 30.08.1963

5. 11.12.1963 - 13.12.1963

6. 04.03.1964 - 06.03.1964

7. 11.03.1964 - 11.06.1964

8. 19.05.1965 - 26.05.1965

Diagnosis at the conclusion of each one of these admissions was Sociopathic personality, Prostitution and Sexual Deviation."

472 A summary of the diagnoses is recorded in the Unit Summary Sheet (A1- 209) as follows:

"1. 25.3.62 - 8.12.62 Sociopathic Personality Prostitution

Dr Yeomans A. W. OL.

2. 1.2.63 - 21.2.63 Sociopathic Personality Sexual

deviation

Dr Yeomans, Disch.

3. 18.5.63 - 14.8.63 Sociopathic Personality Prostitution

Sexual deviation

Dr Yeomans, Disch.

4. 28.8.63 - 30.8.63 Sociopathic Personality Prostitution

Dr Chong Gladesville

5. 11.12.63 - 13.12.63 Sociopathic Personality Disorder

Dr Hill, Disch.

6. 4.3.64 - 6.3.64 Personality Trait Disturbance other

Dr Palme, Disch.

7. 11.3.64 - 11.6.64 Sociopathic Personality Prostitution

Dr Hennessy, Disch.

8. 19.5.65 - 26.5.65 Sociopathic Personality Prostitution."

473 Having viewed these records and the corresponding notes, what Dr Waters did was, perhaps in effect to "retrospectively" review the diagnoses so that the correct diagnosis was quoted above. His approach to the plaintiff's psychiatric diagnosis raises questions as to the use of hindsight and of the influence of advances made in psychiatry which Dr Waters admits. In offering his "retrospective" diagnosis, Dr Waters made no reference to there being a change in psychiatric nomenclature, rather he made his diagnosis in retrospect. Perhaps at this point one might be excused in thinking that what he was initially suggesting was that there had been an incorrect diagnosis by the different psychiatrists in connection with the plaintiff's eight admissions between 1962 and 1965. Dr Waters' approach to the plaintiff's diagnosis was confirmed in his report of 22 October 1997 (at p.3), where he says:

"As I have indicated in my earlier reports, Ms Williams' early adulthood was severely disrupted by numerous admissions to psychiatric hospitals for what in *retrospect* was the consequences of a Borderline Personality Disorder associated with self-destructive behaviour." [my emphasis]

474 In 1997, he again made no reference to any subsequent change in psychiatric nomenclature between 1962 and today. Later in oral evidence he stated that not only did he believe that the plaintiff had a Borderline Personality Disorder in 1962-5, in contrast to the diagnoses made by psychiatrists at that time, but in addition, he says (at T 135):

"I'm quite comfortable going back and saying she had a Borderline Personality Disorder by the end of her adolescence." (my emphasis).

475 Having made this retrospective diagnosis, Dr Waters in oral evidence offered an explanation for the differential diagnoses made by the psychiatrists at the Macquarie Hospital. He stated his diagnosis of Borderline Personality Disorder arose due to a change in the psychiatric nomenclature since 1962 and that what was diagnosed in the various admissions at that time was consistent with borderline personality disorder using current psychiatric nomenclature. He stated (at T 107):

"What they diagnosed I think were the - using the current nomenclature - that (sic) make diagnoses that were *consistent with* borderline personality disorder, and what descriptions there are of her behaviour I think now, if - that's one of the reasons I wanted to have a look at the full notes, because, as I say, it would have verified what I'm quite sure is the case, that

sociopathic personality for instance is closely allied to and overlaps with borderline personality. At that time sociopathic personality was a much broader diagnosis in the sense that it applied to more people, and probably - and captured people with borderline personality.

As I say, some of the behaviours that brought her into hospital - in fact I would say all the behaviour that brought her into hospital, and what observations there are about her conduct in hospital, are all consistent with borderline personality." [my emphasis].

476 Dr Waters testified that the term "Borderline Personality Disorder" was first used in the 1950's but was largely used by people of psychoanalytic persuasion as they were the ones that constructed the psychiatric classification system. He said that the term would have come into official use in the 1960's and early 1970's. Importantly however, he made this comment (at T 108):

"It was part of the official classification. I would have thought it was unlikely that anyone at Macquarie Hospital would have even been familiar with the debate that was going on in the States at the time."

477 When asked when he thought they would have become familiar with it he stated that it would most likely have been when DSM-IIITM came out in the 1970's. It is accepted that DSM-IIITM was first printed in 1980. DSM-ITM, the first edition of the DSM series was printed in 1952. DSM-IITM, the second edition came to print in 1968 and after DSM-IIITM, the final and current edition of the **Diagnostic and Statistical Manual of Mental Disorders**, DSM-IVTM, was printed in 1994.

The Retrospective Diagnosis as at 1962-5

478 The plaintiff's submission on the matter of the retrospective diagnosis deserves to be set out in full. Miss Adamson for the plaintiff said (at T 724):

"**ADAMSON**: Your Honour will recall the evidence of Dr Waters and Dr Lal that the diagnoses made in Fraser House [Macquarie Hospital] between 62 and 65, although they had different labels attached, were consistent with the description of Borderline Personality Disorder in DSM-IVTM, and that is the evidence on which the plaintiff relies." [my emphasis]

479 The plaintiff in terms relies upon the descriptions of Borderline Personality Disorder described in DSM-IVTM as retrospectively applied. It is needless to say that between the printing of DSM-ITM, which was the **Diagnostic Manual** current during the years 1952-68, and the printing of DSM-IVTM released in 1994, there have been considerable developments in psychiatric learning. As I understand it, that is the part of the plaintiff's case as to why the diagnosis of Dr Waters should be accepted. Dr Waters (at T 110) made the following comments as to the relevant psychiatric advances,

"**WATERS:** In this area of personality, I think that - I think that perhaps to an outsider the advances have been of a fairly subtle nature. Within the field, I think people would think that they have been fairly dramatic changes." [my emphasis]

480 What has occurred on the plaintiff's case appears, perhaps on one view, to be the application of modern psychiatry, in terms of diagnosis and diagnostic criteria to events long since past. It is one thing to say that names change and that what once was known as

sociopathic disorder is now known as Borderline Personality Disorder. It is quite another thing to assert negligence against persons in the 1940's and 1950's to take reasonable care in respect of scientific material that is contained in post-period editions of scientific journals.

481 Notwithstanding this I am willing to accept and I do find, though not without concern or reservation, that as far as the evidence of Dr Waters goes, as to the plaintiff having in retrospect a diagnosis consistent with the description of Borderline Personality Disorder as at 1962-5, that such a finding is consistent with the records of the Macquarie Hospital. In saying this I note I do not understand Dr Waters to be testifying that what has occurred in this case is merely a change in name alone. He gave evidence (at T 107) that Sociopathic Personality Disorder "was a much broader diagnosis in the sense that it applied to more people and probably - and captured people with Borderline Personality Disorder." I would further observe in passing that Dr Waters did not indicate whether the same criteria for diagnosing borderline personality disorder was the same as or similar to that used to diagnose sociopathic personality disorder in 1962-5. What is being presented is not only a new name, but a new category albeit that the diagnosis of Borderline Personality is consistent with the former Sociopathic Personality Disorder. It is a diagnosis made at a different time when diagnostic criteria and acceptable treatments were different to what they are now known to be.

482 Nevertheless, that finding does not require a finding that that or any psychiatric condition existed or had manifested itself in any signs or symptoms prior to 1962. On this point I accept Dr Cooley's views in 1960. Nor does that finding require me to make any findings of fact about the plaintiff's history different to what I have made in respect of the lay evidence. Particularly it should be noted that each of Dr Lal, Dr Waters and Dr Ellard proceeded on the basis that the history obtained by Dr Waters in 1991 and the plaintiff's affidavit affirmed 20 November 1996 was accurate and reliable particularly in relation to the nature of the plaintiff's life at Lutanda.

483 In respect of Dr Waters' evidence and the history he obtained from the plaintiff, Dr Waters is not, and has not been, the plaintiff's treating psychiatrist. He is, and has been, the medico-legal expert supporting the case of the plaintiff since 1991 and prior to the institution of the proceedings. He understood when he first saw her in 1991 that he was seeing her in the course of litigation and subsequent to the making of his first report, he was aware that that litigation was believed to be a test case about "Stolen Children". The history of the plaintiff's `removal' from her mother which he obtained is to be viewed, as I have said, in light of my findings that the plaintiff was removed at the request of the mother: s 7(2) of the Act.

484 Upon taking the plaintiff's history, he did not feel it was his obligation to verify the claims (some of them very serious) made by the plaintiff. He accepted that perhaps he didn't qualify his conclusion as he might have done because he anticipated that the truth of the serious assertions would be made evident by independent evidence at the trial.

485 He said that he was provided with the plaintiff's affidavit of 20 November 1996 and that he broadly accepted the truth of what was recorded in relation to her experiences. They were truthful as he recollected. He thought that some of the material was the product of vagueness of memory but that he did not think they were affected by delusions. The affidavit was not thought to be the consequence of delusions. Several incidents in the affidavit he said had a ring of implausibility. He admitted he failed to draw any distinction between that which he thought may be implausible and those parts he thought to be true.

486 I have made findings on the evidence as to the plaintiff's history and her affidavit. I do not repeat here what I found in that respect except but to note that in significant respects the plaintiff's evidence is found to be unreliable. I except from this finding of her unreliability evidence from her about her recollections at Bomaderry and evidence of what her mother told her about the circumstances of her conception, birth and parentage which I generally accept and other exceptions referred to. The foundation of fact upon which the expert evidence is based is unreliable. Where that foundation is unproved on the evidence, as I find it is in this case, the expert evidence must be rejected so far as it expresses opinions on matters arising from the plaintiff's history and her affidavit which I find did not occur: see **Ahmedi v Ahmedi** (supra) per Kirby P (as he then was) at 291.

487 These comments apply to all the plaintiff's experts in this case and include also the expert for the defendant Dr Ellard who relies on the history given by the plaintiff and her affidavit. Significantly, Dr Ellard notes in his findings (at p 2 of his report of 19 April 1999), that,

"A perusal of the available material - particularly that from Fraser House - leaves no doubt that the diagnosis of borderline personality at that time was appropriate... The environment [at Lutanda] can best be described as destructive and I believe that her experiences there would be the substantial part of the causation of her borderline personality disorder. Another important factor would be the sexual assaults that she has described in her documentation." [my emphasis].

488 I reject this part of his evidence as to the "destructive" environment of Lutanda and as to the plaintiff's "sexual assaults" as it is based on the history given by the plaintiff which I have rejected in accordance with my findings stated above. I further reject any submission that would require me to make findings other than those I have made in relation to the plaintiff's time at Lutanda based as it is on the evidence of the lay witnesses. Accepting that the plaintiff had a disorder consistent with borderline personality disorder in 1962 does not require me to accept the experts' assumptions about the truth of the plaintiff's allegations of sexual assault or about the "destructive" nature of her experiences. Nor does it require me to reject the evidence in relation to Bomaderry and Lutanda that I have accepted and made findings about and from which I do not resile.

489 I have set out my findings and I do not find that the sexual assaults occur as alleged, indeed, they were conceded by the plaintiff as being not objectively true. I do not find that the plaintiff's time at Lutanda was destructive for the reasons given in respect of the lay evidence, most particularly because of my acceptance of the Lutanda lay witnesses' evidence.

The Plaintiff's Behaviour (1960-1962)

490 It is appropriate to set out some of the history of the plaintiff's behaviour and life style. Evidence as to the plaintiff's behaviour on leaving Lutanda is not really addressed on the plaintiff's case, indeed, it is to some extent glossed over by her psychiatrists, particularly Dr Waters. This is perhaps because it is not in terms dealt with in any detail in the plaintiff's own affidavit evidence. There is almost silence on the matter beyond the plaintiff's reference (at para 74 of her affidavit dated 20 November 1996) that she started abusing various substances and became involved in a cult and in criminal activities. The reference is minimal. This is the case notwithstanding that it is a period involving the plaintiff's criminal conduct and involving her association with criminal company and with members of Roslyn Norton's "pagan" cult. All this activity occurred after her visit to Dr Cooley in 1960.

491 In respect of these events, which I consider to be serious and significant events in the plaintiff's life, Dr Waters said (at T 126-127) that "we" tried to talk about the things dealt with in Parole Officer Barnett's Report of 1962, but "she didn't want to talk about them". He said it was "too distressing" for her. The matter was not pursued.

492 The material contained in the Parole Officer's Report was however known to Dr Waters having been furnished to him in the preparation of his reports for the plaintiff. Broadly that report dealt with the plaintiff's conduct and behaviour between 1960 and 1962 during which, as mentioned, she associated with certain Kings Cross company, worked as a prostitute and attended celebrations of Black Mass with the cult of Roslyn Norton, as well as engaged in criminal conduct. One charge in relation to which the plaintiff was convicted was for the offence of attempted bestiality, which, Dr Waters conceded, was conduct that is rare in the case of women. Little or no reference was made to these matters in Dr Waters' reports, which is in accordance with the slight reference made to those matters in the plaintiff's affidavit. I have made more extensive reference to the evidence in Miss Barnett's report in relation to an assessment of damages.

493 The circumstances surrounding the commencement of the use (and abuse) of drugs, even of alcohol, does not appear to have been fully ventilated in the plaintiff's affidavit or explored by Dr Waters. Dr Waters, seemingly, has assumed that because he considered that the plaintiff had a history of "substance abuse" that this was caused by a psychiatric disorder (which the plaintiff asserts was caused by default or negligence of the AWB). The same observation may be made with respect to the plaintiff's alcohol abuse. The circumstances surrounding the commencement and use of substances was not adequately explored.

494 Additional to evidence of the plaintiff's behaviour during this period, the plaintiff's mother's mental health was also not explored with the plaintiff, yet the situation concerning her was or would have been known to the plaintiff. The plaintiff had been reunited with her in 1973 and had from time to time thereafter lived with her. There was a history of alcoholism involving the plaintiff's mother particularly during her child-bearing years. This too seems to have been relatively unexplored with respect to the plaintiff.

Diagnosis of the Plaintiff prior to 1962

495 Dr Waters gave evidence that he was comfortable finding that the plaintiff had a Borderline Personality Disorder by the time of her late adolescence (T 135). By doing so he purports to go beyond his retrospective diagnosis that, as at 1962, the plaintiff could be said to have a condition of Borderline Personality Disorder consistent with what was then diagnosed by the psychiatrists at Macquarie Hospital. Assuming that by "late adolescence" Dr Waters meant to refer to "late teens", that puts his retrospective diagnosis as early as 1959-60 when the plaintiff would have been 17-18. By suggesting the disorder was present in 1960, Dr Waters puts himself in conflict with the evidence of Dr Cooley whose views I accept.

496 Dr Waters during oral testimony sought to distinguish the findings of Dr Cooley when confronted with them in cross examination. As I have said, prior to being cross-examined on the matter, Dr Waters did not know of the report of Dr Cooley. He says the following in respect of Dr Cooley's report (at T 110):

"**WATERS:** Well I'm not surprised that there wasn't a diagnosis. It's a matter of practice. To some extent one would think that a doctor would automatically make a diagnosis, but in

child psychiatry, an issue for a long time I think arising out of sociologically (sic) has been a concern whether you label people using diagnoses. So some people are a bit reluctant to use terms that might dog somebody for the rest of their lives. I don't agree with that practice. But I'm not surprised that there isn't a diagnosis."

497 Later (at T 111) he continues in relation to the report of Dr Cooley:

"**WATERS:** And I think that that report talks about how she sees herself and tries to identify some areas in which there may be - where there may be some reasons for hope. As I say, the diagnosis of the antisocial behaviour rather than motivation, she might be sort of consigned to the incorrigible bag, and so - I mean , I think that that report is quite possible to read that report (sic), and I think reading that is the interpretation I put on the report, that there is a reluctance to use diagnostic terms for fear of how that might guide action afterwards. And so it's a more descriptive approach."

498 I reject Dr Waters' interpretation of Dr Cooley's report. I further reject these and any other attempts by Dr Waters to explain away the findings of Dr Cooley. I have said already that I find Dr Cooley to be an expert in the field of Child Psychiatry. Her report is a contemporaneous document. Made in 1960, it involves an assessment of the plaintiff by a Child Guidance psychiatrist at or around the time at which Dr Waters says the plaintiff's disorder had crystallised. The report finds no such disorder. The report also reflects a different record of the plaintiff's history to that given to Dr Waters in 1991, a history taken from the plaintiff herself in circumstances which would give the plaintiff even reason to be candid about her history and Dr Cooley to be equally frank with the Court.

499 The report prepared by Dr Cooley was, as I said, a report made for the purposes of court proceedings in which the plaintiff was involved. The report was to the court and for the benefit of the plaintiff in criminal proceedings. I do not accept that a qualified psychiatrist would choose not to make a diagnosis that could assist a client in receiving remedial assistance or a fair and just hearing. I do not accept that Dr Cooley's report would resile from fully informing the court on the plaintiff's well-being. It should be remembered that Dr Cooley was an expert child psychiatrist who worked in a Child Guidance Clinic and so would have had more extensive exposure to the psychiatric care of children than any other specialist in child psychiatry.

500 I do not accept the "retrospective" diagnosis of Dr Waters to the extent that he suggests the plaintiff had a disorder consistent with a Borderline Personality Disorder in 1960 or any psychiatric disturbance at that time. It is an opinion also based on matters that I do not accept. I find his diagnosis to be unreliable as to the plaintiff's condition in 1960 or during her late adolescence. I am not willing to find, as I must if Dr Waters is accepted, that Dr Cooley was in some sense inaccurate in the views she expressed. I do not accept that she would fail to disclose something so significant as a disorder consistent with a Borderline Personality Disorder when it was in the plaintiff's best interest to do so. The plaintiff had every opportunity to give an accurate history on that occasion and it was in her interests to do so. Dr Cooley would have received that history and acted on it. Dr Cooley administered tests to the plaintiff in the course of her assessment, all of which confirms my feeling that her report was exhaustive, accurate, frank and reliable.

501 Given its contemporaneity, I am prepared to give the report of Dr Cooley significant weight as to the nature of the plaintiff's mental condition as at 1960. I am made more confident in making this finding by the fact that Dr Cooley was accepted by Dr Waters to be an expert in the field and that she worked in a Child Guidance Clinic, one of the very

institutions it is submitted on the plaintiff's case that the plaintiff should have been taken for assessment. Dr Waters was not qualified as a psychiatrist till 1977 and was as I have said at no time the plaintiff's treating psychiatrist, whether in 1960 or during the course of the 1990's when he prepared reports and a history in respect of the plaintiff. Those reports and history were made pursuant to a request by the plaintiff and for the purposes of the present litigation. I do not accept his view that the plaintiff had a disorder of the type he contends at 1960.

502 Further, or alternatively, even accepting Dr Waters' view that the plaintiff had a disorder consistent with a Borderline Personality Disorder as at 1960, (and even assuming that there was an antecedent disorder of attachment), that does not of itself establish negligence or want of reasonable care. Experts only ever assist with their views. Those views are persuasive only to the extent that the facts upon which they are based are proved on the evidence: **Ahmedi** (supra) at 291. I do not have to accept expert opinion simply because it is voiced by a person with expert qualifications. See also **HG** at 288. Indeed, essentially the truth of the facts I have accepted particularly stands in the path of the experts' views which I reject.

Plaintiff's Submissions as to the effect of Psychiatric Evidence on the Use to be made of the Lay Evidence

503 The plaintiff has presented extensive psychiatric evidence as to the aetiology of a Borderline Personality Disorder. Evidence from Dr Waters in his affidavit affirmed 9 March 1999 has been (at para 5) to the effect that while the Borderline Personality Disorder cannot be diagnosed in its full form until the age of around eighteen, the antecedents of that disorder are observable from adolescence. Dr Waters deposes that the causes of the disorder are primarily "poor emotional care of the child including poor parenting." In his opinion a child who is in a situation where it cannot form a close, responsive bond with at least one adult is susceptible to Borderline Personality Disorder.

504 Evidence from Dr Katz is to the effect that the plaintiff suffered from a disorder of attachment in 1948 (para 16 - affidavit sworn 10 March 1999) which was later to develop into a Borderline Personality Disorder. Dr Katz makes this finding of a disorder of attachment based on assumptions taken from the plaintiff's affidavit evidence which in his opinion showed that the behaviour of the plaintiff was "stubborn, attention seeking, self-centred behaviour". Dr Waters confirms the view that the antecedent symptoms of Borderline Personality Disorder include behavioural symptoms such as. inter alia. self-centredness, attention - seeking conduct, selfishness, aggressiveness, self-destructive behaviour and indiscriminate attachment.

505 The case of the plaintiff is such that given the conclusion that the plaintiff had a diagnosable Borderline Personality Disorder or a disorder in 1962 which was consistent with a modern diagnosis of Borderline Personality Disorder, that these antecedent behavioural characteristics as elaborated by Dr Katz and Dr Waters should be expected as the aetiological antecedents of that disorder. Dr Katz in cross-examination (at T 476-7) seemed to doubt whether a Borderline Personality Disorder could perhaps develop from anything other than an antecedent disorder of attachment.

506 The plaintiff has also led evidence of the diagnostic criteria for Borderline Personality Disorder from DSM-IVTM which she submits should be considered when making an assessment of the reliability of her evidence. In short, it is suggested by the experts that given that it is known that the plaintiff suffers from a known condition, the antecedents and

diagnostic criteria associated broadly with that condition should form the framework by which I should look at the plaintiff's case on duty and on causation and the way I look at the evidence.

507 Accordingly the plaintiff has submitted that I should find that on the evidence the plaintiff's behaviour at Bomaderry and at Lutanda was of such a kind and intensity as to be consistent with antecedent signs of disorder which would eventually mature into Borderline Personality Disorder. Alternatively, she submits, to the extent that the defendant's lay witnesses suggest that the plaintiff's behaviour was normal whilst at Lutanda, I should find that those witnesses misinterpreted the plaintiff's behaviour because of their ignorance of the psychiatric learning on the subject of attachment disorders. I reject these arguments. The plaintiff submits (at p 81 of submissions) that:

"Had the AWB discharged its duty of care to the Plaintiff it would have visited her at Lutanda at regular intervals of at least once a year (and probably more frequently in the earlier years). The AWB representative would have interviewed the Matron or Superintendent and would have separately interviewed the Plaintiff. Had the AWB visited the Plaintiff at Lutanda at any time between 1947 and 1960 it would have found a profoundly disturbed child."

508 The plaintiff further alleges that had the defendant been told of these matters an inference should be drawn that the plaintiff would have been sent to a Child Guidance Clinic for assessment and treatment and any treatment would have reversed the plaintiff's disorder. It is submitted that the plaintiff would have made complaints similar to those made in her affidavit of 20 November 1996, both to the Child Guidance Clinic and the AWB. I reject these submissions in the terms stated and repeat my finding that at no time in the period 1947-1960 would the defendants have found either a profoundly disturbed child or a disturbed child. I find that they would not have found the plaintiffs other than as a child that exhibited behaviour consistent with descriptions by the Lutanda witnesses which I have accepted.

509 In some ways it might be thought that the evidence given by various witnesses that the plaintiff's behaviour was "normal" for a teenager is challenged, inter alia, because it does not reflect the expected aetiology of Borderline Personality Disorder.

510 Mr Hutley, (at p 75 of the plaintiff's submissions) submits:

"The plaintiff's bad behaviour was an incessant and counterproductive cry for the attention which she had not received through attachment to attain through more acceptable means (sic). The people who heard the cry misunderstood it because of their ignorance of the then current learning and the plaintiff's circumstances of maternal deprivation."

511 This challenge is and has been rejected in terms stated and otherwise. For reasons given and findings made, I reject the argument of there being any misunderstanding on the part of the Lutanda carers as to the plaintiff's behaviour and I reject any suggestion of ignorance on the part of the Lutanda carers as to the plaintiff's circumstances. I reject the description of the plaintiff's bad behaviour and what it represents. One should also avoid the potential for the "concertinaing" of the evidence of the plaintiff's behaviour into over-simplified descriptions.

512 There is nothing in the expert evidence of Dr Waters, Dr Katz or in the DSM-IVTM which prevails upon me to read the evidence of the lay witnesses in this case any other way

than as I do read it, as both credible and reliable. I will not traverse anew my findings as to the lay evidence. I have already set out the lay evidence in considerable detail as well as my findings in relation to it. I have set out the evidence of the plaintiff as well as my findings in relation to her credibility and reliability, findings made in light of some significant concessions by the plaintiff's counsel as to her reliability. It is sufficient to say that I am convinced on my reading of that evidence and in light of submissions that the plaintiff is not reliable in the evidence that she gives in significant respects especially as to events at Lutanda. In contrast I find that the evidence of the defendant's lay witnesses is credible and reliable and that I can act on it.

513 I am satisfied that nothing in the expert evidence requires me to reject the evidence of the defendant's lay witness if I find, as I have, that it is credible and reliable for me to act on.

514 The views of the Lutanda lay witnesses are human observations of experienced able child carers at the time. Their opinions are based on time spent with the plaintiff over a number of years and upon the care they have given to her during that time. Mrs Middleton, Mrs Buxton and Mrs Moorhouse were trained nurses and experienced, practical child minders, qualified to observe and supervise the health and behaviour of their charges. I accept their opinions, for the reasons stated elsewhere, that the plaintiff was not a troublesome child and was not a depressed or disturbed child. I repeat the finding that nothing in the lay evidence leads me to conclude that the plaintiff exhibited behaviour and which reasonably suggested a need for third party intervention or referral to a third party. I have rejected the evidence of the plaintiff and Mr Sattler to the extent that they suggest the plaintiff engaged in self-mutilation and attention seeking behaviour and otherwise as stated and for the reasons already given. In the circumstances these findings are not, and are not able to be impugned or brought into question by the expert evidence.

Dr Lal

515 Dr Lal, the plaintiff's current treating psychiatrist at Shellharbour, considered in March 1999 that the plaintiff's condition had the likely label of "manic disorder". As an alternate diagnosis he said that she may also have been suffering from a substance (namely, marijuana) induced disorder. At that time he thought that a third conditional diagnosis was also possible, namely that of a brief psychotic episode. In relation to marijuana use, Dr Lal obtained a history of the plaintiff that she had been using marijuana daily for several years up until her admission.

516 Dr Lal defined "manic episode" as a disorder of mood involving persistent, sustained elevation of one's mood above normal. It could often, he said, involved elation and behaviour that is markedly different from one's usual behaviour. While their is no settled aetiology, Dr Lal said that one cause of the condition is certainly hereditary factors. Regular manic episodes, he said, are more properly labelled as a bipolar disorder which is the modern term for manic depressive psychosis. Psychosis, in turn, is essentially a term meaning any disjunctive break with reality. In his opinion, the overall label he gave to the plaintiff's current condition was that of "manic episode". He accepted that, on the basis of the information given to him by Dr Waters, Dr Aarons (the plaintiff's long time treating psychiatrist) and the plaintiff's daughter, and having no first hand knowledge of the plaintiff's condition prior to her current admission, that the plaintiff had a Borderline Personality Disorder.

517 According to Dr Lal, when a child is separated from his or her mother, studies have found that harm can be caused to the child and that damage had been found in children

much younger than 12 years of age. The harm that results to the child, he said (at T 186), occurred irrespective of the race or sex of the child. Similarly, he said, the mechanism for separation does not matter. Damage to a child from a breaking of an attachment bond could occur regardless of whether the breaking of the bond occurs because of the death or illness of the mother or by their incapability of caring for the child or even from the imposition of a jail term on the mother. While any separation could bring about harm to the child, much would depend upon the subsequent experiences of the child.

518 Dr Lal said (at T 188) that the two transfers in this case, first by the mother, because of her inability to care for the plaintiff, to the AWB (involving going to Bomaderry), followed by further separation after four and a half years, with the child going to a new home (Lutanda), were both capable of contributing to a Borderline Personality Disorder. If there was a further disruption of the bonding process with a carer with whom the child had formed some attachment at the second home, such might also he said contribute to the development of a Borderline Personality Disorder. Further, however, Dr Lal said that one could only speculate as to why some children develop borderline personality disorder as adults and others do not.

519 Dr Lal, while acknowledging that an institution per se usually offers less care and nurturing support to a child that found in a private home, conceded that he had come across cases, as a clinician, of people suffering from Borderline Personality Disorder who did not come from institutions. He was asked as to whether a child, from the moment of birth has a disposition to a Borderline Personality Disorder. He said (at T 191):

"**LAL:** Everyone has a personality and everyone has elements of different personalities. Again this is very much a non expert opinion, but my guess is that people who ... all children if they are poorly raised, are vulnerable to personality disorders. Some people will debate that. Certainly many people will argue differently and say that it is constitutional genetic or whatever...."

520 I have found that the plaintiff was not poorly raised at Bomaderry or Lutanda.

521 When asked whether there was any general pre-disposition to Borderline Personality Disorder, Dr Lal referred to the personality structure of the individual and to some children having more resilient personality structures than others. He was asked about his understanding as to where personality comes from. He said (at T 192):

"**LAL:** Some argue and say it is predominantly genetic and others will not. I think it is like tabula rasa and I don't think there is a definitive opinion on the subject. It is a matter of continuing debate."

Dr Katz

522 I propose now to deal with Dr Katz's evidence. At the threshold Dr Katz's evidence runs into a number of problems. He did not see the plaintiff. He had access to limited materials. He made assumptions of facts and expressed views on facts, hypothesis and assumptions not proved. Indeed, he has made assumptions contrary to findings made by me. The findings of fact made by me in respect of accepting the Lutanda witnesses and in respect of the plaintiff's situation at Bomaderry provide reasons for rejecting his views. Indeed, my findings in relation to the reliability and credibility of the plaintiff in respect of serious matters also cause me to reject his views. Further of alternatively, my later finding on the subject of state of knowledge in the 1940's is inconsistent with his views and also

supports a rejection of his views.

523 Dr Katz swore several affidavits, including two in March 1999. Dr Katz is a retired consultant psychiatrist born and initially educated in South Africa. He saw war service and did further study in the United Kingdom. He graduated in South Africa as a child psychiatrist and emigrated to Australia in 1960. He was initially employed as a psychiatric adviser in the School Medical Service (Victoria) and worked in Clinics.

524 In 1964 he moved to Sydney to take up a position as Associate Professor of Child Psychiatry and consultant to the Royal Alexandra Hospital for Children. This was, I would add, the first specialist position of Associate Professor in Child Psychiatry in Sydney. Dr Katz was not in Australia during the period between 1942 and 1960. That is the period which is relevant to the issue of liability in this case.

525 Dr Katz's post-war fellowship year in England was devoted to establishing knowledge in his chosen field of child psychiatry. He said Dr Bowlby was amongst "the first" to show the importance of "the development of attachment early in life and show how disruption of attachment leaves behind many emotional disturbances".

526 Before returning to Dr Katz's affidavit of 10 March 1999 it is quite clear that Dr Katz places great weight on Dr Bowlby's report to WHO (1951) where the prevalent theories and origins of mental disturbances were summarised. Dr Katz suggested that similar ideas to those of Dr Bowlby were found in the literature of the 1920's, 1930's, 1940's (see para 2 of his affidavit of 30 March 1999).

527 It appears from his first affidavit that Dr Katz was asked to consider the hypothetical situation of what steps a reasonably competent psychiatrist would have advised the person with responsibility for the care of Ms Williams in 1942, in 1947, in 1953 and in 1959 if the plaintiff had made visits to Child Guidance Clinics at those times. In expressing his opinion he was asked to make certain assumptions based upon what would have been done by experts in or about these years.

528 A number of paragraphs from Dr Katz's affidavit of 10 March 1999 are set forth:

"13. Had it been necessary for whatever reason to remove Ms Williams from her mother this step should have been delayed until a willing "mother-substitute" had been located. The literature available to reasonably competent child psychiatrist or child mental professionals at or prior to the time of Ms Williams' birth indicated the development problems which could occur, particularly in the development of attachment, if the child was deprived of a caring adult with whom she could develop an attachment. The literature identified case studies of children who were subjected to maternal deprivation and the grave consequences of such deprivation.

529 I reject this view of Dr Katz. He does not appear to have considered the circumstances in which the removal took place including in wartime Sydney. I do not see how in the circumstances the removal could be delayed. In my opinion there is a degree of unreality about this view divorced from time, place and the real circumstances of "the removal". Further or alternatively, I do not accept that it would have been the prevalent expert view at the time. I do not accept that it was reasonable or practicable to do as he suggested or that reasonable care required an implementation of that view. I also do not accept it accorded with then state of knowledge. I do not accept how one could in advance, or at all, understand how the hypothetical willing mother substitute could have been found before "a

removal". I find it difficult to understand how in advance a willing mother substitute would be reasonably located. The simple fact is the child had to be removed to the only practicable place, Bomaderry. The mother had to leave hospital where she had been for a month. Dr Katz has not considered these real practical matters, or considered them adequately. In many ways Dr Katz's views rather reflect perhaps an ideal rather than what was real or reasonable.

530 I thus reject Dr Katz's opinion in terms of what an expert psychiatrist would have done at the time in 1942. This is a sufficient ground almost in itself for rejecting his views and opinions, which I do for this and reasons already stated.

531 It must be remembered that the issue of "reasonable" care is for the court. The reasonableness of a proposed course, its practicability or impracticability, are not matters that are to be resolved merely by medical experts. They are matters for close consideration and decision by the court. There are further problems with acceptance of Dr Katz's evidence (and indeed Mrs Bull's) including as to suggested hypothetical remedial care that may have been given or suggested at different ages since they are inconsistent with my findings of fact and rejection of the plaintiff's reliability in respect of significant matters. The views of experts are necessarily limited by the information on which their decisions are made. The point on reliability of information from a patient also in the area of psychiatry is well made by the U.S. Supreme Court in **Jaffe v Redmond** [1996] USSC 57; (1996) 518 US 1 at 10:

"Treatment by a physician for physical ailments can often proceed successfully on the basis of physical examination, objective information supplied by the patient and the results of diagnostic tests. Effective psychotherapy by contrast depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts emotions memories and fears." [my emphasis]

532 Several remarks should here be made. First, Dr Katz's view is predicated upon there being an onset of symptoms, or manifestation of symptoms (not signs) of which human carers would or should have become aware. There were none or none have been proved. Next it assumes at different times a disorder present and manifesting itself. I do not accept any disorder in attachment has been proved to have been present at Bomaderry or Lutanda. Next, inadequate attention is paid to how an appropriate permanent relationship could be found or whether it was reasonably achievable, let alone reasonably practicable. His statements as to appropriate treatment with respect ignores problems associated with its practical implementation and means of such. As to the counselling issue, it is again a matter I reject. There was on my findings nothing to counsel, or justifying counselling. There is no evidence as to the nature or extent of counselling required, or for how long. The assumptions made by him have either not been proved or have been rejected. I do not accept that there was a childhood deficiency of attachment or one which could have been reversed or minimised at any time. I reject his view as based upon unproven hypotheticals.

533 In his affidavit the following paragraphs appear:

14. Although at the time of Ms Williams' birth and infancy it was recognised that not all institutions had a necessarily deleterious effect on the development of attachment, reasonably competent child psychiatrists or child mental health professionals recognised at the time that the risk of a disorder in the development of attachment was particularly high in institutions such as orphanages. This was so because the usual structure of such organisations was for relatively large numbers of children to be supervised and cared for by

staff members as a whole. This structure, although it may have had administrative benefits, was antipathetic to the development of a close emotional attachment between an individual child and a specified adult and exposed children in such institutions to a high risk of disorder in the development of attachment.

15. A reasonably competent psychiatrist or child mental health professional would have advised the Board that the risks associated with placing Ms Williams who had already suffered the trauma of removal from her mother when she was very young would be greatly increased if she was placed in an institution, particularly if the institution was not structured to create small identified family units. Such a person would have advised the Board that the childhood antecedents of a disorder in the development of attachment may not manifest themselves in any recognisable form until the child was five or six. Manifestation of such symptoms at the age would I dictate that some damage to the facility for attachment had already been done.

534 I reject these views inter alia for reasons already given. I do not accept that such advice would have been given in 1942 nor that reasonable care required that if the advice was given, it was reasonable or practicable to implement it. There was no real practical choice but to place the plaintiff in the one suitable institution available at Bomaderry.

535 No treatment was called for on my findings, none would have made any difference. The measures suggested are not required or reasonable, let alone practical. I find Dr Katz's views generally unhelpful.

536 There is nothing to suggest that in circumstances such as those present at Lutanda, or anywhere that it was possible to find a "substitute" mother ready willing and able to bond with, and with whom in terms of mutuality or reciprocity the child too would bond, interact and attach to in terms of deriving satisfaction enjoyment in a warm intimate relationship (Dr Bowlby). I reject Dr Katz's views on this point. I reject his view then there were any childhood manifestations of disorder at any early age (or at all). I reject the proposition that "Bomaderry contributed to the disorder". In my view on the findings I have made it did not.

537 Further or alternatively, for reasons that I have set out later, I have not accepted Dr Katz's opinion as to state of knowledge in the 1950's. As to state of knowledge see my later views.

538 Dr Katz prepared a further 34 page affidavit (13 April 1999) in which he was asked to make assumptions based upon what was said by Mr Sattler. I have made findings rejecting Mr Sattler's evidence. Those assumptions have not been proved, or more accurately accepted by me. He assumed that the plaintiff demonstrated the misbehaviour described by Mr Sattler (and I have not any) and that that made fostering or adoption in 1948 a matter of priority. There is no evidence of any misbehaviour at the age of six, requiring either or both. I repeat that I found the plaintiff experienced no loss of opportunity to be adopted or fostered. There is no evidence about how, if at all misbehaviour, or even age might impact upon adoption or fostering prospects. These are matters that are not addressed by Dr Katz, but are by me.

539 I have said enough to indicate that I reject Dr Katz's views for a variety of reasons. I do not accept his views in respect of the situation, remedial or otherwise, in relation to the plaintiff's mental condition at any age.

540 Some of the problems with accepting his views also appear in Dr Katz's cross-

examination after the filing of a further affidavit. In summarising what he said, Dr Katz accepted that:

1. Each item identified allegedly in the second affidavit is to a certain degree features of behaviour which one would see from time to time in all children; [my emphasis]

2. Views of what constituted "normalcy" vary from one adult person to another;

3. If the "assessors", the lady carers looking after the plaintiff, did not take her for professional help, then according to their feelings, professional help was not required. A neighbour school teacher might think they needed help. He didn't read any material suggesting that a school teacher or other person had recommended help (at T 476). I have found that no such teacher ever suggested help was required.

4. If the plaintiff's behaviour was so aberrant as he assumed he would have expected it to be present at school. (I find it was not)

541 It is interesting that Dr Waters too (T 130) also agreed if the plaintiff had been as "disturbed" as she must have been for his view of her psychiatric state, he would "most probably have expected teachers to have picked it up".

5. A child is predisposed at birth to form an attachment to a figure. If such a figure is not available, then the child is likely to develop a Borderline Personality Disorder.

542 In my view this type of evidence again highlights the difficulty of guaranteeing the elimination of a risk of a disorder developing, particularly in an institutional setting. On my findings, sadly perhaps for the plaintiff, an institutional life was unavoidable.

6. Someone has to make up their mind whether or not to take a child to a clinic. If a parent or carer thinks there is nothing wrong with the child or the child's environment, then, a clinic never sees the child except when the child is referred to a clinic by a teacher.

7. Between 1960-1965 he did not see very many children from institutions. Those children that came from those institutions involved usually as a result of a third party intervention from a school, general practitioner or hospital before he saw them. If they came directly from the institution, someone from the institution referred that child.

543 To sum up I do not accept the opinions proffered by Dr Katz in respect of his assessment of, or suggestions of care for the plaintiff at different ages. I also do not accept the validity of the history, hypotheses or assumptions on which they are based. I do not accept his views as to hypothetical actions or that suggested treatment at any time would have made any difference. I accept the Lutanda carers' evidence as well as the evidence as to Bomaderry. Finally as to state of knowledge I do not accept his views as to the state of knowledge as it existed in the 1950's.

Mrs Bull - Social Worker

544 A Mrs Bull gave evidence both in affidavit form (sworn 1 April 1999) and in oral evidence. She sought to be helpful as a witness. However, I am unable to accept or act upon her views. Leaving aside the issue of qualifications as a social worker: see **HG v The Queen** supra, I reject her views essentially, but not exclusively, because of the factual findings I have made. Much of what I have said in relation to Dr Katz also applies to Mrs Bull's evidence as well.

545 She was born in 1915, and held a BA degree from the University of Sydney in Philosophy, English and History. In 1946 she was awarded a Diploma of Social Work from Sydney University after a two year course. She held a Certificate of Psychiatric Social Work from Edinburgh. She gave evidence of familiarity with certain academic works as a social worker, some of which were listed in an affidavit of Dr Katz sworn 30 March 1999.

546 She followed a career as a social worker. In 1944-45, as a student, she worked with a Dr Sebire at the Child Guidance Clinic No 2 at Camperdown under the leadership of Dr Sebire. She described Child Guidance Clinics as operating as a team. There were three professionals consisting of a psychiatrist, a psychologist and a social worker. The team leader was the psychiatrist. An application for assistance she said was usually received from a worried parent or carer. Mrs Bull gave evidence that she had met Dr Cooley in the course of her training.

547 She also gave evidence as to what took place in terms of the initial diagnostic interview at a Child Guidance Clinic. The social workers would interview one or both parents or carers in a separate room with the interview beginning with the social workers explaining the need for a detailed Social History. If the parents or carer were willing, the social worker would obtain details such as those set forth in para 4 of her affidavit. The interview would take place a week later with the psychiatrist interviewing the parents/carer and the child both together and separately. Treatment was not to be undertaken unless the parents/carer agreed.

548 Treatments were usually on "a weekly basis lasting for 45 minutes". Casework treatment for parents was concurrent with the child's treatment session (although how such casework treatment involving a staff member or carer from an institution or orphanage would operate, was not identified) and was aimed at enhancing parents' insight into their attitudes to their child and to that child's behaviour.

549 The child attended the psychologist and psychiatrist with sessions consisting of "play therapy" interpretations and discussions with the child. Treatment sessions would continue weekly for as many times as necessary but usually on average for "4 to 8 weeks". In the cases of seriously disturbed children the psychiatrist would generally conduct the entire psychotherapy often calling for further psychological tests.

550 Visits to the child's school and home was an essential part of the Child Guidance Clinic's work which would enhance treatment. These were done by the social worker.

551 Children were referred to clinics by parents, teachers, the courts' officers or the Department of Child Welfare, or institutions in which they resided. At the end of every three weeks the team met to discuss and review ongoing treatment cases.

552 Mrs Bull's affidavit appears to be particularly directed at the situation qua parent/carers. It is hard to imagine carers from institutions attending (let alone it being reasonable) in the 1940's, 1950's and 1960's with children for treatment absent good and valid reason to do so. In the instant case there was no such good reason. They, like parents, too were the evaluators of children and of the need for appropriate intervention in respect of child conduct.

553 Mrs Bull had returned to Australia in 1952. She said that employment opportunities for psychiatric social workers included working with disturbed adults in established mental hospitals or in one of the two Child Guidance Clinics then existing in Sydney serving the

whole of the child population of Sydney.

554 In October 1952 Mrs Bull chose to work in the Child Guidance Clinic being appointed to Child Guidance Clinic No 1 under Dr Alan Jennings. The clinic was run on similar lines to those in the United Kingdom where she had done training.

555 She said that one of the most serious conditions of childhood which she met whilst working in a Child Guidance Clinic was that of children who had "been deprived of all who could love them and who never had a chance to grow in attachment to love and trust someone". Such children were generally deprived of parental care or an adequate substitute for parental care for a variety of reasons. Such children had generally been placed in institutions run by various church and charitable bodies and taken by the Child Welfare Department into government homes. They would sometimes be referred for clinic help.

556 A further affidavit was sworn by Mrs Bull on 12 April 1999 (just before the trial). In that affidavit she said that she had read affidavits of Joy Williams (20 November 1996) and of Mr Sattler. I have made adverse findings in relation to the evidence of both.

557 Mrs Bull was asked by the plaintiff's solicitor to give an opinion as to what a reasonably competent social worker who worked in a Child Guidance Clinic such as the one at which she worked would have recommended in relation to Joy Williams, had she been seen at the age of eleven or as a teenager.

558 It is important to observe here that Mrs Bull was asked to express views in terms of recommendations of what a reasonably competent social worker would do. That is her expertise and her opinion is to be so viewed in the context of an expert social worker. She is not in terms qualified or able to speak on treatment that would in fact have been prescribed by a psychologist or psychiatrist in any individual case.

559 Under the heading **"Assumptions"**, Mrs Bull appears to have assumed a history of Ms Williams' background and circumstances and behaviour in terms as contained in the affidavit evidence of the plaintiff and Mr Sattler. That said, the assumptions upon which her views and hypothesis are based have been rejected by me.

560 Mrs Bull had never seen the plaintiff or obtained her own history, nor had she seen the plaintiff's 1962-1965 Psychiatric Centre notes. Upon the assumptions made, Mrs Bull said that had the plaintiff been referred to a Child Guidance Clinic in 1953 certain views would have been expressed by a hypothetical social worker namely;

"(1) Ms Williams would benefit greatly if she were permitted to form an attachment with an adult within Lutanda Children's Home, particularly if this attachment were with an adult with whom she already had some rapport;

(m) Since Ms Williams had identified Ms Atkinson as the person to whom she felt closest, it was likely that the attachment which was likely to be of greatest benefit to Ms Williams was an attachment with Ms Atkinson;

(n) That, in order not to prejudice the development of an attachment with Ms Atkinson it was desirable that Ms Atkinson not be required to administer corporal punishment of any severe nature to Ms Williams; and

(o) It was desirable that Ms Atkinson, if she were willing, should be involved in Ms Williams'

treatment in any way possible and that she receive some counselling from the staff of the Clinic when she came with Ms Williams for weekly appointments. The effect of this involvement would be to put Ms Atkinson in the role of surrogate mother to Ms Williams."

561 Some of the recommendations appear on one view to fall outside her speciality as a social worker performing social worker duties as they concern recommendations as to psychotherapy treatment. More significantly on my findings there was nothing warranting taking the plaintiff to a social worker or any one else in 1953. As to these views I reject them for a number of reasons. First what I have said in part in respect of Dr Katz applies; second, there is no evidence of such an "attacher" being available; third, Ms Atkinson (in her 70's) had left or was about to leave Lutanda; fourth, an attachment could not be "compelled" with any person whether at Lutanda or otherwise; fifth, there was no corporal punishment administered; sixth there was no reason for counselling or taking the plaintiff to a clinic. Mrs Bull also raised the matter of the plaintiff having an insecurity that may have been caused by not being told the truth about her mother whilst at Lutanda. With respect this is a view expressed in 1999. I reject her views for reasons stated. I further reject them because the exercise of reasonable case did not require such.

562 Simply stated on my findings, no visits to a Clinic at any time were reasonably required. I have made findings inconsistent with the unproved hypotheses of Mrs Bull and Dr Katz.

563 In her oral evidence Mrs Bull said that for a child aged between five and eight years residing at Wentworth Falls there could have been practical difficulties in terms of bringing a child to Sydney to a Child Guidance Clinic, even if symptoms of disturbed behaviour or otherwise warranted or justified it being done. In my view to bring the plaintiff to Sydney would also have required an escorting adult and associated school interruptions with no corresponding benefits to be found in the light of my findings. As to children behaving in a "rebellious" way, Mrs Bull was asked how parents or carers would determine whether that behaviour was better dealt with by appropriately rewarding or punishing the child rather than taking the child to a psychologist or a psychiatrist. Mrs Bull said she didn't think that that decision rested with parents alone, since the school would also have input. As I have said, in the instant case there is no evidence of any school "complaint" about behaviour of the plaintiff at Lutanda to the authorities. There is no evidence that any school authority suggested that the plaintiff at anytime be sent to a clinic. There is no evidence of any suffering or educational detriment. No staff member (including qualified nurses/carers) at Lutanda ever suggested it. Mrs Bull also said there was a lot of prejudice about psychiatry of any sort in the 1950's, perhaps rather suggesting that in that era the community tried to manage, and deal with children's problems without resorting to professional assistance, which is perhaps a situation different to that prevailing in the 1990's. She said there was a "jeering attitude in the community" to psychiatry in the 1950's. A point I consider she was seeking to make is that counselling did not have the role, that it now has.

564 Mrs Bull accepted that people in the 1950's rearing a child of pre-teenage or teenage years may well have thought that they could do more harm than good by taking them to a psychiatrist. I would add in passing that many parents might well reasonably hold similar views even in the 1990's. Mrs Bull said that it was very seldom that children of Aboriginal or part Aboriginal background were referred to Child Guidance Clinics for treatment.. The following question and answer appears (at T 73):

"**BARRY:** Did you have yourself any understanding at that time of aboriginal culture ?

BULL: . I am ashamed to say I was like most Australians ... we just didn't really see them. We knew - mean the very fact that children could be separated from their parents somehow we ought to have known it but I doubt that whether many of us did".

565 I do not believe that Mrs Bull really fully understood that the separation in this case was because the mother had asked the Board to take the plaintiff from her. On my findings it was the plaintiff's mother who was responsible for the separation.

566 After a number of witnesses for the defendant had given evidence, Mr Hutley sought to have Mrs Bull recalled to give evidence. In the circumstances I considered it appropriate that he should be permitted to do so. Her further affidavit sworn (28 April 1999) was also read.

567 Mrs Bull was further cross-examined during which she agreed that teenagers as part of their development engaged at some time in "oppositional" behaviour, in order to test the limits, to see how far they could go with adults.

568 Mrs Bull also said that where there were loving parents and a child ends up being rebellious or criminal that a "lot of the appearance of harmony might be a discordant underneath [sic]. There would always be some relationship problem somewhere" (at T 468). With respect I do not find that I am able to accept this view at least in the terms of the answer given.

569 In the 1940's Mrs Bull said she did not see many children from orphanages or institutions at the clinic. The following question and answers appears (at T 468):

"**BARRY:** How many children came from orphanages or institutions?

BULL: Not many. As I said before, there were not - I suppose the knowledge of the clinic's existence might have been shut off from people. It generally has some sort of religious affiliation of making them good Christians, as seen in the affidavit earlier - Joy Williams' affidavit. So I think there was not much readiness to think anything outside their care was going to be of help. But parents knew where they were going and they welcome it and that is when the clientele starts building up and is known to a wider circle."

570 This evidence does not accord with my findings. I am satisfied that the Lutanda carers if they thought help was required would have sought help from a third party (and probably so would the school or teacher). There was a readiness to seek help if required including if necessary from Dr Lovell, the Honorary Medical Officer. None was required on my findings. Any implied criticism of Lutanda or its dedicated staff in this passage I reject as not according with the evidence on my findings. It is another reason for rejecting Mrs Bull's evidence as unhelpful.

571 Mrs Bull further appears to have considered that Lutanda was a place of "great strictness", the sort of place where the "average child" could not be very easily accommodated "without being punished, some of it might suggest cruelty". I reject these impressions as being not founded on the facts found or supported by the evidence. I do not regard Mrs Bull's views as of assistance or helpful.

572 I would observe that as regards foster parents, Mrs Bull said that finding them was the work of the Child Welfare Department; that even some foster parents were not good foster parents, and that there were a lot of "problems".

573 Mrs Bull gave evidence that by the standards of the 1940s, foster parents were sometimes temporary. It could be hurtful to a child to move from one foster home to another. In the 1940's and 1950's looking for foster parents meant looking for married couples. Not until the 1960s was it found that a single mother was able to cope with the duties of a foster parent. As she said "Society is changing too"!

Illawarra Aboriginal Medical Service:

574 I have considered the report of the Illawarra Aboriginal Medical Service (Dr G Jones) relating to his dealing with the plaintiff's health since December 1991. The consultations with various doctors at the clinic include treatment for a variety of "organic" conditions as well. In December 1991 there is reference to migraine and a past history of alcohol dependency. Over the years there are a variety of complaints including back pain, and weight loss. Scripts for various drugs including Voltaren and Rohypnol were sought. On one occasion (March 1998) Rohypnol was refused. In June 1998 there is a reference to loss of hearing. In September 1998 there is a complaint of stress with weight loss and increased alcohol intake. In November 1998 there is a complaint of chest pain. In February 1999 there is a complaint of back pain.

575 On the terms of that report it appears that the plaintiff had been attending the Clinic since 1986 with a history including a hysterectomy, migraine, drug abuse, psychiatric illness and anxiety attacks. According to the report, the plaintiff had been losing weight over a period of time with no cause being identified.

Dr Ellard:

576 I have already discussed some of Dr Ellard's evidence. Dr Ellard is a medico-legal psychiatrist called by the defendants. His education and experiences actually span the period during which the events with which we are concerned occurred. His report of 12 April 1999 (with enclosures) was tendered. He also gave oral evidence.

577 In 1942 Dr Ellard became a member of the Australian Army Psychology Service. He performed the duties of clinical psychologist at 14th AGH, met most of the significant Australian psychiatrists of the 1940's and gained knowledge of concern and relevant to psychiatric thinking. His firm recollection was that at the time child psychiatry was mainly concerned with problems of what was called "mental deficiency and neurological disorders generally".

578 Dr Ellard began his medical training in 1946. Psychiatric input was small. There was little or no mention of child psychiatry. The standard text book at the time was Professor Dawson's **"Aids to Psychiatry"**. Professor Dawson was a Professor of Psychiatry at Sydney University in the period 1927-1951. He was the only Professor of Psychiatry in Australia at that time.

579 I will deal with the contents of that book in due course when I discuss in greater detail some of the considerable volumes of academic material tendered in evidence.

580 Dr Ellard made the point that Professor Dawson did not place any emphasis on matters of "separation" or attachment (see Professor Dawson's 1942 Book **"Aids to Psychiatry"**. In the material tendered that appears to be so.

581 Dr Ellard said that in the 1950's there was one medical school in New South Wales

and one professor of psychiatry - Professor Dawson. As at 1960, a Dr Jennings was a part time lecturer on child psychiatry. Dr Ellard was also on the staff. Professor Katz took up a position as Associate Professor in 1964, four years after the plaintiff left Lutanda in 1960. I would here observe that Professor Dawson (in his 1942 text) said in respect of children "It is possible that further undue emphasis has been laid on hereditary factors and too little attention given to faulty parental discipline and to such factors as malnutrition and poor physical hygiene". This passage perhaps reflected the then current thinking by some practitioners in Australia psychiatry in 1942.

582 Dr Ellard also said that a standard text book of the day was said to be "**Leo Kanner's Textbook of Psychiatry"**. Dr Kanner was Associate Professor of Psychiatry at the John Hopkins University. The first printing was in 1948, the Fourth Edition in 1955. The Table of Contents did not mention "separation", nor did the Index to it.

583 Dr Ellard's evidence was that for many years whilst at North Shore Hospital, what is now regarded as child psychiatry was performed by paediatricians. He referred to a publication by Dr W. H. Arnott a psychiatrist employed at the Royal Alexandra Hospital and to Dr Arnott's review in the **Medical Journal of Australia** of 271 cases seen at the Child Guidance Clinic of that hospital. Seventy six per cent had organic central defects and twenty four per cent had psychological causes.

584 Dr Ellard was of the view that the issue of "separation" and its effects on child development entered psychiatric thinking in the 1950's. It was associated with Dr John Bowlby. There is some support for this view since the Child Welfare Department Annual Report 1952 commences with a reference to the report of Dr Bowlby. Indeed that Child Welfare Report indicates the Child Welfare Department was keeping itself abreast of learning and thinking in relation to children including overseas developments. Dr Jennings (from one of the Clinics) gave a lecture on "separation" at a WHO seminar in 1953.

585 Dr Ellard believed that information in relation to "separation" became available to the psychiatric community in the 1950's. I would add that this view is not to deny that there were materials dealing with the subject that had been published before in the 1940's. I believe that the point sought to be made is that it rather became part of general psychiatric knowledge in terms of significance only after Dr Bowlby's views were expressed.

586 As regards the general issue of separation, Dr Ellard said that it came into psychiatric prominence after Dr Bowlby's works. He did not think that before then it was really discussed in Australia. As regards the matter of Borderline Personality Disorder, Dr Ellard accepted it was related to a very difficult upbringing, but there could be another component in the complex disorder - cerebral organic disorder.

587 Dr Ellard considered that the focus of child psychiatric practice was the Child Guidance Clinic. Dr Ellard considered that child psychiatry was not an organised and prominent speciality in New South Wales until the 1960's, and that there were not many child psychiatrists (a view which seems to have some support in the evidence).

588 In his letter of 19 April 1999, Dr Ellard expressed a number of views from a perusal of the available material particularly from Fraser House (North Ryde). The first was that the diagnosis of Borderline Personality Disorder at that time was "appropriate". I should add this was not in terms the diagnosis at the time. According to Dr Waters' evidence, it was his view in retrospect, or at least by description reached by later changes in psychiatric nomenclature, and later criteria for such diagnosis that the plaintiff had a Borderline

Personality Disorder. Secondly, Dr Ellard said, on the basis of the plaintiff's assertions and history that the plaintiff's environment at Lutanda "was destructive" and that her experiences there would be a substantial part of the causation of her Borderline Personality Disorder. There was no evidence everyone who went to Lutanda developed "Borderline Personality Disorder". Dr Ellard also had regard to allegations of sexual assault made on the plaintiff's evidence.

589 As to these matters I have found that the plaintiff's evidence should be rejected in terms of sexual assaults and of her description of Lutanda. I reject Dr Ellard's view that the environment at Lutanda was "destructive" for the reasons stated, and not supported by my findings.

590 He also said not everyone subject to a disadvantaged early environment would develop a Borderline Personality Disorder. In fact (there is no evidence any Lutanda child resident did so. Indeed, he said that some children can without early deprivation developed the condition later in life. Many Borderline Personality patients also moved out of it. He accepted that the diagnosis of Borderline Personality Disorder was not "now" in relation to the plaintiff an appropriate conclusion. It had remitted a decade ago He did not state that any disorder had been present or had manifested in the plaintiff before 1962. He said the plaintiff's present "psychosis" could have a number of explanations, perhaps more than one, including chronic schizophrenic illness, intermittently felt for decades, undiagnosed physical disorder (marked weight loss), the use of prescription medicine since 1991 and drug abuse.

591 The text, **"Menders of the Mind"** (A History of the Royal Australian and New Zealand College of Psychiatrists, 1946-1996) reveals a history in Australia including the following matters.

592 In 1946 an Association of Psychiatrists was formed. Professor Dawson was elected President. Three of the primary psychiatrists were women including Dr Sebire. Over the years there was an increase in numbers to 208 members by 1956. The early stance and outlook of the Association differed widely "from that which the Society would be likely to adopt today" in that its earlier stance involved a judgmental stance closely linked with notions of exigencies. In May 1950 most psychiatrists welcomed the continuing growth of psychiatrist numbers which was welcomed because most psychiatrists were seeing Australia as containing "a vast amount of untreated psychiatric disorder". Even as at 1981 the history records show an imbalance between psychiatrists in general practice in all specialities with all sub-specialities being seriously "short of manpower". The increase in psychiatric numbers had been uneven. As at 1981 fifty one per cent of psychiatrists in Australia were employed in the public sector. Indeed, in 1981 the report showed in most states the majority of children and adolescents with psychiatric disorders were seen in the public sector. There was said to be no obvious remedy for the imbalance.

593 In a further report Dr Ellard addressed the question "of what should have been done". I quote:

"By the middle of the century any reasonable adult with common sense would know that it was better to grow up in a loving home than in an institution. One did not need to be a psychiatrist to realise that. Granted that, it did not follow that every child in an orphanage was a candidate for intensive psychiatric treatment, even if it were apparent that the plaintiff needed it when she began to cut herself at the age of 8."

(I have also rejected the plaintiff's claim of cutting herself at Lutanda at any time.)

"The full significance for early deprivation did not become generally realised until the publication of Dr Bowlby's first book as described in my report of 12/4/99.

In the environment in which she was, her behaviour may well have been attributed to sin, rather than unhappiness."

(I have already made findings as to the situation at Bomaderry and more significantly at Lutanda. Her behaviour was not attributed to sin.)

"Again, even if the advised management had been available, there is no guarantee that it would have been successful. My previous report gave a general picture of the resources at the time - they scarcely existed. It being noted that the College's Manpower Committee Report of 1981 stated that all the subspecialties were seriously short of manpower, even more so in rural areas, and it further being noted that the Child Psychiatry Section concluded that in 1982 there was "a severe and critical shortage of child psychiatrists in Australia which would take 15 to 20 years to remedy the situation", the state of affairs in mid century can be seen in perspective.

The chance of the kind of psychotherapy described in the affidavits being made available to a child in an orphanage in the Blue Mountains did not exist"

State of Knowledge

594 The plaintiff does not as I understand it advance a case, nor could she, that the Board was under a duty to exercise a higher degree of skill or skill such as that of a psychiatrist, psychologist or social worker: see **X (Minors) v Bedfordshire County Council** [1995] UKHL 9; [1995] 2 AC 633 per Lord Browne Wilkinson at 766.

595 The plaintiff's argument in a general way also advanced (at T 39) is that it was clear to the Board or ought to have been clear to the Board, as it was clear to other government departments, that "the position and relationship between a child and parent or parent figure was vital to the emotional well-being of a child".

596 For the defendant it was submitted that there was a distinction between state of knowledge to be expected from, for example, medical practitioners who may have thought that children in institutions had a propensity to develop personality disorders and knowledge of such by a lay body such as the AWB. The defendants argued that it would not be appropriate to suggest that the Board would have the kind of psychiatric knowledge that is suggested in the affidavits of Dr Katz or Dr Waters or the kind social work knowledge contained in the affidavit of Mrs Bull. It was said that it was unrealistic to expect that a Board of "lay people" would have had that same knowledge. Further it was contended that in any event there was a "yawning gap between the evidence in relation to state of knowledge and the reasonable expectations (having regard to other obligations and responsibilities under the Act) that could be had about a government Board of that kind".

597 Next, it was submitted by the defendants that, relevant to the most recent amendments pleaded in the further amended statement of claim, the standard of knowledge, even of an expert, was not necessarily to have read "all the literature".

598 Having regard to the massive amount of material put before me, and to Dr Ellard's evidence on the subject of literature, materials, articles and knowledge, I can well

understand, the defendant's submission. Mr Barry relied upon the decision of Cox J in **Gower v State of South Australia & Perriam** (1985) 39 SASR 543 at 562. His Honour when speaking in the context of a professional negligence case, observed (at 562):

"However it was at a time, when the study of the topic was at its early stages, and a considerable amount of the work was being done in another speciality. The matter had not then entered the general corpus of knowledge of which all experts in the defendant's field could be expected to be aware".

599 In the instant case it is to be remembered that the Board had responsibilities extending beyond the custody and maintenance of the children of Aborigines. That said it had special duties for their custody and maintenance. It cannot avoid having knowledge or being imputed with such knowledge that goes with the discharge of such duties. It would also have acquired knowledge through differing expertise of members of its own Board (s 4), and from dealing with other government departments. These remarks still leave open the question of what requisite knowledge was known or reasonably required to be known, at different times during the period with which I am concerned.

600 For the plaintiff it was argued that the state of knowledge during the relevant period regarding the conditions which were necessary to permit a child's personality to develop, appears from evidence of text books and other publications in the public domain during the relevant period, evidence from practitioners who worked in the field of child guidance or child psychiatry at the relevant time, including Dr Katz and Mrs Bull, and Government publications such as Annual Reports of the AWB, the Child Welfare Department, and the Department of Public Instruction and Health.

601 The plaintiff submits that based on the available information, the methods at Lutanda were at odds with learning on child psychology as to how a child who had been subjected to total maternal deprivation (including at Lutanda) should be cared for, and that the State should have been aware that many institutions were not staffed or had no training in "modern child psychology".

602 The plaintiff asserts that the learning stressed the importance of parental and significant bonds in the development of children which tended to be absent in children in institutions; the fact that absence of these bonds manifested itself in behavioural problems of children; that unless steps were taken to address such problems the child was likely to be harmed; and that there were means available of addressing such problems through free State Child Guidance Clinics.

603 The plaintiff asserts that the effects of maternal deprivation were referred to in the literature and that there was, in effect, a responsible body of educational thinking on the subject not only in the 1950's and 1960's but also in the 1940's. As I have already indicated, it is not suggested by the plaintiff (and it could not really be so) that the AWB was under a duty to exercise a degree of skill of professional persons such as psychiatrists, psychologists, social workers or others in the field. As I understand it, it is rather put that the Board had by the 1940's and 1950's access to a state of knowledge giving effect to such professionals' views similar to or the same as psychiatrists, psychologists, social workers and those involved in the child care field.

604 As to the state of knowledge, particularly significant is the reference made in the 1952 Annual Report by the Minister of Education (the Minister in charge of the Child Welfare Department) to Dr Bowlby's report to World Health Organisation ("WHO") in 1951

"Maternal Care and Mental Health". Both parties' experts have referred to Dr Bowlby's prominence in the field. I have already referred to it at some length but return to it again because of the importance also to be attached to his views in terms of "state of knowledge". Indeed, I have found his report to be a most helpful document in terms of setting forth the state of knowledge as at the time of its publication in 1951.

605 The plaintiff alleges that the Board had access to the relevant state of knowledge through the Department of Education and Public Instruction which were based upon and run in accordance with the then state of knowledge regarding the child's personality. She alleges that they had access to such knowledge since 1936. The Child Guidance Clinics as I have said grew from the School Medical Service: see Annual Reports of the Department. Next, it is said, there was knowledge available to the Board through the Child Welfare Department "which regarded itself as essentially concerned with the protection and care of children where homes are non-existent or inadequate and which safeguards their education and general welfare": see the Annual Reports.

606 The plaintiff, relying upon several matters, asserts that the relevant knowledge was available to the Board. Subject to the question of what the knowledge was and when it was known I believe that the Board would have had knowledge that the Education Department and the Child Welfare Department would have had. First, the AWB was an instrument of the Crown. Next, as will be seen the 1940 amendments to the Act gave effect to Public Service recommendations including recommendations that there should be appointed to the Board persons with certain qualifications and knowledge and full use was to be made by the Board of specialised services available to the Department including the Child Welfare Department. Third, the Act, amended in 1940, required that officers from the Department of Health and Public Instruction were to be appointed, and in fact were appointed to the Board; the Minister for Instruction (Education) had responsibility for the Child Welfare Department and the AWB through its ex-officio board member of the activities of both departments; and the Annual Reports of the AWB make reference to assistance to the Board by other Departments. Fourth, there was a relationship between the **Child Welfare Act** and the **Aborigines Protection Act** in that the Children's Court exercised functions under both. Action taken in respect of adoption of children under the Board's control involved action under the **Child Welfare Act** and liaison with the Child Welfare Department. Again there was regular communication between the Board and the Child Welfare Department. The Board sent its welfare officers (eg Mr Felton) to a course on Child Welfare conducted by the Child Welfare Department. There is also some evidence of some wards of the Board being sent by the Board to Child Guidance Clinics at least in the 1950s. Finally, the Act makes reference to the **Child Welfare Act** and to Children's Court powers under the **Child Welfare Act**. For all these reasons I am disposed to accept these arguments of the plaintiff on the issue of knowledge as being knowledge of the Board, still leaving to be resolved the question of what state of knowledge was known or ought to have been known particularly before 1951.

607 I have carefully considered the rival submissions of the parties as to state of knowledge. The matter is not in my view simply to be seen in terms of the same state of knowledge before 1951 and same state of knowledge thereafter. I have carefully considered the materials but have concluded that in determining the state of knowledge question, considerable significance should be given to the timing of Dr Bowlby's WHO report, "**Maternal Care and Mental Health**" and to the views of Dr Bowlby on the development of knowledge, to which reference has been earlier made.

608 The evidence would suggest that the Child Welfare Department quickly became aware of Dr Bowlby's monograph shortly after its publication. Having regard to the evidence, I am prepared to accept that at the same time as the Child Welfare Department acquired knowledge of that report and the thrust of it, so probably did the AWB, at least it ought to have done so. In the Annual Child Welfare Department Report (1952) the conclusion of Dr Bowlby was stated under the heading "Dependent Children". This report would suggest that the Child Welfare Department was keeping and had kept pace with contemporary knowledge. The Child Welfare Department however noted by way of reporting that world authorities were placing more and more emphasis on home values and keeping the child in the home environment and in the home circle (the thrust it appears to me of the Bowlby report). It reported if home conditions were impossible, adoption or foster home care, in that order, "was the next best thing". That said, it was also reported (a matter relevant to reasonable care standards in the 1952 New South Wales community) "that the public at large still nourish the outmoded method of institutional care", at that time. The report acknowledged that there were difficulties in finding suitable homes for fostering, that fostering was not alway available, and that some children were not suitable for fostering.

609 I am satisfied that the Board (for reasons including close relationship with the Child Welfare Department) was or ought to have been aware of Dr Bowlby's report in 1952. His conclusion in 1951 was stated in the Report as follows:

"The proper care of children of a normal home life can now be seen to be not merely an act of common humanity, but to be essential for the mental and social welfare of a community. For, when their care is neglected, as happens in every country of the Western world today, they grow up to reproduce themselves. Deprived children, whether in their own homes or out of them, are a source of social infection as real and serious as are carriers of diphtheria and typhoid. And just as preventive measures have reduced these diseases to negligible proportions, so can determined action greatly reduce the number of deprived children in our midst and the growth of adults liable to produce more of them.

The break-up of families and the shunning of illegitimates is accepted without demur. The twin problems of neglectful parents and deprived children are viewed fatalistically and left to perpetuate themselves."

610 As to the Board's knowledge of Dr Bowlby's report and of the views of the Child Welfare authority there can be little doubt. In a letter from the AWB to the United Aborigines Mission (17 September 1952) and signed by Mrs English, an inspector of the Board, the following passage appears:

"The policy of the Aborigines Welfare Board in relation to the maintenance and training of Aboriginal children favours the system of boarding-out, rather than placing them in an institution. It is felt that the aboriginal child reared as an integral part of a family, either white or aboriginal, gains a better chance of ultimate assimilation. In any case, training as one of a family group has a more beneficial effect on the character building of the child than the conditions of life usually associated with an institution".

611 Thus I infer that the AWB from the time of receipt of Dr Bowlby's report in Australia was aware of his views. That still leaves extant the matter of the Board's knowledge (actual or constructive) before the publication of Dr Bowlby's monograph in 1951. To some extent the Board's knowledge is also partly dependent upon the knowledge of such bodies as the Child Welfare Department.

612 It is to be remembered that the plaintiff was born in 1942, well prior to the 1951 report. The extract from pp 11-12 of Dr Bowlby's report (see earlier) is revealing as to the state of knowledge in respect of the quality of mother (or permanent mother substitute) care. I accept it reflects the state of knowledge situation as well and the evolving of views in the 1940's ie "in the past decade".

613 It is appropriate, apart from noting again the earlier references in Dr Bowlby's report to the development of evidence during the "past decade" and to "new knowledge", to observe that Dr Bowlby's basic principle is stated in somewhat general terms. There is in the proposition a degree of vagueness and imprecision in its scope and content. It is difficult to see how it could be regarded as being a statement giving rise to some type of legal duty to implement such either by a parent, particularly a mother in relation to a child or even a mother substitute. There is reference to the notion of "mutuality". How and by what means such mutuality can be achieved is not addressed. Some of the views are not really clarified and his terms are not readily defined. In an event the finding of a "permanent mother substitute" is also not something that is readily apparent in terms of how it may be reasonably or practicably achieved.

614 I accept that prior to the report of Dr Bowlby (ie including in the 1940's) the general components of knowledge contained in his report were in effect still evolving for those persons, parents or authorities responsible for child care generally and even for those expert in the area.

615 His views emphasised home values and the retention of the child in the home environment. Under the heading **"The Purpose of the Family"** he said (at p 67):

"The demonstration that maternal deprivation in the early years has an adverse effect on personality growth is a challenge to action. How can this deprivation be prevented so that children may grow up mentally healthy?

It was said at the beginning of the first chapter that what is believed to be essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or mother-substitute), in which both find satisfaction and enjoyment. The child needs to feel he is an object of pleasure and pride to his mother, the mother needs to feel an expansion of her own personality in the personality of her child: each needs to feel closely identified with the other. The mothering of a child is not something which can be arranged by roster; it is a live human relationship which alters the characters of both partners. The provision of a proper diet calls for more than calories and vitamins: the need to enjoy our food if it is to do us good. In the same way the provision of mothering cannot be considered in terms of hours per day but only in terms of the enjoyment of each other's company which mother and child obtain.

Such enjoyment and close identification of feeling is only possible for either party if the relationship is continuous. Much emphasis has already been laid on the necessity of continuity for the growth of a child's personality. It should be remembered, too, that continuity is necessary for the growth of a mother. Just as the baby needs to feel that he belongs to his mother, the mother needs to feel that she belongs to her child and it is only when she has the satisfaction of this feeling that it is easy for her to devote herself to him. The provision of constant attention day and night, seven days a week and 365 days in the year, is possible only for a woman who derives profound satisfaction from seeing her child grow from babyhood, through the many phases of childhood, to become an independent man or woman, and knows that it is her care which has made this possible.

It is for these reasons that the mother love which a young child needs is so easily provided within the family, and is so very very difficult to provide outside it. The services which mothers and fathers habitually render their children are so taken for granted that their magnitude is forgotten. In no other relationship do human beings place themselves so unreservedly and so continuously at the disposal of others".

616 This was the view of Dr Bowlby in 1952. In terms of state of knowledge those involved in the welfare of children without parents would then have had knowledge of such as did the Child Welfare Department, and, I infer, also the Board.

617 The United Nations Department of Social Affairs (1952) in its report **"Children Deprived of Normal Home Life"** referred to Dr Bowlby's report. It recognised that it was generally accepted that the best environment for a growing child was a "normal home". The United Nations 1952 report acknowledged that long term care was nevertheless provided in both foster homes and in institutions, and the latter was a traditional method of long term care. The report concluded:

"100. Institutions may be organised on a closed or open basis. In the closed institution all activities, including education, take place within the institution and the children have little, if any, contact with the outside world. In open or semi-open institutions the children usually attend local schools and have some other ties with the local community. In general authorities in all countries agree that children in institutions should be permitted to have as much communication with the outside world as possible."

618 In the instant case, the "open institution" was the situation at Bomaderry and Lutanda. As to the state of knowledge in the 1940s I also generally accept the views of Dr Ellard. He was in Australia in the relevant period and was well qualified to express views as to the position in respect of Australian psychiatric knowledge and standards. His evidence also however supports the state of knowledge urged by the plaintiff after receipt into the Australian Community of Dr Bowlby's 1951 WHO report. That is a different matter. I also have regard to **"Menders of the Mind"** supra and accept the contents of the history contained in the text as to the general state of psychiatry in this country indeed in New South Wales in that period. Much of Dr Ellard's evidence is consistent with that history, including his views that discussion of attachment became prominent after Dr Bowlby's report.

619 Next, in terms of state of knowledge at 1942 Professor Dawson (**"Aids to Psychiatry"**) whilst discussing the subject of "psychiatric examination of children" and mental hygiene appears to have made no reference to the matter of maternal deprivation or attachment in terms or even under a different nomenclature (p 313). Dr Ellard made the point that Professor Dawson did not place any emphasis on matters of separation or attachment in his 1942 book. On the material tendered before me, that appears to be generally the situation.

620 It is worth repeating that Mrs Buxton (of Lutanda) gave evidence (at T 406-407) that she went to Lutanda when she was 25 in about 1952. She said in cross-examination she was a qualified nurse having general, midwifery and infant welfare certificates. Infant welfare concentrated on the care of babies from birth to kindergarten age. In respect of her training Mrs Buxton, a very fully trained nurse with considerable practical experience in tending to and caring for children, said in cross-examination by Mr Hutley for the plaintiff (at T 407):

"**Q.** Were you lectured upon the importance of the mother/child bond?

A. It was mostly difficult feeders and the care and feeding of the infant more than mothering bond. That wasn't recognised, I don't think, for some years after that, the very great importance of a mothering bond. Certainly not in my training time.

HIS HONOUR:

Q. Were you lectured in it?

A. Was I lectured in that? Not that I recall

Q. Were you lectured in situations where, for example, no mother, for one reason or another, was available ---

A. Not that I recall.

Q. -- to look after the child?

A. No, your Honour. We were lectured more on the health of the infant and the feeding of the infant. It was Truby King form of training, in which we were lectured in the feeding of the infant more than the mother/child relationship and we had children in that place that were removed from their mother because they were difficult feeders and so on. We didn't have psychology lectures or those sort of things in our course." [my emphasis]

621 She was a lady well qualified to speak. She is a practical experienced nurse and child carer, whose evidence on state of knowledge I accept as well.

622 To summarise, in terms of state of knowledge of psychiatrists in the 1940's with respect to issues of parental care, bonding, attachment and disorders, maternal care and associated issues, I accept the evidence of Dr Ellard. In terms of nursing and training of nurses in infant welfare I accept the evidence of Mrs Buxton from Lutanda. I also accept the position in the 1940's as to Australian psychiatry as that being stated in the documentary material including Professor Dawson's works on these matters. I prefer their evidence to that of Dr Waters (who did not qualify in medicine till 1977), or that of Professor Katz who came from South Africa to Victoria in 1960 and to Sydney in 1964 (after the relevant period of events). No child psychiatrist was called by the plaintiff in respect of that period.

623 It would appear to me that the views and material I have accepted as to state of knowledge in the 1940's generally accords with those which are described as evolving in Dr Bowlby's WHO report.

624 In my view the relevant state of knowledge began in 1951 after Dr Bowlby's report, and I have found that the AWB was aware of it.. That said I would find it difficult to see how it could provide a reasonable basis for finding a duty, let alone a breach of any duty based upon it, and particularly before its publication.

A brief history of Aborigine Protection Legislation and Background to 1940 and 1943 Amending Legislation:

625 The Act of 1909 covered an area far more extensive than that covered by the **Child Welfare Act 1939**. It is appropriate if I set forth a brief history of legislation and regulations for the protection of Aborigines. Such history will also provide some understanding of the

then current values and standards as well as community attitudes, as they are reflected from time to time, by the community through its elected members of Parliament. The annual reports of the Aboriginal Welfare Board to which I will also refer, fall into a similar category of reflecting community attitudes as well as providing some assistance and understanding of contemporary views, values and standards. They also show that Governments, the Parliament, and the Board had a long history of activity in the area of securing the protection, welfare and advancement of Aboriginals.

626 In particular in the Aborigines Protection Report and in Recommendations of the Public Service Board of New South Wales tabled in Parliament in 1940 ("PSB Report"), there is to be found much information and history (including legislation) of dealings with the aboriginal community. I shall deal with it and at the same time consider in greater detail the relevant legislation. The report itself led to amendments to legislation dealing with aborigines in 1940. That report has been tendered in evidence. It was tabled two years before the plaintiff was born.

627 The PSB Report commenced by indicating that on 16 June 1939 (just before Word War II broke out and towards the end of the Depression years) the relevant Minister, the Chief Secretary, stated that he was concerned with regard to the question of the protection and development of the aboriginal population of the State and that it was "the desire of the Government to give early consideration to the matter generally with the object of ensuring that the best arrangements in the interests of all concerned are made". The then significant Public Service Board agreed to undertake the investigation. The Board detailed the inquiries it had made which included consideration of evidence given before the Parliamentary Select Committee appointed in November 1937 to inquire into the administration of the Aborigines Welfare Board. It also had regard to the proceedings of conferences and inquiries held in New South Wales and elsewhere including the provisions of legislation in other States and countries. It should also be noted that in 1937 the Commonwealth/State conference had established a national policy of assimilating Aboriginal people into the broader community. That was the Australia policy then, no doubt perceived to be appropriate despite its clear lack of acceptability by modern contemporary standards and values.

628 The report revealed that in 1881 the Government appointed a Protector of Aborigines who was accommodated in the Chief Secretary's Department to distribute "necessary aid". In 1883 a Board of Protection was established. The Aborigines Protection Board functioned without statutory force till 1909 when the **Aborigines Protection Act 1909** was passed.

629 The **Aborigines Protection Act 1909** was passed to provide for the protection and care of aborigines. "Aborigine" was initially defined to mean "any full blooded aboriginal native of Australia and any person apparently having admixture of aboriginal blood who applies for and is in receipt of rations or aid from the Board or is residing on a reserve". (The Act was subsequently amended in 1936 to define "aborigine" as meaning "any full-blooded or half-caste aboriginal who is a native of Australia and who is temporarily or permanently resident in New South Wales"). Under the 1909 Act the "Board for Protection of Aborigines ("APB") was established consisting of the Inspector General of Police and ten members. The Board was designated as the authority for the protection and care of aborigines. Under s 7, duties or a number of duties were imposed on the Board. One duty under s 7(c) was to provide for the "custody, maintenance and education of children of aborigines". Under s 7(d) a duty was also imposed to exercise a general supervision over all matters affecting the interests and welfare of aborigines. To advance a ward's interests,

pursuant to s 11, the Board could also apprentice a child of any aborigine, or neglected child of any person apparently having an admixture of aboriginal blood. The words "neglected child" were given the same meaning as assigned to them in the **Neglected Children and Juvenile Offenders Act** (a predecessor of the **Child Welfare Act**. What is clear and will become clear is that historically, aboriginal children and non-aboriginal children were treated differently and covered by different regimes of child welfare. Regulations under the Act were made in 1910 and were not substantially altered as at 1939.

630 In 1916 the APB, which then consisted of eleven members including four members of Parliament, was reconstructed by replacement of the ten member board by a Board comprising the Under Secretary of the Chief Secretary's Department, the Director General of Public Health, the Chief Inspector of Schools, a member of the Legislative Assembly and others. The point is that a variety of relative Government Departments were given representation with an opportunity for their views and interests (including from the Departments of Health and Instruction) to be reflected in Board policy and decisions. Parliament too was represented as I have observed.

631 The PSB Report (1940), revealed that as at the time of reporting, there were three members of the Legislative Assembly on the APB and one member of the Federal House of Representatives.

632 The PSB Report 1940 summarised the then powers and duties of the APB as including powers and functions:

"(III) to provide for the custody, maintenance and education of the children of aborigines and welfare of aborigines and;

(XI) it may assume full control and custody of the child of any aboriginal, if after due inquiry, it is satisfied that such a course is in the interest of the moral or physical welfare of the child".

633 The PSB Report stated that it was estimated that 10,593 aborigines were subject to the provisions of the Act comprising "849 full-bloods and 9,744 half-castes etc".

634 Also noted was that whilst the number of full-bloods was gradually reducing, the number of persons within the Aborigine Board administration was increasing. At page 12 of the PSB's report (p 1438) the following appeared in terms of identifying "the problem":

"Shortly the problem to be faced today is the method to be adopted in dealing with what the man in the street probably considers to be the problem, viz those persons with a preponderance of aboriginal blood but with a constantly increasing number of persons who are half-castes, or who have a lesser proportion of aboriginal blood". [my emphasis]

635 It also reported that it appears to be "the consensus of opinion of those best qualified to speak that the only satisfactory solution of the problem is so to mould the administration so as to ensure as early as possible, the assimilation of these people into the social and economic life of the general community". [my emphasis].

636 I have underlined various passages to highlight what was perceived to be the problem and solution to the problem in accordance with the contemporary values and standards of the times, beginning in the 1940's.

637 The PSB noted and agreed that a considerable part of the difficulty associated with the problem was caused by the "then antipathy of the fully white community to those possessing aboriginal blood". The current contemporary word to describe such might be fairly called straight out "prejudice". The point is that the Board and the political leaders were addressing the problem against this background of antipathy and prejudice according to the perceived standards of the time. The matter identifying and resolving problems was clearly not easy against this background. The PSB felt that before the problem, including the antipathy, could be overcome, every effort should be made to utilise the services of public-minded citizens and to obtain the organised interest "of the churches in the aborigines". [my emphasis]

638 The PSB report also discussed the assistance then being rendered by the State to Aborigines. It noted that in relation to schools the then present system of education of children left much to be desired and made a number of recommendations including that the Department of Public Instruction gradually take over the education of children, working closely with the Aborigines Protection Board. The Board commented that there was room for more social work amongst Aborigines than at present (there was a shortage of staff) including co-operation with inspectors of the Child Welfare Department.

639 The PSB observed that the Aborigines Protection Board's efforts had largely been confined to the improvement of conditions of life of persons within its control. The PSB was sympathetic with the APB in the difficulties it was experiencing in its work. The Board it was said had endeavoured whilst providing improved conditions to carry out duties in "a manner most economical to the Government". The members of the Board (occupying responsible public positions) were "all honorary".

640 The PSB expressed the view that whatever was done to re-constitute the Aborigines Protection Board, the "Board form of control at present existing is the correct one". They nevertheless suggested that a person who was an expert in sociology "the science of social relations" and/or anthropology (the study of characteristic cultures etc of mankind)" should be appointed to the APB.

641 The PSB made other recommendations including (p 28) a greater use of the powers conferred on the APB to assume control and custody of the child of an aborigine if, after due inquiry, it is satisfied that such a course is in the interest of the moral and physical welfare of the child.

642 I turn to the summary of the Public Service Board's views and recommendations (p 30) based upon its inquiries. Such presumably also reflected contemporary views, standards and thinking. They may not be correct or enlightened by today's contemporary values and standards. That is not the point. The recommendations were significant, and legislative changes in 1940 policy are also to be seen against such background. These are the significant changes of relevance that were recommended:

(a) The ultimate aim of the administration should be the gradual assimilation of aborigines into the economic and social life of the general community.

(b) Recommendations to change the Board to include representatives of the controlling Department (the Chief Secretary's), the Department of Education and Health, an expert in social or anthropological work, an executive member to be the principal officer of the Board staff devoting full time duties to the task.

643 I would observe in passing that in the PSB's report there was no mention of fostering children out as a recommendation. The Act as it then stood conferred no power in terms of fostering out children who were wards under the Act or at all. Likewise there was no provision, at least in express terms, in respect of the matter of adoption of Aboriginal Children or children of Aborigines.

644 In respect of staff organisation it was recommended that the Act be altered to bring all employees under the one control, the **Public Service Act**.

645 Turning to the matter of facilities, the PSB observed that the maintenance of an institution such as Kinchela a training home for boys run by the AWB, was "essential" with some reorganised methods. The same view applied in respect of the girls' training school at Cootamundra. No recommendation was made in respect of Bomaderry. The Board recommended statutory changes. Some of these significant changes were taken up by the legislature in 1940. Before turning to these amendments I would note that in 1936 a number of amendments were made to the Act including the powers to arrange and monitor apprenticeships without the consent of child or parents, and other amendments were made touching upon the position of children and their families: ss 13 and 13A.

The Assimilation Policy and Legislative Amendments of 1940

646 The **Aborigines Protection (Amendment) Act No 12 1940** (assented to in June 1940) contained some significant amendments. The 1909 Act, as amended by the 1940 provisions, was the Act on foot at the time of the plaintiff's birth on 17 September 1942. After her birth significant legislative changes were further brought about by the 1943 legislation, to which I will refer in due course.

647 As I have said, the 1937 Commonwealth-State conference established a national policy of assimilating aboriginal people into the general community. The 1940 report of the Public Service Board made a similar recommendation. The legislation was passed to accord with and, inter alia, to reflect those aims. Indeed, not only did this legislation have a historical context it also presumably reflected and gave effect to the contemporary values and views, standards and attitudes of Parliament representing the New South Wales community.

648 New duties were imposed upon the constituted AWB including under s 7(1)(a), a duty of that Board:

"(a) to apply moneys voted by Parliament or funds in its possession for the benefit of aborigines or otherwise for the purpose of assisting aborigines to become assimilated into the general life of the community".

649 Whatever may be thought today of that duty and the policy behind it, the fact is that Parliament imposed it upon the Board, and the Board had a duty to implement that which was set forth in s 7(1)(a). The policy of assimilation as earlier discussed was given statutory emphasis by Parliament.

650 In **Aborigines Welfare Board v Saunders** (1961) NSWR 917, Walsh J (at 922) came to the conclusion that the powers granted under the 1909-1943 legislation placed the AWB in the same category of a body independent of the Government with powers and functions in relation to which it acted with a substantial degree of independence and in accordance with its own discretion. The functions entrusted to the Board were considered

to be of the kind normally to be regarded as falling within the province of Government.

651 In respect of s 7(1)(c), it is important to observe that in 1940 the earlier sub-section was amended so that the words of the sub-section read "custody and maintenance". The duty of education was removed. This was a significant change and relevant to the relationship between the plaintiff and the Board. The removal of that duty to provide for education was not noted in **Williams [No 1]** and the remarks of Kirby P at 511 that the Board "was in the nature of a statutory guardian" should be perhaps considered in context of his Honour's "assumption" that there was also a duty to provide education in s 7(1)(c). Perhaps the removal of the duty to educate was done to give effect to the PSB's recommendation that Aborigine children should be educated and absorbed into ordinary schools. However, one cannot be certain about this.

652 Other amendments included the abolishment of the Board for Protection of Aborigines and the reconstitution of the Aborigines Welfare Board ("the AWB"). The Board was reconstituted to consist of eleven members, with the chairman being the Under Secretary of the Chief Secretary's Department. The Board was to consist of one each from the Department of Public Instruction (the precursor of the Department of Education with the Minister also being the relevant Minister for Child Welfare as well) the Department of Public Health. Other members included a member of the police force, the Superintendent of Aborigines Welfare, one an expert in agriculture; one an expert on "sociology and/or anthropology; and three persons appointed by the Minister.

653 At the time a new definition of "child" was introduced providing that "child" meant an Aborigine under 18 years of age. A new definition of "ward" was introduced. "Ward" meant a child who has been admitted to the **control of the board** or committed to a home constituted and established under s 11 of the Act [my emphasis]. This definition and its meaning has given rise to considerable argument and discussion in which "ward" was given a statutory meaning for the purposes of the Act. There was no reference to or definition of a guardian in s 3. A child became a ward only when the child has either been admitted by the Board to its control under (s 7(2)), on the application of the parent or guardian; or committed to a home constituted and established under s 11 of the Act (a "committal" by a Children's Court established under the **Child Welfare Act** under s 13A(1) of the Act). As to the nature of wardship and wardship proceedings, and whether care and control is but one aspect of custody, and whether custody is co-extensive with guardianship; see **Wedd v Wedd** [1948] SASR 104; **Fountain v Alexander** [1982] HCA 16; (1982) 150 CLR 615 at 626.

654 I would note in passing that s 5 of the amending Act of 1940 provided that the Governor might, under the **Public Service Act 1902**, appoint a Superintendent of Aborigines Welfare "and such other officers and employees as may be necessary for the administration of the Act, with such persons being subject to that Act during tenure".

655 In 1941, Regulations were made pursuant to the provisions of the Act to take effect from September 1941. The Regulations dealt with a number of matters, see Exhibit A5 (pp 1380-1386). Further Regulations were made in May 1942. In May 1943 a Regulation was made providing for travelling allowances to members of the Board.

The Provisions of the Aborigines Protection Act 1909 - 1943 (A summary as at 1943)

656 The **Aborigines Protection Act 1909** was next amended by the **Aborigines**

Protection (Amendment) Act 1943. The plaintiff was born in 1942 before these amendments including those permitting fostering out and those amending the provisions of s 11D. The 1943 amendments did not resolve what might be regarded as the somewhat obscure status of the AWB with respect to wards. The 1940 legislation was somewhat silent as regards the Board's position. The fact that the duty to educate was dropped in 1940 and amendments passed in 1943 might militate against the view that a guardian-ward relationship or even one in the nature of a statutory guardian was created or intended.

657 A consolidated version of the **Aborigines Protection Act 1909**, as amended, applicable in the period from 1942 to 1960 inclusive, may be found in Volume 1 of the **New South Wales Statutes 1824-1957** (Red Statutes). The language of the Act is obscure in terms of identifying the legal status and legal relationship between the AWB and a ward. Under the **Aborigines Protection Act** there is no similar analogous, or counterpart provision to s 9 of the **Child Welfare Act 1939**, whereby the Minister became a guardian of any child or ward. Next, no definitions of "guardian", "care or "maintenance" appear in the **Aborigines Protection Act**. The relevant provisions of the **Aborigines Protection Act 1909-1943** (as at 1943) may be summarised:

(i) Section 3 defines "aborigine" to mean any full-blooded or half-caste aboriginal who is a native of Australia and who is temporarily or permanently resident in New South Wales.

(ii) Section 3 defines "Adopted boarder" to mean, inter alia, a child allowed by authority of the Aborigines Welfare Board to remain a foster parent.

(iii) Section 3 defines "boarded-out" to mean placed in the care of some foster parent for the purpose of being nursed, maintained, trained or educated by such person or in such person's home.

(iv) Section 3 defines "child" to mean an aborigine under 18 years of age.

(v) Section 3 defines "foster parent" to mean any person with whom any child is boarded-out or placed as an adopted boarder.

(vi) Section 3 defines "reserve" to mean an area of land reserved from sale or lease under any Act dealing with Crown lands or given by or acquired from any private person for use of aborigines.

(vii) Section 3 defines "stations" to mean stations on reserves.

(viii) Section 3 defines "ward" to mean a child who has been admitted to the control of the Board or committed to a home constituted and established under s 11 of the Aborigines Protection Act.

(ix) Section 4(1) creates the Aborigines Welfare Board.

658 As foreshadowed s 4(1) provided that the Board should consist of eleven (11) members, the chairman being the Under Secretary of the Chief Secretary's Department with appointed members being the Superintendent of Aboriginal Welfare, one each from the Department of Instruction (The Minister was the Ministerial head of the Child Welfare Department), and Department of Public Health. The others consisted of a member of the police force above the rank of Inspector; an expert in agriculture, an expert on sociology and/or anthropology, two (2) persons to be nominated by the Minister and under a new sub-

paragraph s 4(vii) two persons who were aborigines at least one of which was to be a "full-blooded" aborigine.

(x) Section 4A(1) provides that the Board shall be a body corporate with perpetual succession and a common seal and that it may sue and be sued in its corporate name.

(xi) Section 7(1)(a) provides, inter alia, that it shall be the duty of the Board to, with the consent of the Minister, apportion, distribute and apply any moneys voted by parliament and any other funds in its possession or control for the relief or benefit of aborigines or for the purpose of assisting aborigines to become assimilated into the general life of the community.

(xii) Section 7(1)(c) provides that it shall be the duty of the Board to provide for the custody and maintenance of the children of aborigines.

(xiii) Section 7(1)(e) provides that it shall be the duty of the Board to exercise a general supervision and care over all aborigines and over all matters affecting the interests and welfare of aborigines, and to protect them against injustice, imposition and fraud.

(xiv) Section 7(1)(f) provides that it shall be the duty of the Board to arrange for the inspection at regular intervals of each station and training school under the control of the Board.

(xv) Section 7(2) provides that the Board may on the application of the parent or guardian of any child admit such child to the control of the Board.

(xvi) Section 11 provides that the Board may establish homes for the reception, maintenance, education and training of wards.

659 Again it may be noted that s 11B(1) permits the plaintiff to be placed in a home pending apprenticeship or employment.

(xvii) Section 11D(1)(a) provides that the Board shall be the authority to admit a child to its control.

(xviii) Section 11D(1)(d) provides that the Board shall be the authority to direct the removal or transfer of any ward, other than a ward committed to an institution.

(xix) Section 11D(1)(e) provides that the Board shall be the authority to, inter alia, board-out or place as an adopted boarder any ward, other than a ward who has been committed to an institution.

(xx) Section 11D(1)(f) provides that the Board shall be the authority to approve of persons applying for the custody of wards and of the homes of such persons.

(xxi) Section 11D(1)(g) provides that the Board shall be the authority to arrange the terms and conditions of the custody of any ward.

(xxii) Section 11D(1)(h) provides that the Board shall be the authority to direct the restoration of any ward (other than a ward who has been committed to an institution) to the care of his parent or of any other person.

(xxiii) Section 11D(1)(i) provides the Board shall be the authority to direct the absolute

discharge of any ward (other than a ward committed to an institution) from supervision and control.

(xxiv) Section 11D(2)(a) provides that the Board may, under s 11D(1), board-out any child to the person for the time being in charge of any charitable depot, home or hostel and may make payments to such person.

(xxv) Section 11D(2)(b) provides that where payments are made in accordance with s 11D(2)(a), an officer appointed for the purpose may, at any time inspect such charitable depot, home or hostel and make such examinations into the state and management thereof and the conditions and treatment of the children and young persons (being inmates thereof) in respect of whom the payments are so made, as he thinks requisite, and the former person shall afford all reasonable facilities for such inspection and examination.

(xxvi) Section 11D(2)(c) defines "charitable depot, home or hostel" for the purpose of s 11D(2) to mean a depot, home or hostel established or maintained by a charitable organisation and used wholly or in part for the purposes analogous to the purposes referred to in s 21(1) of the **Child Welfare Act**.

(xxvii)Section 11D(3) provides that the Board may, on terms, place a ward as an adopted boarder in the care of a foster parent.

(xxviii)Section 11E provides that the Board may remove any child from any charitable institution, depot, home or hostel supported wholly or in part by grants by the Consolidated Revenue Fund and cause him or her to be, inter alia, boarded-out or placed as an adopted boarder.

(xxix) Section 12(1) provides that if any ward placed in a home established under s 11, or any ward placed in employment or apprenticed, is absent without the leave of the Board or a duly authorised officer of the Board, any police officer or officer of the Board may apprehend such ward and convey him to such home or back to his employer.

(xxx) Section 12(2) provides that any magistrate or justice may issue a warrant for the arrest of any ward who has absconded or been illegally removed from his proper custody.

(xxxi)Section 12(3) provides that where any such ward is arrested, he shall be brought before a Children's Court.

(xxxii)Section 12(4) provides that any ward who absconds from his proper custody is guilty of an offence under the Act and such court may order one or more of the methods of punishment referred to in Part II of the Child Welfare Act, 1939 or exercise any of the powers in subs 83(1), (2) or (3) of the Child Welfare Act, 1939 with certain qualifications therein stated; or return the ward to his former custody.

(xxxiv)Section 13A(1) provides that a justice may, upon oath being made before him by an authorised officer of the Board, or by a member of the Police Force, having made due inquiry, if he believes any child to be a neglected or uncontrollable child, issue his summons for the appearance of such child before a Children's Court established under the **Child Welfare Act**, or issue a warrant for the apprehension of the child.

(xxxv)Section 13A(2) provides that any person having the care, custody or control of a child may apply to a Children's Court established under the **Child Welfare Act**, to commit the child to the control of the Board or to a home established under s 11 of the **Aborigines**

Protection Act 1909 upon the ground that he or she is an uncontrollable child.

(xxxvi)Section 13A(3) provides that the expressions "neglected child" and "uncontrollable" are to have the same meanings as under the **Child Welfare Act**.

(xxxvii)Section 13A(7) provides that the provisions of ss 81 and 82 of the **Child Welfare Act 1939** shall apply, mutatis mutandis, in respect of proceedings against the child under s 13A, provided that where the court decides to exercise its power under s 82(d) of that Act, it shall commit the child to the care of the Board to be dealt with as a ward admitted to the control of the Board; and where the court decides to exercise the power under s 82(e) it shall commit the child to a home established under s 11 of the **Aborigines Protection Act 1909**.

(xxxviii)Section 18B provides, inter alia, that in any legal proceedings, if the court does not consider that there is sufficient evidence to determine whether a person is or is not an aborigine, such court, having seen such person, may determine the question according to its own opinion.

(xxxix)Section 18C(1) provides that the Board may, upon application in writing, issue a certificate to any aborigine or person apparently having an admixture of aboriginal blood, who, in the opinion of the Board, ought no longer be subject to the provisions of the **Aborigines Protection Act**, in or to the effect of the prescribed form exempting such aborigine or person from the provisions of the Act.

(xl) Section 19A(1) provides that the Board may, from time to time, by resolution delegate to any person either generally or in any particular case or class of cases, such of the powers, authorities, duties or functions of the Board as may be specified in the resolution, provided that no such delegation shall have any force or effect unless and until it has been approved by the Minister.

(xli) Section 19A(2) provides that a delegate while acting within the scope of any such delegation shall be deemed to be the Board.

(xlii) Section 19B provides that the Board shall, as soon as practicable after 1 July each year, submit to the Minister a report of its proceedings during the preceding year and that the Minister shall cause such report to be laid before both Houses of Parliament.

660 The statute thus provided in s 19B its own machinery for seeing that the statutory purposes and duties were achieved.

661 The amendments to the Act in 1940 (and the earlier provisions) did not in terms permit fostering of a ward by the AWB. Under the new provisions in 1943, fostering was provided for with definitions in s 3 of "adopted boarder"; "boarded out" and "foster parent". Under s 11B(1) the Board could place a ward in a Home for the purpose of being maintained, educated and trained. It may also be noted that s 11A(1) permitted the Board to place a ward into indentures or employment, and to sue for wages for the benefit of the ward (s 11A(4)), but where an apprenticeship agreement or employment agreement was to be cancelled, the Board had to obtain the "approval of the employer or guardian of the ward". [my emphasis] This last provision appears to contemplate, for example, the wardship of a child in another person other than the Board, such as possibly the mother of an illegitimate child: **Lawson v Youngman** (1980) 2 NSWLR 457; **Ex parte Vorhauer; Re Steep** (1968) 88 WN (Pt 1) (NSW) 135.

662 Importantly the new section 11D(1) conferred an authority upon the Board to board out any child to the person for the time being in charge of any charitable depot, home or hostel and to make prescribed payments to them. Whilst such payments were made, that person in charge came under an obligation to afford all reasonable facilities for inspection and examination into the state and management of the charitable depot, home or hostel. "Charitable depot, home or hostel" was defined as meaning a depot, home or hostel established or maintained by a charitable organisation and used wholly or in part for purposes referred to in s 21 of the **Child Welfare Act**.

663 Section 11D(3) conferred upon the Board a right (not a duty), upon terms and conditions prescribed, or as it may in any special case approve, to place a ward as an adopted boarder in the care of a foster parent. Section 11D(4) dealt with limitation on the payment of foster parents. Mere forcing out did not suggest that the child ceased to be a ward. The Act imposed no duty on the Board in the 1943 amendment to seek out and find foster parents.

664 Under s 11E the Board was given power to remove a child from any charitable institution, depot, home or hostel supported wholly or in part by grants from Consolidated Revenue Funds and cause him or her to be apprenticed, boarded out or placed as an adopted boarder.

665 Pursuant to the amendments in 1943, additional regulations were gazetted on 21 April 1944. These included Regulations headed "Boarding-out of Aboriginal Wards Placing of Wards with Foster Parents". Regulation 39 provided that an application for admission of a child to the Board's control as a ward should be in accordance with Form 11 in the Schedule. Regulation 40 provided that a person desiring to undertake the care of a ward as a boarded out ward or as an adopted boarder shall furnish the particulars in Form 12 of the Schedule. Regulation 40(2) required certain particulars to be given, including references from a Magistrate, Justice Peace or Clergyman as to an applicant's fitness to be "entrusted with the care of a ward or wards".

666 Indeed, the Board (by the 1943 legislation) was given a discretion as opposed to a duty to "cause to be visited and inspected any child who has been a ward for any period after the date upon which such child attains the age of 18 years".

667 Regulation 41 dealt with a copy of the list of clothing issued to a ward to be provided to each foster parent. A foster parent with whom a ward was boarded-out or placed as an adopted boarder had certain obligations under the regulations including a requirement "that the ward's moral and religious training shall be cared for by the foster parents". Clearly in the 1940's there was a perception of the clear importance of religion and its note in the then Australian society. The regulations dealt with obligations in respect of medical and dental treatment. Any welfare officer or visitor appointed might in the performance of his duties visit any ward at the home of his or her foster parents. The reference to religious training in the Regulations provides some background for the placement of children in homes.

668 It is hard to see how Form 11 (Regulation 39) would apply to a child which had already prior to 1943 been admitted to the Board's control. That said, the form required information including amongst other things, a reason for making a request. That such was required for an admission to the Board's control was not surprising since s 7(2) involved a discretion to admit the child to its control.

669 In **Coe v Gordon** [1983] 1 NSWLR 419 Lee J (at 426) said the whole purpose of the Act is "the orderly settlement and supervision of Aborigines for their own benefit and for the benefit of the community under the control of a public authority established under the Act".

The Provisions of the Child Welfare Act 1939-1956

670 A consolidated version of the **Child Welfare Act 1939**, as amended, applicable in the period from 1939 to 1956 inclusive, may be found in Volume 1 of the **New South Wales Statutes 1824-1957** (Red Statutes). The relevant provisions of the **Child Welfare Act 1939-1956** are:

(i) Section 4(1) defines "admitted to State control" to mean admitted to the control of the Minister for the purpose of being apprenticed, boarded-out, placed-out or placed as an adopted boarder.

(ii) Section 4(1) defines "adopted boarder" to mean a child or young person who is allowed by authority of the Minister, inter alia, to remain with a foster parent.

(iii) Section 4(1) defines "boarded-out" to mean placed in the care of a foster parent for the purpose of being nursed, maintained, trained or educated by such person or in such person's home.

(iv) Section 4(1) defines "care" to include custody and control.

(v) Section 4(1) defines "child" to mean a person under 16 years of age.

(vi) Section 4(1) defines "institution" to mean institution established under the **Child Welfare Act 1939**, and including any special school for truants established under the **Public Instruction (Amendment) Act 1916**.

(vii) Section 4(1) defines "maintenance" to include clothing, support, training and education.

(I note no such definition appeared in the **Aborigines Protection Act**).

(viii) Section 4(1) defines "uncontrollable", where used in reference to a child or young person, to mean child or young person who is not being or cannot be controlled by his parent or any other person having his care.

(ix) Section 4(1) defines "ward" to mean any child or young person who has been, inter alia, admitted to State control or committed to an institution.

(x) Section 4(1) defines "young person" to mean a person who has attained the age of 16 years and is under the age of 18 years.

(xi) Section 9(1) provides that the Minister shall be the guardian of every child or young person who becomes a ward to the exclusion of the parent or other guardian.

(xii) Section 10 provides that the Minister shall have the care of the person of all wards.

(xiii) Section 21(1) provides, inter alia, that the governor may, by proclamation, establish:

(a) depots for the temporary accommodation and maintenance of children and young

persons;

(b) homes for the reception and maintenance of children or young persons admitted to State control;

and

(c) hostels for the accommodation and maintenance of wards and ex-wards.

(xiv) Section 22 provides that all depots, homes and hostels so established shall be controlled by the Minister and shall be inspected once at least in every three months by an officer appointed by the Minister and that such officer shall submit to the Minister a report dealing with the matters prescribed.

(xv) Section 23(1)(a) provides that the Minister shall be the authority to admit a child or young person to State control.

(xvi) Section 23(1)(b) provides that the Minister shall be the authority to provide for the accommodation and maintenance of any child or young person admitted to State control until he or she is, inter alia, boarded-out or placed-out.

(xvii) Section 23(1)(d) provides that the Minister shall be the authority to direct the removal or transfer of any ward.

(xviii) Section 23(1)(e) provides that the Minister shall be the authority to, inter alia, board-out or place-out any ward.

(xvix) Section 23(1)(f) provides that the Minister shall be the authority to approve of persons applying for the custody of wards and of the homes of such persons.

(xx) Section 23(1)(g) provides that the Minister shall be the authority to arrange the terms and conditions of the custody of any ward.

(xxi) Section 23(1)(h) provides that the Minister shall be the authority to direct the restoration of any ward to the care of his/her parent or of any other person.

(xxii) Section 23(1)(i) provides that the Minister shall be the authority to direct the absolute discharge of any ward from supervision and control.

(xxiii) Section 23(2)(a) provides that the Minister may board-out any child or young person to the person for the time being in charge of any charitable depot, home or hostel.

(xxiv) Section 23(2)(d) provides that where payments are made in accordance with s 23(2)(a) or (b) made to the person for the time being in charge of any charitable depot, home or hostel, an officer appointed by the Minister may at any time inspect such charitable depot, home or hostel and make such examinations into the state and management thereof and the conditions and treatment of the children and young persons (being inmates thereof) in respect of the payments are so made, as he thinks requisite.

(xxxix)Part VII of the **Child Welfare Act 1939** provided, inter alia, for the licensing of places established or used for the reception of children apart from their parents.

(Note Lutanda was one such place and subject to the provisions of the Act and licensing conditions)

(xl) Section 28(3) provides that such licence when granted shall remain in force until cancelled by order of a court.

(xli) Section 29(1) provides that a register is to be kept in respect of each child received.

(xliv) Part XIV of the **Child Welfare Act 1939** deals with committal of neglected or uncontrollable children or young persons.

(xlv) Section 72 defines "neglected child" for the purposes of Part XIV.

(xlvi) Section 82(c) provides, inter alia, that if a court finds that a child or young person is a neglected or uncontrollable child or young person it may commit the child or young person to the care of some person who is willing to undertake such care upon terms.

(xlvii) Section 82(d) provides that if a court finds that a child or young person is a neglected or uncontrollable child or young person it may commit the child or young person to the care of the Minister to be dealt with as a ward admitted to State control.

(xlviii)Section 82(e) provides that if a court finds that a child or young person is a neglected or uncontrollable child or young person it may commit the child or young person to an institution, either generally or for some specified term not exceeding three years.

(xlix) Section 158(1) provides that no suit to action shall lie against the Minister or any officer or employee of the Child Welfare Department for or on account of any act, matter or thing done or commanded to be done by him and purporting to be done for the purpose of carrying out the provisions of the Act, if the Minister or officer or employee has acted in good faith and with reasonable care.

671 Part XIX of the Act (to which I have earlier made reference) dealt with the adoption of children. The court was given powers to make orders (s 164). Applications had to be made to the court by persons described (s 163) under s 167. An order could not be made except where there was an order dispensing with consent (s 168) or, in the case of an illegitimate child, where there is the consent of the mother or, if the child has a guardian, where the guardian consents.

The Law

Trespass

672 As regards the action in trespass, the plaintiff only maintains such an action in respect of Bomaderry in the event that I were not to find that the UAM took control of the child under s 7(2) of the Act on the mother's application: see also the defendant's submission (at T 540). I have already found that the Board did take control of the child at the mother's request before the child was taken to Bomaderry in October 1942.

673 Further, in her written submissions in reply the plaintiff stated that she accepted that any claim for trespass could not be maintained once the plaintiff's mother gave her consent to the plaintiff's transfer to "Lutanda" in 1947. The mother's signature (and this is not disputed) appears on the Application Form for entry of her daughter to Lutanda in 1947, thus at the very least she "consented" to the plaintiff going to Lutanda. This accords with the plaintiff's submission (at T 539-540). The case of trespass was advanced by the plaintiff upon the alternative were I to find that the Board took control of the plaintiff without legal justification. Indeed, the plaintiff accepts the conclusions urged by the defendants that the

plaintiff's placement at Bomaderry and/or control or custody by the AWB was lawful being with the consent, or at the request of, the mother and that the plaintiff's transfer to Lutanda was with the consent of her mother and in accordance with the AWB's statutory duty.

674 The cause of action in trespass does not arise on the facts and should be rejected.

Statutory Count

675 Next, the plaintiff advances a case of breach of statutory duty.

676 The plaintiff's argument is advanced in a short paragraph only in her submissions in reply. The argument is put as follows:

"... The primary relevance of the provisions of the Act is that they impose duties on the Board and concomitant powers to perform the duties. The statutory duties were exercised by the Board in the instant case to create a relationship with the plaintiff which attracts common law duties of care and fiduciary duties".

677 No authority is quoted in support of this submission. In one sense this submission might be understood as being an assertion that the Board having the requisite statutory powers was liable to the plaintiff at common law for negligence in respect of the performance of a statutory function including a negligent failure to perform it: **Romeo v Conservation Commission** supra per Kirby J at 472.

678 I am left with the impression that the plaintiff's argument advanced in support of the reliance upon the statutory count, is not regarded by Mr Hutley as being a strong one. The statutory cause of action was not pleaded in the original statement of claim in 1993 nor is it the subject of any ruling by Studdert J in the extension of time proceedings (judgment 25 August 1993). The matter does not appear to have been raised or dealt with in the Court of Appeal where the damages sought were for "negligent breach of duty and wrongful imprisonment", and "a claim for equitable compensation for an alleged breach of fiduciary duty": **Williams [No 1]** supra per Kirby P at 500.

679 The Further Amended Statement of Claim (22 March 1999) alleges that the defendant owed a statutory duty to the plaintiff:

(a) to provide for her "custody, maintenance and education"; and

(b) to exercise a general supervision and care over all matters affecting her interests and welfare and to protect her against injustice, imposition and fraud.

680 It is said that the duty referred to in (a) arose by reason of s 7(1)(c) of the Act. It is appropriate if I here repeat that whilst in the Court of Appeal in **Williams [No 1]**, Kirby P (at 511) referred to the words "custody maintenance and education". As at 1942 and thereafter the word "education" did not appear in s 7(1)(c) of the Act, having been removed by the amending legislation of 1940. Indeed, to this extent I would observe at this point in passing, that the absence of a further duty to "educate" distinguishes some of the Equity cases to which I was referred from the instant case. The views of Kirby P in **Williams [No 1]** in one sense are expressed in the context of an understanding of the presence of the words "custody, maintenance and education". Next, in respect of the duty alleged under (b) of the Further Amended Statement of Claim, such is said to arise from s 7(1)(e) of the Act.

681 In my view there is no actionable statutory duty at all: see **O'Connor v S. P. Bray Pty**

Ltd [1937] HCA 18; (1937) 56 CLR 464; **X (Minors) v Bedfordshire County Council** supra; see also **Stovin v Wise** [1996] UKHL 15; [1996] AC 923. The alleged statutory duties do not arise. The provisions were not intended to give a right of action in tort. On a proper statutory construction "no inference" arises that a right of action is conferred having reference to the nature, scope and terms of the Act. As I have said, in **Coe v Gordon** supra, Lee J at 426 referred to the whole purpose of the Acts as being for the "orderly settlement and supervision of Aborigines for their benefit and for the benefit of the community under control of a public authority established under the Act". In **Aborigines Welfare Board v Saunders** supra, Walsh J referred to the Board as a body with powers and functions to which it acts with a substantial degree of independence and in accordance with its own discretion.

682 It is submitted that there is no action for breach of statutory duty unless the legislation confers a right of the injured person to have the duty performed. If no right is conferred the general rule is that there is no liability in damages: see **Northern Territory v Mengel** [1995] HCA 65; (1995) 185 CLR 307 at 343-344 and the cases cited by way of footnotes. In my view the provisions do not impose upon the defendants any special statutory duty or liability to the plaintiff enforceable by an action for damages independently of the ordinary principles of the common law of negligence: **Sutherland Shire Council v Heyman** [1985] HCA 41; (1985) 157 CLR 424 per Deane J at 500 where his Honour also dealt with the matter of "assumed legislative intent". Next, it is well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty. Indeed, there may be separate and concurrent causes of action arising from breach of a statutory duty and common law negligence, so that the breach of statutory duty may both itself give rise to a separate cause of action and be evidence of negligence at common law: see Mason J at 459-461. In **Leask Timber Hardware Pty Ltd v Thorne** [1961] HCA 73; (1961) 106 CLR 33 at 44-45, Kitto J referred to the scope and purpose of the Act as the test for determining whether the statutory provisions conferred private rights and whether the statute created correlative rights to have them observed. In **Stovin v Wise** supra, Lord Hoffman observed that whether a statutory duty gives rise to a private cause of action is a question of construction also involving an examination of the policy of the statute. The question of whether Parliament has conferred a private right of action depends on the interpretation of the statute: **Heyman** supra, at 482-483, per Brennan J at 480-484. Breach of statutory duty is a cause of action distinct from the cause of action for common law negligence. The former is a creature of statute; the latter of the common law. However, the same set of circumstances may give rise to either cause of action: **Pyrenees Shire Council v Day** [1998] HCA 3; (1998) 192 CLR 330 per Brennan CJ at 442.

683 Some of the recent authorities dealing with actions for breach of statutory duty were considered by O'Loughlin J in **Cubillo** supra in the context of a strike out argument where his Honour noted the competing arguments in relation to the **Northern Territory Ordinance**. There O'Loughlin J considered in the circumstances of the particular strike out application before him, (which was one involving a claim that the plaintiffs were allegedly removed from their families without their consent or that of their mother, and thereafter detained in institutions against their will, a totally different case and one removed from the facts of the present case), that prima facie the plaintiffs had private rights of action for breach of statutory duties available to them. His Honour held that the allegations were sufficient to sustain an argument that their cases rested on a misuse or abuse of statutory power for the implementation of an improper purpose (which cannot be said about this case). With respect I therefore, do not find his Honour's arguments (at 33) persuasive or binding upon me in this case. His Honour distinguished **X (Minors) v Bedfordshire**

County Council supra. That said in this case I cannot see that the distinction has force, or why the views of Lord Browne Wilkinson at 737, 738, 747 and 751 are not applicable. In **X (Minor)'s** case Lord Browne Wilkinson was prepared to assume that the plaintiff was a member of a class for whose protection the statutory provisions were enacted. That said he could find nothing in those provisions which demonstrated a parliamentary intention to give that class a statutory right of action for damages, particularly where the legislation left so much to be decided by the local authority. In the instant case the Act is one concerned with the establishment of welfare and protection and advancement of interests of Aborigines where difficult decisions have to be made. In such a context, in my opinion, clear statutory language would be required to indicate, a legislative intention to create a private law duty. There is no express provision for civil recovery as found in the statute. It does not appear that there is any private cause of action available for contravention of some statutory requirement: see **Pyrenees Shire Council** supra at 342.

684 Having regard to the general nature of the statutory duties relied upon, I find it difficult to see how it can be properly submitted that a breach of such duties (either or both) was intended sub-silento by Parliament to give rise to a private claim for damages. The statutory duties relied upon are in the nature of public law functions. To suggest they give rise to a private law remedy in damages could in effect involve the court in an act of judicial legislation and not of legislature construction: **Newcastle City Council v GIO General Limited** (1997) 72 ALJR 97 per McHugh J at 110. For this further reason I do not consider that such an action for breach of statutory duty is available.

685 As to the situation in New Zealand, in **E v K** [1995] 2 NZLR 239 at 245 it was held that s 4 of the **Children and Young Persons Act 1974** (requiring that any person exercising any power conferred by the Act should treat the interests of the child as the first and paramount consideration) did not contain legislative language normally used to impose a statutory duty but was a principle for the exercise of a statutory discretion. In this case the defendants also submit that the Further Amended Statement of Claim does not allege which statutory power, if any, the Board was exercising when the alleged breaches of statutory duty occurred. With respect I do not regard this point as being decisive. The court in **E v K** also held (at 149) that the paramount principle in s 4 of the Act did not disclose a statutory duty to the public: see also **Coe v Gordon** supra, per Lee J at 426. In one sense, the present legislation may be thought to be somewhat of the type of legislation considered in **O'Rourke v Camden London Borough Council** [1997] UKHL 24; [1998] AC 188, which Lord Hoffman, in his reasons, described as involving a scheme of social welfare intending to confer benefits at public expense on the ground of public policy.

686 I now turn to the more recent New Zealand Court of Appeal decision in **Prince** supra. In that case, the cause of action for breach of statutory duty was struck out.

687 The court considered the operation of the **Adoption Act 1955** and whether, inter alia, the Crown could be liable in tort or equity for the "errors" of those social workers exercising statutory powers under that Act and another Act. The question of statutory cause of action was not pressed on appeal but, nevertheless, in the Court of Appeal, there appears reasoning which could suggest that even in respect of the breach of statutory cause of action, had it been the subject of an appeal it would not have succeeded. As the majority observed (at 275) it would be inconsistent with the policy and scheme of the Act to allow individual claims in respect of particular acts or omissions in the carrying out statutory functions. They said that statutory powers must be exercised in accordance with the policy and purpose of the legislation and (at 276) that there was nothing in the legislation to

indicate a parliamentary purpose to create an actionable obligation. I would therefore, not regard the New Zealand case of **Prince** as supporting the plaintiff's reliance upon a breach of statutory duty, in fact it is to the contrary.

688 I turn now to the English decisions. I have already referred to the decision of Lord Browne Wilkinson in the **Bedfordshire** case. That decision was considered by the House of Lords in **O'Rourke v Camden London Borough Council** supra. **O'Rourke** concerned the question of whether there was available a private cause of action for damages to a plaintiff who claimed to be homeless with a priority need, on the basis that the housing authority failed to provide accommodation pending inquiries. It too involved welfare legislation.

689 In **O'Rourke**, Lord Hoffman in delivering the judgment of the House of Lords also accepted the approach of Lord Browne Wilkinson in **Bedfordshire** in terms of the test of whether there was a legislative intention to a private right of action. His Lordship (at 193) in referring to a number of indicators noted that the legislation contained a scheme of social welfare intending to confer benefits at public expense on grounds of public policy. Public money was spent not simply as a matter between a private claimant and the housing authority or as a private benefit, but also upon grounds of general public policy and interest. Next, he concluded that the existence of the duty to provide accommodation depended on a good deal of judgment on the part of the housing authority. His Lordship (at 196) examined the issue of "legislative intention" and the various considerations, in determining whether or not a statute was intended to create a duty in private law sounding in damages. The action for breach of statutory duty was dismissed. The decision in **O'Rourke** does not assist the plaintiff.

690 In the more recent decision **Barrett v Enfield London Borough Council** supra, the House of Lords did not suggest that statutory duties to exercise quasi parental care in the upbringing of children gave rise to a statutory cause of action for damages if breached. Indeed, in the House of Lords it was conceded they did not, this concession accepted as having been correctly made. The approach in **Barrett** is also supportive of the conclusion that the breach or breaches of statutory duty which the plaintiff complains give rise to no cause of action in private law.

691 In the present case the defendants have also submitted that if it is a matter of inference as to whether or not the statute gives rise to a cause of action in tort, then the same policy that denies a duty in tort compels a denial of the relevant "inference" of legislative intention when construing the statute. I reject this submission in the terms stated.

692 In **X (Minors)'s** case, Lord Browne Wilkinson observed (at 198) that it is impossible to impose a common law duty of care which is inconsistent with or fetters a statutory duty. However, there is no reason to deny a common law duty of care which would otherwise exist just because there is a statutory scheme addressing the same problem: see **Heyman**. The mere fact that the defendants' relationship with the plaintiff in the instant case arose from the exercise of a statutory power does not prevent the plaintiff from claiming that the AWB owed her a common law duty of care. Indeed, the statutory enablement may itself facilitate the existence of a common law duty.

693 Finally, for reasons given and to be given, there was further or alternatively no breach of any alleged statutory duty if there be one

694 The cause of action for breach of statutory duty should be rejected.

Fiduciary Duty:

695 The action for breach of fiduciary duty is a novel one.

696 The parties accept that it is appropriate for me to find that from the time of the plaintiff's birth (in 1942) until the time the plaintiff left Lutanda (in 1947), the plaintiff's legal guardian was at all times her mother. I have found that the plaintiff was the illegitimate daughter of a relationship between her Aboriginal mother and an Irish father or father of Irish descent. They were unmarried at the time the plaintiff became pregnant and never did marry. I have accepted as correct the parentage history given by the plaintiff's mother to her daughter and set forth in the plaintiff's affidavit. Its accuracy was not challenged or brought into question.

697 Next, I have accepted that the plaintiff was admitted to the control of the AWB pursuant to s 7(2) of the Act on the application of the mother thereby becoming a ward within the meaning of the Act. I again mention that the plaintiff could also have become a ward (not by order of the Equity Court) but by a committal order made by a Children's Court pursuant to s 13A of the Act in circumstances involving a "neglected" or "uncontrollable" child. In terms of considering the issue, the s 13A committal procedure method of becoming a ward ought not to be overlooked. In the instant case, it is perhaps difficult to imagine that if the plaintiff's mother had not had her application under s 7(2) accepted, that the "child" would not have probably become the subject of an order under s 13A. It would not have been left "neglected". However, it is not necessary to decide this. The point is that if there be an issue of fiduciary relationship and fiduciary duty there is no obvious reason why such could arise under s 7(2) but not under s 13A of the Act, or why the position in terms of creating a statutory "ward" would be different to that under s 13A. Such a comparison perhaps also identifies some of the possible problems or difficulties arising from the creation of an alleged fiduciary relationship and associate fiduciary duty of the type asserted in the instant case. It is also to be remembered that under s 13A, a Children's Court may not merely commit a child to the control of the AWB to be dealt with as a ward, but may specifically commit a child to a home under s 11 of the Act, and also for a fixed period of time: see s 13A of the **Aborigines Protection Act** and s 82 of the **Child Welfare Act**.

698 In **Tito v Waddell (No 2)** supra, it was held that none of the statutory duties under consideration in that case was sufficient to impose any enforceable statutory obligation of a fiduciary nature. Megarry VC observed (at 228, 230, 239) that, in relation to one such duty, under discussion, that it operated in the sphere of government, and not by way of imposing any fiduciary obligation and that before a fiduciary obligation (apparently drawing a distinction between fiduciary relationship and the obligations arising therefrom) could arise from a statutory duty, there must be something to show that the imposition of such an obligation was a matter of intention or implication: ("the argument must thus require that some fiduciary obligation should be imposed upon the statutory obligation").

699 As I have observed earlier, I am not bound by the views of Kirby P or Powell JA as expressed in **Williams [No 1]**, a case decided at the same time as the Court of Appeal's decision in **Breen v Williams** supra. In that latter decision Kirby P was in dissent. The majority decision in **Breen** was upheld on various grounds by the High Court in **Breen v Williams** supra, a case of some considerable importance to which I will again return.

700 It is appropriate for me to refer briefly to the different approaches of Kirby P and Powell JA in **Williams [No 1]**. Kirby P considered that the action for breach of fiduciary duty was not hopeless, rather that it was arguable, with the decision being left for

determination by the trial judge. On the materials before him (and those materials have now changed considerably as have the plaintiff's pleadings) and in the context an extension of time application, his Honour considered that the Board was in "the nature of a statutory guardian of Ms Williams, and that the relationship of guardian and ward was one of the established fiduciary categories". To repeat, his Honour was of the view that the Board "was arguably obliged to act in her interest and in a way that truly provided in a manner apt for a fiduciary, for her "custody, maintenance and education" (s 7(1)(c)). Pausing at this point with respect, it is appropriate to again repeat that s 7(1)(c) of the Act had been amended in 1940 with the deletion of the words "and educate". His Honour's decision is thus to be seen as having a statutory background different to that stated and relied upon before me. The duty is in terms of "custody and maintenance". His Honour, also in reliance upon Canadian decisions considered it was "distinctly arguable that a person who suffers as a result of want of proper care on the part of a fiduciary may recover equitable compensation for losses occasioned by want of care".

701 In **Barrett** (where no fiduciary duty or the statutory duties were relied upon) the relevant statutory provisions were described by Lord Browne Wilkinson (at 81) in terms of being "statutory duties to exercise **quasi parental care** in and about the upbringing of the plaintiff" [my emphasis]. There was no suggestion there was or could be a fiduciary duty, or even a fiduciary relationship. Nor do I understand his Lordship to suggest that "quasi parental care" obligation of itself, provides a basis for finding a fiduciary relationship or fiduciary duty.

702 In **Williams [No 1]** Powell JA approached the matter in terms of an assumption that a person or body, who, or which adopts the role of a parent, or guardian, in relation to an infant, could be regarded as being in a fiduciary relationship. It is important to understand that his Honour did so only as an assumption, the correctness of which is in actual issue in the instant case. His Honour having made the assumption rather addressed the matter in terms of what duties "by reason of that relationship" would be imposed. His Honour said (at 519):

"... I am unable to see the slightest reason, or justification, for seeking further to extend the range of fiduciary duties cast upon a person, or body, adopting the role of a parent, or guardian, so as to constitute as breaches of fiduciary duty - conduct undertaken in furtherance of a statutory duty, and in the belief - join up what were then, even if they are not now, the accepted standards of the time - that they were in the best interests of, and for the furtherance of the welfare of, the person fulfilling the role of the child in the relevant relationship".

703 With respect there is much force in the views of Powell JA, albeit that I am not bound by them. In many ways they perhaps reflect in part my own ultimate independent views. It seems to me, that even assuming a fiduciary relationship is established, there is no fiduciary duty of the kind urged by the plaintiff, or that further or alternatively, that no action for breach of fiduciary is available in any event. Indeed, in light of my finding and reasons, no breach of such duty has in the event been established

704 In Canada there has been a greater willingness to find fiduciary relationships duties and obligations than in Australia and in New Zealand, with the reluctance to extend the doctrine even more marked in England: see also **Breen** supra in the Court of Appeal per Mahoney JA at 566. In **Norberg v Wynrib** (1992) 92 DLR (4th) 449 at 499 McLachlin J considered that fiduciary principles were capable of protecting not only narrow legal and economic interests but could also serve to defend fundamental human and personal

interests (a view not supported by English Australian authority). In **M (K) v M (H)** (1992) 96 DLR (4th) 289, a case involving an intentional tort of assault and battery by a father against his daughter, and not a breach of a common law duty of care as in negligence) there was also a claim of breach of fiduciary duty. The Court accepted that there was a fiduciary relationship and was prepared to recognise equitable protection of interests of a wider than economic type by expanding them in effect, to include the fiduciary duty of loyalty in a family. In **Williams [No 1]** Kirby P, in reliance upon Canadian authority, sought to suggest that equitable duties (the content of which included a responsibility to take proper care in performing a task) could be utilised to protect non-economic interests. With respect to the views of Kirby P (as he then was), I do not consider having regard to authority, that even if there be a fiduciary relationship between the AWB and the plaintiff, in respect of all or some parts of the AWB's activities, that any action lies for breach of the duty of the kind urged in the instant case. Indeed, a person may be in a fiduciary relationship position of some parts, but not other parts. If a fiduciary relationship has been established it is still necessary to have regard to the particular transaction impugned. Thus in each case it is appropriate to examine all of the facts and circumstances to see whether a fiduciary relationship exists, and if so, whether it applies to the particular transaction in question: **Breen's** case supra per Kirby P at 544. In **Re Coomber, Coomber v Coomber** (1911) 1 Ch 723 Fletcher Moulton LJ at 728-729 warned against "assuming that every kind of fiduciary relationship justifies any interference" and that in "the nature of the fiduciary relation must be such that it justifies the interference".

705 Even if a case falls within an established category of fiduciary relationship and a party stands in a fiduciary relationship to another, nevertheless there still remains the need to ascertain the particular obligation or obligations owed by one party to the other in order to further consider what acts or omissions amount to a failure to discharge those obligations.

706 I have found the views of Professor R Austin (as his Honour then was) in **"Moulding the Contents of Fiduciary Duties"** - Oakley, Trends in Contemporary Trust Law (1996) of assistance. Professor Austin (at 154) in discussing the matter of the content of fiduciary duties, quoted from a decision of Frankfurter J in **SEC v Chenery Corporation** (1943) 318 US 80, 85-86 that to say that a person is a fiduciary "only begins the analysis". He also referred (at 155) to the decision of the High Court in **Warman International Ltd v Dwyer** (1995) 182 CLR 554 as exemplifying a trend in case law in which the fiduciary concept was coming to designate "specified duties rather than an entire relationship": see also **Paramasivam v Flynn** [1998] FCA 1711; (1998) 160 ALR 203 at 218. Such an approach thus involves a consideration of whether a fiduciary concept embraces a specific duty of the type urged in the instant case. In my view it does not.

707 The authorities suggest that actual fiduciary duties imposed by equity upon a fiduciary are those which in the particular circumstances are called for so to prevent an abuse of the relationship: **Re Coomber** supra: as applied in **Warman Industries** supra and by Powell JA in **Williams [No 1]**. The scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case: **Hospital Products Ltd v United States Surgical Corporation** [1984] HCA 64; (1984) 156 CLR 41 per Mason J at 102. Similarly in **Mabo v Queensland (No 2)** [1992] HCA 23; (1992) 175 CLR 1 Toohey J (at 204) considered that the content of a fiduciary obligation would be "tailored by the circumstances of the specific relationship".

708 For the purpose of determining the relationship between the parties one must also turn to the statutory provisions under the Act.

709 The situation is quite unlike that under s 9(1) of the **Child Welfare Act 1939** passed shortly before the 1940 amendments to the **Aborigines Protection Act**. The draftsman of the 1940 Act would have been aware of its provisions. By way of contrast, under s 4 of the **Child Welfare Act** a ward included a child admitted to the control of the State or committed to an institution. However, significantly under s 9(1) and s 10, the Minister became the statutory guardian of the ward to the exclusion of the parent or guardian of the child and subject to the provisions of the Act the Minister had the care of all wards, except where inter alia they were boarded out or placed as adopted boarders of foster parents: see **Green & Anor v Minister for Child Welfare** (1972) 1 NSWLR 314; **Minister for the Interior v Neyens** [1964] HCA 71; (1964) 113 CLR 411; **Quinn v Minister for Youth and Community Services** (1986) 5 NSWLR 716 at 720. This is not the situation under the **Aborigines Protection Act**.

710 There were no counterparts to s 9 and s 10 introduced into the **Aborigines Protection Act** in 1940, nor subsequently. A definition of "ward" was introduced for the purposes of the Act, but it did not include the concept of "guardian". There was no provision such as s 9 which made the Board a guardian. Section 11B(2) in referring to the need for approval of a guardian to cancel an indenture, itself suggests that it was someone other than the AWB that was the guardian, and provides support for the view that control, under s 7(2) and/or custody and maintenance of children under s 7(1)(c), did not create an actual ward/guardian relationship under the Act. In **Williams [No 1]** Kirby P (at 5) did not suggest it did, at least in terms. In **Youngman v Lawson** [1981] 1 NSWLR 439, Street CJ (at 445) referred to guardianship as a relationship which as long as it subsists is recognised as conferring rights on the guardian in respect of custody and upbringing (educational as well as in respect of the religion of the child). The authorities since the 17th Century reveal that Courts of Equity have consistently expressed views that guardians have duties including ordinarily, a duty to educate: **Duke of Beaufort v Berty** [1721] EngR 306; [1721] 24 ER 579 at 580. As I have said in 1940 the Act deliberately removed from s 7(1)(c) of the **Aborigines Protection Act** the duty to educate. There was no such duty in respect of the plaintiff. Thus, it might be fairly that absent adopting comparable provisions to ss 9 and 10 of the **Child Welfare Act**, the **Aborigines Protection Act** neither makes the AWB a guardian of a ward, or one in the nature of a statutory guardian and that it was not intended by Parliament by its 1940 amendments to the Act to create a ward/guardian relationship with the Board. Indeed, further or alternatively, it might be fairly argued that in the context of the **Aborigines Protection Act** control does not mean, or equate, with guardianship as such.

711 As to the nature of the relationship between a ward and the AWB under the Act, the decision of the Federal Court in the case of **Cubillo** does not assist. That Federal Court decision not to strike out was in the context of very wide powers including a provision that the Director under the 1918 Ordinance, was under s 7, a legal guardian of every Aboriginal. Whilst it is not necessary for me to decide in any event I would not follow **Cubillo** to the extent that it even suggests that a fiduciary relationship might give rise to a fiduciary duty of the kind urged in the instant case: see **Breen v Williams** in the High Court: cf **Paramasivam**. Nor does the trial judge's decision in **Bennett v The Minister for Community Welfare** (1988) Aust Torts Reports (80-210) assist. In that case s 10 of the **Child Welfare Act (WA)**, by its very terms, made the Director of the Department of Community Welfare the "guardian and to have the care, management and control of the persons and property of wards" perhaps reflecting a statutory provision closer in type to the statutory provisions of ss 9 and 10 of the **Child Welfare Act (NSW)**.

712 As I earlier said, the plaintiff in this case became a ward under s 7(2) of the Act. The mother made application to admit the plaintiff to the AWB's control. The Board "voluntarily" made an administrative decision to admit the child to its control. On admission to the Board's control, the child then became a ward within the meaning of the Act. Under s 13A the situation would not be one of a creation of a statutory guardian situation by the Act but by a committal by a Children's Court order, not even one by the Equity Court. If a guardianship situation is created then it is one by virtue of court committal imposed upon the Board and not a guardian or a statutory guardianship in fact of the kind to be found in s 9 of the **Child Welfare Act**. It might be thought arguable that a Children's Court committal can no more place the AWB in the position of being a "guardian", or in the "nature of a guardian", or create a fiduciary relationship with obligations, any more than it can be put in such a position by the operation of the provisions of s 7(2) of the Act.

713 In **Ex parte Vorhauer; Re Steep** supra (applied in **Green** supra) it was held that where the Minister discharged himself under s 23 (a provision similar in terms to s 11D(1) of the **Child Welfare Act**) from his statutory guardianship, then the person entitled to the custody of the child is the mother. In **Youngman v Lawson** supra, a case involving (as is the instant case) an illegitimate child, Street CJ (at 443) considered that in the case of an illegitimate child, all of the rights that are customarily incidents of legal guardianship in the case of a legitimate child adhere to the mother, although equity might give custody to the father of an illegitimate child. In **AMS v AIF** (1999) 73 ALJR 927 the High Court, when discussing the custody of ex-nuptial children, referred to Chancery doctrine eventually prevailing under the general law of England, said that the desire of the mother of an illegitimate child as to its custody was primarily to be considered, if to do so would not be detrimental to the interests of the child. However, the authorities suggest that legal custody is in the mother, a position as I have earlier said apparently accepted by the parties in the instant case as being one that was appropriate for me to adopt.

714 Under the present **Aborigines Protection Act** it may well be that once a child became a ward, not only did the mother remain the legal guardian, but her situation as a guardian was at all times subject to the Act so that she could not do anything or exercise parent or guardian rights inconsistent with the provisions of the Act: see also s 11B(2).

715 The word "custody" used in s 7(1)(c) of the Act is perhaps, used in the broad sense of "control ..... preservation and care of a child's person physically, mentally or morally": see **Wedd v Wedd** supra; **Fountain v Alexander** supra.

716 Even postulating that a guardian/ward relationship arises in any instant case, it is by no means clear that in any event the relationship of guardian and ward is "one of the established fiduciary categories". In **Hospital Products Ltd v United States Surgical Corporation** supra, Gibbs CJ (at 68) discussed the established categories of fiduciaries and concluded that whilst he did not include the category of guardian and ward relationships the categories were not closed. In the same case Mason J (at 96-97) listed the traditional or accepted categories of fiduciary relationship, but did not include in that list the relationships of parent and child, or of guardian and ward. In **Maguire v Makaronis** supra, the views of Gibbs CJ in relation to the established categories of fiduciary relationship was cited with approval by the whole Court. In that case the Court considered (at 463) that it was not necessary to specify criteria by which it might be determined whether parties "not being within the accepted categories referred to by Gibbs CJ stand in a fiduciary relationship" because the solicitor in the case was classically a "fiduciary to the client and owed certain duties in each case". Indeed, as was made clear (at 474) the case

was one in which the trustee notion of disloyalty on the part of non-trustee, fiduciaries was regarded as an important consideration in the case of "delinquent fiduciaries such as solicitors". Further **Makaronis** was a case involving a case of economic interests in contradistinction to the instant case.

717 It is not strictly necessary for me to determine whether or not under the provisions of the Act the plaintiff and the AWB were in a relationship of guardian and ward, or whether the AWB was in the nature of a statutory guardian of the plaintiff (**Williams [No 1]** at 511) or even whether the relationship of guardian and ward is one within the accepted categories. I have some reservations in respect of each of these matters but do not need to finally determine or resolve them. The present case is not one where there is a need to specify criteria by which it may be determined whether the parties, not being within the accepted categories referred to by Gibbs CJ stand in a fiduciary relationship: **Makaronis** at 463.

718 Since the judgment has been reserved, I have had drawn to my attention by counsel the recent decision of the Court of Appeal in **Brunninghauser v Glavanic** (NSWCA, 23 June 1999, unreported). The plaintiff relies upon a passage (at p 14) to support her argument that the relationship of "guardian and ward has always been one which gives rise to fiduciary duties".

719 Before turning to the relative passage several things may be said about **Brunninghauser**. That case concerned the question as to whether a sole effective director owed a fiduciary duty to the other shareholder in the purchase of shares, and whether he breached this duty by his non-disclosure of the negotiations of the companies' assets before the purchase of the respondent's shares. It was a case concerning fiduciary duty in relation to once again economic interests, and not interests of the type involved in the present case, nor involving a fiduciary duty of care of the type here asserted. In the circumstances of **Brunninghauser** there was a "special vulnerability" of the other shareholder, as well as presence of traditional matters relevant to the existence of a fiduciary duty and its content, that is, of a relationship of trust, confidence and of the need to avoid conflict between duty and interest including interest in the particular economic interest transaction. The case is thus totally different to the instant case. In fact, even if in the present case I were to find a fiduciary relationship, **Brunninghauser** would not help the plaintiff in terms of establishing a fiduciary duty of the scope or extent presently urged.

720 As to the existence of a fiduciary relationship, the Court said (at 14):

"Some of the traditional fiduciary relationships such as partners, principal and agent, solicitor and client and priest and penitent are created by the more or less free choice of the parties .... Other relationships such as guardian and ward, parent and child and trustee and beneficiary arise by operation of law or from acts of others".

721 With respect, in that case it was not necessary to decide whether the relationship of guardian and ward, or parent and child is a fiduciary relationship, or one in all or any particular circumstances.

722 As I have said, in **Hospital Products Limited v United States Surgical Corporation** [1984] HCA 64; (1984) 156 CLR 41, Gibbs CJ (at 68) did not include guardian and ward or parent and child within his classes of fiduciary relationship, nor did Mason J do so (at 96) in his analysis of accepted fiduciary relationships. In **Makaronis** the High Court (at 463) applied the views of Gibbs CJ at 463 as to the categories or classes.

Further or alternatively, even if the situation be stated as in the Court of Appeal, the establishment of a fiduciary relationship is in any event but the first step in the exercise - its scope and content still need to be examined. That the relationship of guardian and ward may in some cases give rise to duties typically characterised as a fiduciary, appears to have been recognised in **Flynn** at 218: see also the assumption by Powell JA in **Williams [No 1]**. Nevertheless, that said the fiduciary concept is still only ever concerned with specific duties rather than an entire relationship.

723 In my view **Brunninghauser** does not of itself determine or establish the existence of a fiduciary or its scope or content in such a case as the present. The parties have referred to further additional authorities since I reserved including the decision of the House of Lords on 17 June 1999 in **Barrett v Enfield London Borough Council** supra. In that case no cause of action for fiduciary duty for breach was pleaded, raised or alleged. Apart from the fact that the plaintiff pleaded a cause of action for breach of statutory duty (which, it was accepted, did not exist) there is nothing in their Lordships' reasons to even hint at or suggest that in the circumstances a fiduciary relationship might have existed between the local authority and the child in care, or that it was, further or alternatively open to find a fiduciary duty of the type here asserted, let alone that the scope of such a content of a fiduciary duty would support an action of the present type for breach. Nor was it suggested that control or statutory provisions, whilst such might help to determine the existence of a duty of care, would or could give rise to a fiduciary relationship. True these matters were not at issue, but that is because in my view English law (like Australian law) does not in circumstances such as the present suggest (even assuming there is a fiduciary relationship) that there is a fiduciary duty of the type here asserted with further or alternatively, an action lying for breach of it.

724 All this said, I am prepared to assume (without finally deciding) as did Powell JA in **Williams [No 1]** (at 19), that the relationship between a person or body who or which adopts the role of a parent or guardian in relation to an infant may be regarded as a fiduciary relationship: see also **Flynn** (at 218) and **Brunninghauser** (at 14) In doing so, I leave extant the question of the scope of such a duty in the instant case to which I now turn.

725 In **Paramasivam v Flynn** supra the Full Federal Court said (at 218):

"A relationship such as that alleged, of guardian and ward, may give rise to duties typically characterised as fiduciary - not to allow duty and interest to conflict and not to make an unauthorised profit within the scope of the relationship (although one might need to know more about the relationship than presently appears in order to ascertain the ambit of any such duties arising in this case). Similarly, it is likely to be a relationship giving rise to a presumption of undue influence affecting transactions, particularly but not exclusively voluntary transactions, entered into by the ward and conferring benefits on the guardian. Equally, of course, breach of a fiduciary duty, and breaches of other equitable obligations, are not remediable only by injunction or by a proprietary or restitutionary remedy: a plaintiff who has suffered loss resulting from breach of such a duty is entitled to compensation for that loss. There is no room for doubt about any of those propositions, and it is unnecessary to cite authority for them. Nevertheless, the judge was right in regarding the appellant's claim as, under Australian law, novel. That is so because of two of its aspects: the nature of the alleged breach and the kinds of loss or injury which the appellant claims to have suffered and for which he seeks equitable compensation".

726 In **Bristol and West Building Society v Mothew** [1996] EWCA Civ 533; (1997) 2

WLR 436 at 439 Millett LJ referred to a distinguishing obligation of a fiduciary being the obligation of loyalty. His Lordship observed that a fiduciary must act in good faith; they must not make a profit out of their position; they must not place themselves in a position where their duty and interest may conflict. A fiduciary, his Lordship said, may not act for their own benefit or the benefit of a third party without the informed consent of their principal. These matters he consider indicated (albeit not exhaustively) the general nature of fiduciary obligations.

727 I have already stated that the establishment of the fiduciary relationship is but the beginning of the problem since the scope and content of the fiduciary duties arising from that relationship will vary and be tailored by the nature of the relationship, the circumstances of the specific relationship from which it arises and the circumstances of the case. I have already stated at common law generally, that as regards a parent and child the matter of upbringing is perceived to be a moral duty and not a legal duty: **Hahn v Conley** supra.

728 In the instant case Mr Hutley did not suggest according to my understanding, that were I to find a fiduciary relationship between the plaintiff and the AWB (which I have assumed without finally deciding) that the content or scope of duties to be found in that relationship were those to be found in the case of an "express" trust case as outlined in **Re Dawson** (1966) 2 NSWLR 211 or in a traditional trustee type fiduciary case. Further or alternatively, I do not see why any fiduciary relationship should in any event, give rise to greater duties than those involving protecting economic interests. In a case such as the present if there is a duty of care it should exist at common law. Further, if the common law does not impose a duty of care for a variety of reasons, one or more, it is difficult to see why equity should intervene or that there is a necessity to do so in the circumstances.

729 In my opinion assuming that there is a fiduciary relationship, the decision of the High Court in **Breen's** case supports a number of propositions. First, that it is an error to regard fiduciary duties as attaching to every aspect of a fiduciary's conduct and that every duty owed by a fiduciary is fiduciary in nature. Next, (as also appears from **Paramasivam** supra) a fiduciary relationship is not really concerned with negligence or the assertion of a fiduciary duty of the type here involved and asserted. On this basis in my view, the Canadian authorities dealing with fiduciary duties are not to be followed in Australia contrary to what was perhaps suggested by Kirby P in **Williams [No 1]**.

730 In **Breen** supra, the High Court held that though a doctor might commonly owe fiduciary duties to a patient, those duties did not include the type of duty in effect asserted in the instant case, namely an action for equitable compensation for personal injury resulting from an alleged breach of fiduciary duty for "want of proper care on the part of a fiduciary" (**Williams [No 1]** at 511).

731 In the course of their judgments in **Breen**, members of the High Court made clear their disagreement with several aspects of Canadian approaches to the development of the law of fiduciaries: see Brennan CJ (at 83); Dawson and Toohey JJ (at 110-113) and Gummow J (at 132). Nor is anything to be found in **Breen** to support the proposition that fiduciary principles may be invoked to protect other than economic interests. There was no suggestion that a fiduciary duty would or should protect personal interests of the type postulated in the instant case, as has been perhaps suggested in the Canadian cases. For these further reasons, in my view the Canadian cases have no application in the present case.

732 In **Breen**, Dawson and Toohey J (at 94) suggested that the law of negligence and

contract governing the duty of a doctor to a patient left no room for the imposition of fiduciary obligations. At 110, Gaudron J and McHugh JJ also spoke of the interrelationship between common law obligations and the fiduciary principle. Additionally, there is no warrant for adopting or applying the obiter views of McHugh J in **Bennett v Minister of Community Welfare** supra. That was a case particularly concerning common law causation. The plaintiff had pleaded an action for common law negligence and not for equitable compensation. That is how the case was litigated notwithstanding the reference by the trial judge to a breach of fiduciary duty. Importantly, that case involved damage to an economic interest of the plaintiff with the claim in negligence being for the loss of a legal chose in action. **Bennett's** case is in my view distinguishable in these various respects and does not assist in the resolution of the present problem.

733 In the decision of the Full Federal Court in **Paramasivam** supra (a case concerning alleged sexual assaults of a ward by a male guardian and breaches of fiduciary duty), the Court applied **Breen v Williams** and declined to follow **Williams [No 1]** and the Canadian case of **M (K) v M (H)** supra. In **Paramasivam** the Court (at 218-219) held that in Anglo-Australian law the interests which the equitable doctrines invoked by the appellant namely, fiduciary duties, have hitherto protected are economic interests. Any extension of the law to protect other than economic interests had to be justified in principle with regard to the particular interests protected by equitable doctrines. In my view no such principle exists to warrant extension into a case such as the present

734 I consider that the law is correctly stated in **Paramasivam**. However, even if the Equity Law is not viewed in terms of protecting only economic interests, such does not in any event necessarily warrant a finding of fiduciary duty (or breach) in terms of that which is asserted in the instant case. In **Paramasivam** the conduct was held to be within the purview of tort. By such a finding the Court, whilst recognising (at 220) that a fundamental aspect of a parent's obligation was to refrain from inflicting personal injuries upon a child, thought that the conduct complained of in that case did not warrant the view that the obligation was a fiduciary one, or that any other equitable intervention was necessary or appropriate. At the same page the Court recognised that the question arose (as it did in **Williams [No 1]**) because a limitation statute barred proceedings at law but not in Equity. Indeed, as was said in **Makaronis** supra (at 463), the courts and legislatures have tended to save from the imposition of arbitrary time limits complaints of breach of trust or other fiduciary duty. Why such an approach should continue to be the case where the fiduciary duty allegedly breached is of a non trustee type and arises from the same circumstances and particulars relied upon to support a tortious or contractual liability is by no means clear. Indeed, it might be thought to be anomalous, and a way of unjustifiably circumventing limitation periods in cases where the relationship properly gives rise if at all, to contractual or tortious liability. If I am wrong in my decision in this case or laches or delay does not operate to "bar" any equitable remedy, there remains a case for the legislature to consider the matter as I have earlier mentioned.

735 Indeed, in my view in the circumstances where similar facts could possibly give rise to a claim in negligence and for breach of fiduciary duty, if there is in the circumstances an action available it should be according to the common law and not otherwise. In my opinion fiduciary duties should not be found, additional to common law duties, merely for forensic purposes in order to avoid or circumvent limitation periods which would apply to common law actions (on the same facts), or to fill a "gap" where such common law actions fail or are not available for good and/or valid reasons. Nor in my view should fiduciary duties be imposed to circumvent the non-imposition of a common law duty, which is denied, for

example, for policy reasons, or to support a claim for relief where no breach of any common law duty of care has been established on the merits. Indeed, I see no reason why there should be a concurrent fiduciary obligation or duty to enable a plaintiff in a particular case to even avoid or circumvent an obligation to mitigate damage, to avoid common law principles of causation, novus actus intervenes or to circumvent other common law principles. As to a discussion of these matters: see Mr Justice Gummow (writing extra judicially) in **Youdan, Equity, Fiduciaries and Trusts** at 75. Further, at the same page, his Honour also dealt with equitable matters of delay, laches and acquiescence which in this case are further or alternatively, relied upon by the defendant in respect of the fiduciary duty cause of action to deny equitable compensation (but not common law damages) in the event that an action lies in breach of fiduciary duty.

736 The recent decision of the Court of Appeal in **O'Halloran v R. T. Thomas & Family Pty Ltd** (1998) 45 NSWLR 262 can perhaps be seen as an application of **Makaronis** in that it was appropriate to adopt the equitable approach to "causation" applicable in the case of a trustee of a traditional trust, to the case of a company director improperly dealing with company assets which were in the nature of "economic interests".

737 In **O'Halloran** the Chief Justice (at 275) also emphasised that every fiduciary relationship (when found to exist) must still be carefully analysed to identify the particular breaches found. In my view there is nothing to support the existence of a fiduciary duty of the kind asserted in the instant case, indeed the reasoning in the authorities would suggest otherwise. There is no case in United States law suggesting a fiduciary duty of the type here asserted to which I have been referred.

738 What I have said about the absence of fiduciary duty of the kind asserted in the instant case is supported by New Zealand authority and English authority. In **Prince v Attorney General** (1996) 3 NZLR 733, an action involving an alleged negligent adoption in which the grievance essentially asserted was that the plaintiff claimed to have ended up with unsatisfactory parents who brought him up badly and damaged his life's prospects, the trial judge struck out a cause of action for breach of fiduciary duty. This striking out of the fiduciary duty cause of action was not challenged on appeal: see **Attorney-General v Prince & Gardner** supra. In **Prince** (at first instance) Anderson J observed at 746:

"It would seem that the inclination for plaintiffs to plead negligence on the part of someone who could recompense life's misfortunes is now being emulated by the inclination to allege breach of fiduciary duty".

739 The case law in the United Kingdom is against the existence of any such duty or obligation of the kind asserted. Indeed, a review of the authorities in the United Kingdom shows that no fiduciary duty case of the present kind or analogous to it has even been advanced either by itself, or at the same time as the assertion of common law causes of action arising upon the same or similar facts or particulars: cf **Stubbings v Webb** [1993] AC 498 (action in assault by a woman against her stepfather for sexual abuse); **X (Minors) v Bedfordshire CC** supra (local authority's duty to safeguard and promote welfare of children including preventing child abuse). In **X (Minors)'s** case Lord Browne Wilkinson (at 739) considered and applied the decision of the House of Lords in **Henderson v Merrett Syndicates** [1994] UKHL 5; [1995] 2 AC 145

740 In **Henderson** supra, Lord Browne Wilkinson recognised that the cogency of a plea alleging a breach of fiduciary duty depends not only on the existence of a fiduciary

relationship and the nature of the duties which it imparts but also upon whether the acts complained of amount to breach of the fiduciary duties themselves or simply occurred during the subsistence of a fiduciary relationship. His Lordship said (at 205):

"The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description."

741 At the same page his Lordship again re-emphasised that the phrase "fiduciary duties" was a dangerous one giving rise to "a mistaken assumption that all fiduciaries owe the same duties in all circumstances". His Lordship considered that the extent and nature of the fiduciary duties owed in any particular contract case fell to be determined by reference to any underlying contractual relationship between the parties. **Henderson** supra provides no support for the plaintiff's assertion of duty of the kind argued for in the instant case. Nor do I understand the passage to support a view that were the common law to deny a duty of care for one or more valid reasons, equity would be satisfied in intervening. In **Bristol and West Building Society v Mothew** supra (referred to in **Makaronis** at 474), Lord Justice Millett (at 447-449) stated that "not every breach of duty by a fiduciary is a breach of a fiduciary duty". Further, Lord Justice Millett (at 448) considered that it was not appropriate to apply the expression "fiduciary duty to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of duties". He applied the passage from **Henderson's** case supra, quoted by me, as well as applying the remarks of Ipp J in **Permanent Building Society v Wheeler** (1994) 14 ACSR 109 at 157:

"It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary is a fiduciary duty. In particular a trustee duty to exercise reasonable care though equitable, is not specifically a fiduciary duty".

742 It seems to me that if there is no duty of care arising at common law in circumstances such as involve a parent and child, then I see no reason why regard may not be had to that situation in determining whether there may or should be a fiduciary duty of care in equity in a situation such as the present. The moral duties of conscientious parenthood do not at common law provide a child with any cause of action arising from their neglect. The liability in tort, if any, on the part of the parent to the child arises as I have said, from a particular situation, not from the mere relationship: **Hahn v Conley** supra, per Barwick CJ particularly at 283-284, 287 and 294. As noted by Professor Fleming in **The Law of Torts** (8th ed 1992):

"There is a consensus that the parents' duty to feed, clothe and maintain and generally care for their child is not enforceable in tort, whatever its moral or other legal (for example criminal) sanctions".

743 Where an action (if a good one or made good) is within the purview of the common law dealing with situations when wrongful conduct is to be compensated then there is no obvious advantage (quite the contrary) to be gained by equity providing a further action on the same facts even where the common law may in the result might deny the existence of a duty of care or liability for breach. The plaintiff's claim in the present, (if a good one) is within the purview of the common law dealing with situations when wrongful or intentional

conduct is to be compensated if at all.

744 Perhaps an issue that I should briefly address is that arising in consequence of my view that in the circumstances no common law duty of care was owed, and further or alternatively, there was no breach of duty. Putting to one side questions of equity following the common law, it seems to me that if there be a finding that for example, because of policy reasons there is no common law duty of care, such reasons ought similarly to operate to deny the existence of a fiduciary duty of care (assuming there be one) arising from the same circumstances and facts. The same considerations ought equally to deny a duty in equity. Further, the same considerations for denying a breach of a common law duty of care similarly apply to deny a breach of a fiduciary duty even if there be a duty, which there is not.

745 In the instant case there is no allegation in terms of good faith, omission, nor is there any loyalty question or issue of conflict between duty and interest arising. Additionally, as I have said there are no economic interests at stake. In such circumstances I further do not see why a fiduciary duty should be found to convert an unsustainable claim at common law, based on the same facts, into a sustainable one in equity.

746 For reasons given or further to be given in respect of the negligence issue (assuming there be a fiduciary duty), in my opinion there was no breach of any such duty. Further or alternatively, there is no equitable "causation" for the same or similar reasons: **Target Holdings Ltd v Redferns** [1995] UKHL 10; [1996] AC 421 at 432; **O'Halloran** supra

Laches Prejudice and the Acquiescence of the Plaintiff

747 I finally turn now to the defendant's submissions in respect of laches and delay. It is necessary to consider these matters, despite the limited regard had to them by the plaintiff, in the event of my extensive views on fiduciary duty, breach and causation being wrong, or that I be incorrect in rejecting the plaintiff's action for breach of fiduciary duty.

748 The principles in respect of the equitable defence of laches going to whether relief should be granted are discussed in **Orr v Ford** supra by Deane J at 340-341. Equity and good conscience also come into play in considering the matter. At common law, time does not begin to run against an infant until after majority.

749 The delay in the instant case has been very inordinately long. The alleged wrong occurred before 1960. Action in respect of that wrong was not brought until 1993, although there is evidence of some "preparation" as early as the late 1980's.

750 The court may take into account the length of the delay: **Fitzgerald v Masters** supra. The delay in respect of this case is substantial in respect of the claim for breach of fiduciary duty. The claim for breach of fiduciary duty cannot however be met by a defence under the **Limitation Act**, in respect of which there is no suspension of the running of the limitation period pursuant to the **Limitation Act**: see **Williams [No 1]** supra; **Makaronis** supra (at 463). There is nothing to prevent in law the pleading of a fiduciary duty, and its breach, based on the same facts giving rise to the common law count. I have already referred to this anomaly. If I am wrong in my view that the fiduciary cause of action is not available in the present case, there is in the circumstances, a potential for injustice unless laches, prejudice and delay can be successfully relied upon to answer or to defeat the equitable cause of action. Thus if the plaintiff seeks to use to his/her advantage the pleading of a cause of action for breach of fiduciary to avoid limitation problems, there is no unfairness to

the plaintiff for the defendant to plead or raise laches, prejudice or delay. There is no reason, subject to notions of equity and good conscience, why lengthy delay or prejudice should not be a bar to relief. Some of the remarks of Powell JA in **Williams [No 1]** at 520C-F are further particularly apt, when considering the "defences" of laches and delay.

751 The court may further take into account the prejudice to the defendant flowing from delay for example, the loss of evidence or the death of witnesses: **Hourigan v Trustees Executors & Agency Co Ltd** [1934] HCA 25; (1934) 51 CLR 619; **Hughes v Schofield** [1975] 1 NSWLR 8; **Crago v McIntyre** [1976] 1 NSWLR 729.

752 Some of the cases dealing with delay in respect of limitation periods and delay generally are referred to in the unreported judgment of Studdert J in **Williams [No 1]**. To the common law cases referred to should be added the decision of the High Court in **Brisbane South Regional Health Authority v Taylor** supra per McHugh J (a case concerning discretion to refuse to extend a limitation period for a common law cause of action). His Honour's observations are on point on the question of delay generally. His Honour said (at 551):

"The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates". (21) Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in Barker v Wingo (22), "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose".

753 Applying the approach of McHugh J to the equitable claim it seems to me that there is substance in the defendants' argument that equitable relief, even if available, should be denied. I see no reason why his Honour's remarks do not necessarily apply to consideration cases of laches raised as a defence to a claim for equitable relief in the circumstances of a case such as the present. The plaintiff, faced with the equitable "defences" really made no attempt to meet them, save advancing argument that "no relevant prejudice has been identified and that delay of itself is insufficient to establish the defence of laches". In the instant case, it is common ground that relevant material documents are missing, there are few records remaining from Lutanda; school records have not been produced; these are minimal records from the Women's Hospital; there are few records from Bomaderry; and incomplete records exist from the AWB. Furthermore, important witnesses are dead or not available including Mr Murray from Lutanda; Mr Reid who is dead; Miss Atkinson, a person to whom it is said there could have been an

"attachment" in 1953, and Dr Lovell who was an Honorary medical officer for Lutanda and from whom no records were obtained. What is also known is that the plaintiff's mother (albeit in ill health) was alive in 1989. The plaintiff had met her in 1973, lived with her for part of the time and obtained information for the purposes of her case from her. Indeed, as to the merits of the case I have had to draw certain inferences from disputed facts as to the circumstances of the plaintiff's birth in 1942, how the plaintiff came to become a ward, and as to the circumstances surrounding the plaintiff's transfer to Lutanda in 1947. No direct evidence from her was tendered in the trial. In saying this I am dealing with the matter of delay. I am not finding nor am I asked to draw **Jones v Dunkel** type inferences.

754 There is well established authority that a plaintiff's delay may also be operative as laches where evidence has been lost which would be important to the defendants' case: see **Hourigan** supra. Delay may be operative as laches where for some reason "other than delay" the defendants' ability to resist the plaintiff's claim has become prejudiced: **Neylon v Dickens** [1987] 1 NZLR 402 at 408-409. A claim for breach of fiduciary duty is subject to the equitable doctrine of laches. A plaintiff's claim to equitable compensation for breach of fiduciary duty may also be barred by the acquiescence of the plaintiff: **Nocton v Lord Ashburton** (1914) AC 932 at 958.

755 Had it been necessary to decide, I would have found considerable merit in the defendants' submissions that equitable relief should have been denied assuming a fiduciary duty and breach had been established.

756 I reject the plaintiff's case based upon the claim of a fiduciary duty and breach thereof. I reject it on the ground of causation as well.

Negligence:

757 Negligence at common law is still a fault based system. For reasons given, to be further given and on the facts as I have found them to be, no negligence would have been established even assuming a duty of care had been proved. It is appropriate to repeat, that the events that I am being asked to judge and evaluate commenced in 1942 and finished in 1960. Thus in 1999 I am asked to judge that which took place 39 to 57 years ago (over a half a century)! I repeat again that these are events that occurred in a different Australia, a society with different knowledge, and with different moral values and standards. To apply attitudes of the present community to a period commencing so long ago would be to apply the standards of today not those of the 1940's and 1950's.

758 The problem of determining negligence is further made difficult by the fact that one is looking not at a particular occasion, happening or incident but rather at alleged general negligent conduct, in effect continuing unabated throughout a period of eighteen years, from 1942 to 1960.

The Plaintiff's Submissions on Negligence

759 I trust I do not do the plaintiff's case a disservice by summarising their submissions in a general way. In so summarising, I am not to be taken as ignoring any argument advanced.

760 The plaintiff's case is that the plaintiff became a ward of the Board under its control in consequence of the mother's application under s 7(2) of the Act in 1942. Thereafter, it is submitted the plaintiff remained a ward and under the AWB's control till she turned eighteen. During that period the Board, it is submitted, had a non-delegable duty or

perhaps as was submitted by Mr Hutley, a personal duty "which may not be applied with its full rigour here. That is that the Board would not be liable for casual acts of negligence. We make that concession" (at T 549)

761 In the plaintiff's case, on the state of knowledge during that period it is alleged that the Board would have known, or ought to have known, that the relationship of child and parent or parent figure was vital to the emotional well being of the child. The AWB would have known, or ought to have known, of the risk of psychological damage during the period 1942-1960 as a result of "inadequate parenting", so that its minimum duty required it to take steps to monitor her progress and take reasonable care in a number of respects having regard to information obtained or that could have been obtained through monitoring, visiting, sending her to Child Guidance Clinics or other experts.

762 It is alleged that the Board (or its representative) did not visit her at Lutanda between 1947-1960, and that, had it done so, it would have obtained reports that warranted her being treated for mental or emotional problems; she would have been referred to a Child Guidance Clinic, would have been successfully counselled and treated and given remedial care; she would not have developed an attachment disorder which itself developed into an alleged Borderline Personality Disorder; and she would have progressed to a normal happy life different to that experienced by her presently. In effect she would have been "a different person" to that which she turned out to be.

763 It is asserted that the Board during her upbringing failed to provide a substitute surrogate "mother" ("parent") or to attach her to a suitable person at Bomaderry and/or Lutanda. The plaintiff's alleged Borderline Personality Disorder it is claimed, did not develop or was not diagnosable until she was an adolescent or aged 18 or so, hence there was time and opportunity to correct it; and a breach of duty in failing to prevent its occurrence. Argument is advanced that the condition of poor attachment is reversible. The plaintiff also relies upon a claim of negligence on the part of the Board in failing to visit. Other allegations of negligence earlier detailed are also alleged and relied upon.

764 The plaintiff has also submitted that the staff at Lutanda had "perceptions" about the plaintiff that were inter alia, clouded by "ignorance and prejudice". I reject this submission as being one that is without justification. I have made findings and I say no more on this point, save to repeat that the plaintiff sent, at least her own daughter to Lutanda in the early 1970's.

765 The plaintiff argues that a parent/child relationship provides no analogy to the circumstances of the present case and that the common law's reluctance to respond to an actionable duty owed by a parent to a child has no bearing on the existence of a duty or breach in the circumstances of this case. I propose to find that the parent/child relationship is relevant in considering a duty in the instant case, but that if I am wrong, it is not in any event decisive or critical, to my ultimate decision. The plaintiff argued that where the Board had control and placed the child in the control of others it had a duty to ensure from time to time that the situation was appropriate for that child and that the child was not harmed. Even if there was no guardian-ward relationship there was a duty of reasonable care arising by virtue of the statutory provisions under the Act. As I understand the way the plaintiff's case is put, the duty of care arose from the very situation in which the statute placed the authority on the AWB. Parliament having conferred both control upon the AWB by virtue of s 7(2) and duties by virtue of s 7(1), it was not a contradiction of such a conferral of powers that they be exercised with reasonable care. It was argued that the general rule is that when statutory powers are conferred they must be exercised with reasonable care

so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned and was likely to be occasioned by their exercise, there may be a liability in negligence. It is submitted that unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty to take care: **Heyman** per Mason J at 459.

766 The fact that the defendants' relationship arises from the exercise of a statutory power does not itself prevent the plaintiff from claiming that the defendants owed her a common law duty of care which it allegedly breached. Thus a public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a position in relation to others which imports a common law duty of care to be discharged by the continuation or additional exercise of those powers. The foundation for the Board's duty of care to the plaintiff (if there be one) is to be found in the statutory powers, including that of control arising under s 7(2) and the performance of duties under s 7(1). When a public authority enters upon the exercise of its statutory powers it must do so carefully, see: **Heyman v Sutherland Shire Council** supra; **Pyrenees Shire Council v Day** supra and **Romeo v Conservation Commission (NT)** supra. That said, I do not understand the plaintiff to cavil with the proposition that no duty to exercise a statutory power and to exercise it with care can be imposed by the common law on the repository of the power when the statute, operating in the particular circumstances, leaves the repository with a discretion whether or not to exercise it: **Romeo** per Brennan CJ at 443 or in respect of policy decisions as opposed to operational decisions (a difference, not always easy to draw): **Romeo** at 491-492. If a common law action lies it will lie because careless performance of the act will amount to common law negligence and not because the act is performed under statutory authority: **X (Minors)** supra. The statutory enablement of the Board it is argued facilitates the existence of a common law duty of care.

767 The plaintiff's case is that any matter of difference or distinction between policy decisions and operational decisions do not arise in the circumstances of this case. Indeed, she submits that for example, the failure of the Board to visit the plaintiff at Lutanda was not (contrary to the defendant's submissions) indicative of a policy of assimilation (itself a policy which it does not appear to challenge) or alternatively, an omission due to the application of s 7(1)(a) of the Act. She also further argues, for example, that alleged neglect and failure by the AWB to make contact at Lutanda with a child over whom the Board had control from 1947 to 1960 could not be converted into a policy decision to "assist" in assimilation.

768 The plaintiff did not sue the State of New South Wales in respect of any activity of the Child Welfare Department (Lutanda was a licensed place under s 28 of the **Child Welfare Act** and subject to licensing conditions, obligations and inspections under that Act and in respect of which it is not suggested there was any breach or non compliance or failure to comply as such with Child Welfare Department standards). The plaintiff submits no regard can be had to possible visits by the Child Welfare Department in respect of the plaintiff. It is no part of any case that the plaintiff came under the control of the Child Welfare Department. Further, the plaintiff submitted that it was not open to find that the actions of the Board of Education constituted a satisfaction of any duty by the AWB. The plaintiff argues that duty of care, proximity, foreseeability and causation have been established, that no policy considerations of any kind would prevent a duty of care arising at common law, or proceedings lying for breach. As will be seen in a case involving such as the present, where a new novel category of duty is being alleged, the matters of foreseeability

and proximity are not necessarily decisive: see the recent decision of the High Court in **Frank Perre v Apand Pty Ltd** (1999) HCA 36 (12 August 1999) ("**Apand**").

769 The plaintiff does not appear to argue against (nor submits that I cannot accept) the defendants' submissions that the plaintiff's placement at Bomaderry and/or control or custody by the AWB was lawful being with the consent or at the request of her mother; that the plaintiff's legal guardian was at all times her mother; that transfer to Lutanda was with the consent of her mother; that transfer was in accordance with the Board's statutory duty; or that the transfer was for the purpose of giving the plaintiff a better chance in life than if she had remained at Bomaderry. I have made findings in relation to these. Nor is any argument advanced that the plaintiff's transfer to Lutanda "was improper or negligent" (written reply p 52). Nor would I find that such transfer was other than in good faith, perceived to be for the benefit of the child and further or alternatively properly done reflecting inter alia the provisions of s 7(1)(a) and/or a policy decision of the Board properly exercised pursuant to its discretionary powers.

The Defendants' Submissions:

770 For the defendant a number of arguments have been advanced which I summarise. I trust in summarising them I do no more disservice to them than I have done to the plaintiff's submissions. Again in summarising, I am not to be taken to have overlooked any argument in so far as it is not specifically mentioned.

771 The defendants' argue that there was no duty of care to the plaintiff, no breach and no relevant causation. It also argued that the statutory duty covered the field to the exclusion of the common law. The last proposition in some ways is reflective of the approach of Lord Hoffman in **Stovin v Wise** supra at 952-953 where his Lordship appears to have considered that if the policy of the Act is not to create a statutory liability to pay compensation, that policy should in the same circumstances ordinarily exclude the existence of a common law duty of care. I do not accept this as applying to the circumstances of this case: see **Heyman's** case, particularly per Mason J. Next, **Stovin's** case has been recently considered by the High Court in **Pyrenees Shire Council v Day**; and **Romeo v Conservation Commission (NT)**: see also "in terms" the recent decision of the House of Lords in **Barrett**. The High Court cases were cases involving established categories of negligence and did not involve "novel categories of negligence" issues as does the present case. I do not see these High Court authority as endorsing in terms the views of Lord Hoffman at 952-953 or suggesting the applicability of his views to a case such as the present. In **Day**, Brennan CJ (at 346) accepted that if a decision not to exercise a statutory power was a rational one, then there could be no common law duty to exercise the power. That is not the present case as it seems to me. Next, the observation of Lord Hoffman may be misunderstood. In Australia a breach of statutory duty is a cause of action distinct from the cause of action for common law negligence. The former is a creature of statute, the latter of the common law. "However, the same set of circumstances may give rise to either cause of action" **Day** at 342. Nevertheless, in **Day** (at 422) Kirby J accepted that some statutory powers are not susceptible to providing a foundation or evidence of a concurrent common law duty. That said, I would not conclude that the statutory provisions with which I am concerned fall into the class considered in **Stovin**, or that **Stovin** requires me to reach a different view.

772 The defendants argue that I should also find that Lutanda was a caring environment run and staffed by persons who honestly acted in what they perceived to be the plaintiff's best

interests. A similar argument is advanced in respect of Bomaderry. Having regard to the evidence I accept these submissions. I have already made findings and they are not repeated. I am also urged to find the plaintiff's behaviour in her early teenage years was "normal". I accept this submission as well, and make such a finding.

773 Next, in the instant case in my view there are no established categories of negligence which provide any analogy for the development of the novel cause of action in negligence urged by the plaintiff. Furthermore, were the common law to be extended by the creation of a new category of negligence it is unclear where the new boundaries should be drawn. That there are consequences not merely affecting this case, have already in part been addressed. There are also considerations impacting in the area of social welfare law and in relation to the upbringing of children past, present and future which are also relevant to a consideration of the recognition or otherwise of a duty of care.

774 In England, the House of Lords in **Caparo Industries PLC v Dickman** [1990] UKHL 2; [1990] 2 AC 605 applied in **X (Minors)** supra at 751, considered that in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided cases. In the same way as in the present case, the House of Lords in **X (Minors)** was not referred to any category of case in which a duty of care has been held to exist which is analogous to the duty sought in that case. Lord Browne Wilkinson (at 762) also indicated that there was no category of case with which the duty of care sought in that case could be imposed by analogy. As to novelty however, in the context of a strike out application see the recent decision in **Barrett** to which reference has already been made and which dealt with public policy considerations in terms of whether it would be fair, just and reasonable to impose a common law duty of care on a local authority in respect of upbringing of a child in care. In my view neither the incremental or analogy argument requires me to find a duty of care in this case. The three stage test in **Caparo** and in particular the third test of fair, just and reasonable (in terms) has not been accepted by the majority of the High Court: see **Apand** supra

Policy:

775 In England in respect of what was said to be the "child abuse cases" ("novel categories of negligence") the House of Lords in **X (Minors)** supra, for the purposes of determining whether an action lay at common law, and the extent of the duty of care owed by local authorities "prior to children being taken into care", applied the three considerations test in **Caparo Industries PLC v Dickman** supra. This "test" I might add, reflects the approach adopted by Kirby J in **Pyrenees Shire Council v Day** supra at 419-420; **Romeo** supra at 476 and recently in **Apand** supra. It is not an approach supported by authoritative statements of the other High Court judges, or reflects the majority view of the Court in that case. As to the three considerations, the first consideration is: were the damages reasonably foreseeable, the second is: was the relationship between the plaintiff and the defendant sufficiently proximate. The third consideration is: is it just and reasonable to impose a duty of care. This last consideration was described by Kirby J in **Romeo v Conservation Commission** supra and **Pyrenees Shire Council v Day** supra in terms of whether it is "fair, just and reasonable for the common law to impose a duty". That third consideration also appears to perhaps "mask", or reflect questions of policy, as well.. That said, in **X (Minors)'s** case the reasons of Lord Browne Wilkinson at 749-750 reveal reasons as to why his Lordship did not consider it just and reasonable to impose or superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children. Those considerations, I believe, are

relevant to be considered in the instant case. The reasons were stated as follows: First, that a common law duty of care would cut across the whole statutory system for the protection of children at risk. Second, the task of the local authorities and its servants in dealing with children at risk is extraordinarily delicate. Next, if liability were imposed it might well be that local authorities would adopt a more cautious and defensive approach to their duties. Finally, there is the consideration that there was no analogy for the novel category of negligence urged. Lord Browne Wilkinson said (at 751):

"Finally, your Lordships' decision in the *Caparo case* [1990] UKHL 2; [1990] 2 A.C. 605 lays down that, in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided categories. We were not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here, for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect weaker members of society (children) from harm done to them by others. The scheme involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare".

776 These considerations (with appropriate modifications to meet the circumstances of this case) are in my opinion, matters relevant to be considered for determining whether a duty of care should be found in the present case. They are particularly relevant to determining whether policy should deny the existence of a duty of care of the type claimed.

777 At (752) his Lordship referred to the need for courts to hesitate long before imposing a common law duty of care in the exercise of discretionary powers or duties conferred by Parliament for social welfare purposes. The recent decision of the House of Lords in **Barrett v Enfield London Borough Council** supra, particularly looked at issues of policy in the context of the third criteria referred to in the three criteria test in **Caparo** test.

778 In **Barrett**, (a strike out case, a point of some distinction) the plaintiff, when ten months old in 1973 was placed in the care of the defendant local authority and remained in care until the age of 17. He claimed damages for personal injury arising out of negligence by the authority. He claimed that the authority, under statutory duties imposed by the **Children's Act**, was obliged to exercise "quasi-parental care" in and about the upbringing of the child plaintiff.

779 The case was considered by Lord Slynn (at 98) as one of ongoing failure of duty to be seen as a "whole", including whether the cumulative effect of the allegations "if true" could have caused "the injury".

780 In **Barrett**, it had also been pleaded that breach of the statutory duties in themselves gave rise to a cause of action for damages. That said, the plaintiff accepted before the Court of Appeal and the House of Lords that he had no statutory cause of action. It was not suggested that such a cause of action may have been available. As I said previously, he did not at any time allege a fiduciary relationship or breach of fiduciary duty. The plaintiff alleged that the relationship between him and the council, arising by reason of the care order, was such as to create a common law duty of care owed by the defendant to him. He alleged that in breach of such duty of care the defendant negligently failed to safeguard his welfare and that by reason of the defendant's negligent treatment of him, he attained the age of eighteen without family or attachments and suffering from a psychiatric illness

leading to his having an alcohol problem and a propensity to harm himself. What he said was that the combination of all or some of the alleged acts of negligence produced that result.

781 In the Court of Appeal Lord Woolf MR ,applying the three stage test in **Caparo** concluded it would not be just and reasonable to impose a duty of care on a local authority for the careless exercise of statutory discretions applicable to children in care. Further, Lord Woolf held that the decision in **X (Minors)** applied to cases of children being taken into care, and that the plaintiff's case substantially rested on allegations of the Council acting negligently contrary to statutory discretion. Evans and Schiemann LJJ reached a similar conclusion, placing more emphasis on the inability of the plaintiff to show any causative link between any negligence capable of being proved and the psychiatric damage.

782 However, in the House of Lords, Lord Browne Wilkinson was of the view that not all careless acts or omissions of a local authority in relation to a child in its care were actionable. If "certain careless conduct (operational) of the local authority is actionable and certain conduct (policy) is not" it would then become necessary to divide the decisions of the local authority into two categories. His Lordship said (at 83) "... unless it can be said ... that operational carelessness could not have caused the damage alleged in the present case it would be impossible to strike out any part of the claim". He considered that causation was quintessentially a matter of fact and that damage capable of being caused by negligence in making an operational decision was recoverable.

783 His Lordship also considered that the plaintiff's statement of claim should not be struck out "in this confused and developing area of the law". He observed that the "erroneous dictum" of his in **X (Minors)** (a striking out application) had given rise to a proliferation of claims against psychological services provided by local authorities in dealing with those suffering from reading disability. This, he considered, emphasised the importance of deciding "these cases" on the actual facts and not on mistaken hypotheticals.

784 What also emerges in Lord Browne Wilkinson's judgment (at 85) was the importance of the need to consider (as Australian Courts do not) provisions such as Article 6 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and the impact of the European Court's decision in **Osman v United Kingdom** (ECtHR, 28 October 1998, unreported. A factor in not striking out the plaintiff's statement of claim was that, because of **Osman**, it was difficult to foretell what would be the result if the House of Lords upheld the striking out order. It sees to me that as **Barrett** reveals, the application of conventions may sometimes have unforseen consequences in terms of impact upon the applicability of domestic law on private litigation involving citizen and citizen, or citizen and State.

785 With respect these matters are not on point in cases such as this. Nor do I see why in an appropriate case the striking out process would not necessarily be suitable or even deemed appropriate to determine as I have said the existence of a duty. Such could avoid potentially lengthy and costly trials. However, this case is not concerned with strike out law, and I move.

786 In some respects, **Barrett's** case is an example, or further example of what may be considered to be a development in Australia, New Zealand and the United Kingdom of a class of social welfare type negligence cases involving issues of alleged psychiatric personality or behaviour type injury or damage, the product of events long since passed.

Indeed, the potential for "floodgate problems" with social and economic consequences cannot be ignored when one is dealing with these novel type cases. As Lord Browne Wilkinson recognised, some observations of his had apparently given rise to a proliferation of claims against local authorities by those suffering reading difficulties. What also appears from the decision in **Barrett** is that it was considered important to have the facts proved to see whether the action was justiciable, and further whether it was fair, just and reasonable ("policy") to impose a duty of care, which was not to be decided in the abstract but on the basis of what had been proved. With respect it is by no means clear why in a case such as the present, the establishment of actual facts at a lengthy trial is required in order to determine whether a duty of care is owed.

787 Next, in **Barrett** it was held that public policy considerations did not have the same force in respect of decisions taken once the child was already in local authority care. Their Lordships did not consider that the "bar" on a child suing his parents for negligent decisions in its upbringing applied in a case such as the one they were dealing with where a local authority had to take decisions which a parent never had to take and which had trained staff to advise on such decisions. With respect to those who hold contrary views, it is not clear why this distinction is made or is a valid one. If there be a public policy reason for not permitting a child to sue a parent for "bad upbringing" or in respect of upbringing generally, I do not see why the same public policy reason ought not to apply where the upbringing is done by another (whether voluntary or compelled). If the parent has only a moral duty (not a legal duty) of upbringing, with a liability to a child essentially only arising from a specific particular situation occurring and not from the relationship of parent-child itself, one can see good reason for concluding that such should similarly be the situation in an upbringing relationship of the type presently under consideration, however it be described. Were it to be otherwise, a higher duty would or could be imposed on the third party (whether it be the Board, a State charitable institution, or a voluntary charitable religious home or even an adopted or foster parent) bringing up the child, than on the natural parent. Further, in matters of bonding or attachment, in matters of maternal satisfaction the natural mother has a benefit denied to a third party "substitute", being that of the force of nature and of natural parenting. The substitute third party (if there can be a true substitute) suffers from the detriment of not being the natural parent by nature and therefore not being able to give what a natural parent can provide. I am not bound by the decision in **Barrett** in a strike out application or at all. I find the views of the English Court of Appeal in **Barrett**, of the majority of the New Zealand Court of Appeal in **Prince**, the views of the High Court in **Hahn v Conley** at 283 and of Powell JA in **Williams [No 1]** in the context of discussing fiduciary duty as being particularly, helpful on the question of whether there is or should be a duty of care in the present case. As to the matter of the Board having "trained staff advising" it should be remembered that this case concerns events in the period 1942-1960. In any event in the area of personality and emotional development there are issues of nature and nurture as well and whether trained staff can be "true substitutes or surrogates" for natural parents, particularly a mother.

788 Again, in **Barrett** Lord Slynn said (at 95):

"It is obvious from previous cases and indeed is itself evident that there is a real conflict between on the one hand the need to allow social welfare services exercising statutory powers to do their work in what they as experts consider is the best way in the interests first of the child but also of the parents and of society, without a unduly inhibiting fear of litigation if something goes wrong, and on the other hand the desirability of providing a remedy in appropriate cases for harm done to a child through the acts or failure to act of such

services.

It is no doubt right for the courts to restrain within reasonable bounds claims against public authorities exercising statutory powers in this social welfare context. It is equally important to set reasonable bounds to the immunity such public authority can assert".

789 With respect, how the courts are to implement the "restraint" or how the relevant principles are to be necessarily balanced is not fully made clear by Barrett.

790 Further, whilst the competing social issues are readily stated they are not always capable of resolution by the courts. The point is also made in **Breen v Williams** supra by Mahoney JA at 558 in the Court of Appeal in observing that where the question is "a competition between compelling social claims" the matter is best left to Parliament. In **Barrett** according to Lord Slynn (at 96-97) policy and operational factors have a role to play in determining whether "the particular issue is justiciable". His Lordship also considered that in deciding whether particular issues are justiciable and whether if a duty of care is owed, and it has been broken "the court must have regard to the statutory context and the nature of the tasks involved. The mere fact that something has gone wrong or that a mistake has been made, or that someone has been inefficient does not mean there was a duty to be careful or that such duty has been broken". His Lordship's approach I regard as being helpful to me in arriving at my decision that no duty of care is owed in the circumstances of this case. Perhaps a somewhat similar approach may be found in the views of Mahoney JA in **Public Trustee v Commonwealth** supra, when he distinguished between on the one hand error and on the other negligent error. In the present case, apart from there being no error, there was no negligent error in any event to be found involving the Board.

791 In **Barrett**, Lord Woolf, in the Court of Appeal did not consider that many of the allegations of the kind in the present case alleged were even justiciable. Such a view was also taken by the majority in **Prince** at 277, inter alia, in the context of fair trial considerations but also specifically in terms of causation. That said, Lord Slynn in **Barrett** (at 99) appears to have shared the view that the question of whether it is just and reasonable to "impose a liability in negligence ... is to be decided on the basis of what is proved at a trial". With respect, I do not necessarily accept that to determine whether a duty lies that such should or must involve a full trial in all cases involving "novel" claims.

792 Next, in **Barrett** in dealing with the matter of causation, whilst not supporting a striking out the matter Lord Slynn accepted that the plaintiff "faced considerable difficulties" in proving their case of causation: see also Lord Hutton (at 115).

793 There is nothing in the decision of the House of Lords strike out application in **Barrett** binding upon me. It is a decision that I have some difficulty with in a number of respects. In this case the law is for me to determine on the facts proven.

794 In both **X (Minors)** and in **Barrett** the matter of standard of care was addressed.

795 In **X (Minor)'s** case, Lord Browne Wilkinson said (at 761) when discussing "educational" decisions, observed that even if they were made carelessly, the claims would fail "unless the plaintiff can show that the decisions were so careless that no reasonable education authority could have reached them". His Lordship said (at 766) in the context of discussing educational well-being of a child that "the headmaster and advisory teachers were not under a duty to exercise a higher degree of skill such as that of an educational

psychologist. Nor would they have been in breach of any duty of care if they held and communicated a reasonable view of dyslexia shared at that date by a responsible body of educational thinking".

796 It is appropriate to also mention in passing Lord Hutton's views on the subject of standard of care in **Barrett** and the approach to be adopted in England under English common law. He considered that the standard of care in negligence must be related to the nature of the duty to be performed and to the circumstances in which it is to be so performed. He said (at 115):

"Therefore the standard of care to be required of the defendant in this case in order to establish negligence at common law will have to be determined against the background that it is given discretions to exercise by statute in a sphere involving difficult decisions in relation to the welfare of children. Accordingly when the decisions taken by a local authority in respect of a child in its care are alleged to constitute negligence at common law, the trial judge, bearing in mind the room for differences of opinion as to the best course to adopt in a difficult field and that the discretion is to be exercised by the authority and its social workers and not by the court, must be satisfied that the conduct complained of went beyond mere errors of judgment in the exercise of a discretion and constituted conduct which can be regarded as negligent".

797 An application of such a test to this case that I am dealing with, would further lead me to the conclusion that there was no breach of that standard in any event. That is however, a further issue different to that of whether there is a duty of care to be found in cases such as the present.

798 In **Prince** supra, the majority of the Court of Appeal (at 277) denied the existence of a duty of care in an adoption type case relying upon public policy reasons, including the public policy reason supporting the absence of an action lying at the suit of the child against a parent for in effect bad parenting. I acknowledge that in New Zealand, the courts in effect give effect to the two stage tests in **Anns v Merton London Borough Council** [1977] UKHL 4; [1978] AC 728 and the decision in **Prince** is to be seen against such a background. That said, the policy point I believe is a relevant matter to consider on the existence or otherwise of a duty of care. A similar policy argument by reference, inter alia, to the parent/child analogy (based on the trial judge's decision in **Prince**) was advanced in **Barrett** supra and accepted by the English Court of Appeal. Other policy reasons for denying the duty of care in **Prince** particularly in point, were considerations mentioned by the majority. The New Zealand Court of Appeal majority said (at 277):

"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."

799 The Court also accepted that in determining new situations in which a duty may lie, policy considerations were relevant . The majority said (at 268):

"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 in *Anns v Merton London Borough Council* [1977] UKHL 4; [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 at pp 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.

800 Speaking for myself, I find the approach of the majority of the New Zealand Court of Appeal in **Prince** and that of the English Court of Appeal in **Barrett** reflects valid policy considerations, and gives appropriate recognition to the decision of the High Court in **Hahn v Conley**. Indeed, I consider the reasoning helpful.

801 In Australia, policy reasons have been held to deny the existence of a duty of care at common law even where proximity and foreseeability are both present. In **Jaensch v Coffey** [1984] HCA 52; (1984) 155 CLR 549 at 583 Deane J dealt with policy considerations when stating that it was not the common law that the reasonable foreseeability of risk of injury to another automatically meant that there was a duty to take care with respect to that risk of injury. His Honour considered that "reasonable foreseeability on its own indicates no more than that such a duty will exist if and to the

extent that, it is not precluded or modified by some applicable overriding requirement or limitation". The policy of the law may impose a limitation in particular circumstances or in classes of case to limit or confine the existence of a duty to take care. In the end (particularly "where a new category is suggested") policy considerations will set the outer limits of the tort: **Hill v Van Erp** (1997) 188 CLR 159 at 179. The outer boundary of liability in negligence will be fixed by reference to inter alia policy considerations: **Day** per Kirby J at 419. In **Gala v Preston** [1991] HCA 18; (1991) 172 CLR 243 at 260 it was held that no duty was owed, apparently, at least on the part of some members of the High Court, for public policy reasons.

802 The effects of imposing a duty in a case such as the present for past events occurring in the 1940's-1950's could presumably have social, economic and resource consequences. Apart from this. the imposition of a duty of the type urged in the instant case could affect not merely the Board but also have financial consequences for other child caring bodies whether conducted by the State or by religious, voluntary or other charitable institutions, the very bodies to whom the very children sought to be protected, turn to and rely upon for assistance. Indeed, foster parents and adopting parents could also be affected as well. The social consequences as well need to be considered in terms of the provision of child upbringing services. Would there be, or could there be a reduction in the availability of services? These matters or effects are difficult to measure. Nevertheless, they are practical considerations of a type which seem to have been addressed in **Romeo** by Brennan CJ at 446-447. To impose a duty measured solely by reference to foreseeable risk of injury and proximity without more, might impact upon the provision of child care services which society unfortunately requires for the upbringing of children, whose parents are unable or unwilling to bring up their children themselves, or provide appropriate care. A factor also relevant to the existence of a duty of care in the circumstances is whether extending liability would reduce the supply of services, increase their cost or reduce standards to the detriment of the public: **Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)** [1997] HCA 8; (1997) 188 CLR 241. Questions of legal policy reflect the need to limit the imposition of a duty of care if foreseeability and proximity alone take the law into imposition of duties of care which are unfair, unreasonable and unrealistic: see **Romeo** per Kirby J at 476-477: **Apand** supra per McHugh J at 80. Further as McHugh J said the existence (or non existence) of insurance, and of loss spreading is not a guiding rationale for the law of negligence.

803 In **Esanda**, McHugh J (at 283-284) referred to the public interest not to overlook the impact of the imposition of a duty on the administration of the court system: see also **X (Minors)** per Lord Browne Wilkinson at 761-762. Before leaving the matter of policy and turning to consider further the correct approach for determining questions of duty ("perhaps none is possible") I would observe that a public authority is not under a duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Whilst these are matters going to the existence of a duty: **Heyman** at 469; **Romeo** at 492, there are perhaps views that such matters are to perhaps rather be regarded in determining what should be done to "discharge a duty of care": cf **Day** per Gummow J at 394.

804 The recent decision of the High Court in **Frank Perre & Ors v Apand Pty Ltd** illustrates some of the difficulties associated in determining whether a duty of care is owed, the tests for such and some of the difficulties associated with questions of reasonable foreseeability and proximity as the tests for negligence.

805 The **Apand** case concerned the questions of liability of an alleged tortfeasor in negligence for financial loss, unconnected with any injury done by a tortfeasor to the person or property of the plaintiff. In his decision Gleeson CJ (at 2) in referring to the "expansive" application which had given to the concept of reasonable foreseeability in relation to physical injury to person or property, concluded that the duty to avoid any reasonably foreseeable financial harm needs to be constrained "by some intelligible limits to keep the law of negligence within the bounds of common sense and practicality". I consider that such a view duly modified to apply to a case such as the present supports the denial of the existence of a duty of care.

806 His Honour referred to the solution as not being found in the three stage "test" said to have been formulated by Lord Bridge in **Caparo Industries Pty Ltd v Dickman** supra. Lord Bridge (617-618) referred to the necessary ingredients of foreseeability, proximity and a situation in which the court considers it fair, just and reasonable that the law should impose a duty. In **Caparo**, Lord Bridge said (at 617-618):

"The concepts of proximity and unfairness ... are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach the features of different specific situations, which, on a detailed examination of the circumstances the law recognises pragmatically as giving rise to a duty of care of a given scope."

807 Lord Bridge also quoted with approval the observations of Brennan J in **Heyman** supra (at 481) in determining whether a duty of care arose. In **Heyman** Brennan J said that it was preferable for the law to develop novel categories of negligence incrementally and by analogy with established categories. In my view the incremental and analogy arguments do not point to a duty of care existing in the instant case.

808 In his judgment in **Apand**, McHugh J observed that there was a danger that the **Caparo** test would be used as the test of duty in every case where duty is in issue. He said that the three stage test in **Caparo** had been adopted by Kirby J in **Pyrenees Shire Council** supra at 419-420. That said, he thought the **Caparo** test suffered from three stated defects. He considered that proximity had no more content under the **Caparo** test than before the decision, and that Dawson J was correct in **Hill v Van Erp** when he said (at 176-177) that proximity is neither a necessary or sufficient criterion for the existence of duty of care. McHugh J, earlier (at 22) whilst considering that proximity may not have been the talisman for determining a duty of care, neither the High Court or the English Courts had "entirely abandoned" the used of proximity as a factor in determining duty. He also considered that since the "fall of proximity, the Court has not made any authoritative statement as to what is the correct approach for determining the duty of care situation. Perhaps none is possible". With respect, the instant case that I am deciding may well be a very good illustration of the point made.

809 His Honour also considered (at 24) that "almost every one would agree that the courts should not impose a duty of care on a person unless it is fair, just and reasonable to do so". Next, (at 25), McHugh J referred to "notions of current ideas of justice or morality" as being a criteria of last resort in determining the duty question. With respect, I agree. Endorsement appears to have given to the view that whatever formula be used, "the outcome in a grey area has to be determined by judicial judgment". Further, his Honour observed that the two stage test for duty in **Anns v Merton London Borough Council** had been rejected by the High Court and in England. Applying the consideration of judicial judgment, I would also find

in the circumstances that there is no duty of care.

810 At 27, his Honour repeated his view that the two stage test in **Anns** and the three stage test in **Caparo** were each defective, and that proximity was not the unifying test for negligence. At 29-30, he discussed a conceptual framework for determinants of duty as including established categories, a considerable body of case law and a useful concept of reasonable foreseeability. He thought that the best solution was to proceed "incrementally from the established cases and principles". McHugh J said (at 30):

"The law should be developed incrementally by reference to the reasons why the material facts in analogous cases did or did not found a duty by reference to the few principles of general application that can be found in the duty cases."

811 The present case that I am considering is novel in terms of categories. That is not the end of the matter. That said, if the court does not think it is fair, just and reasonable to impose a duty such should not be imposed. I do not consider it should be imposed in the circumstances of this case. Likewise, even if the case is in a "grey area" with the outcome to be determined by judicial judgment, the courts' judicial judgment is against imposing a duty. In saying this, in addition I also rely upon the other reasons as stated in reaching such a decision.

812 In his reasons for decision in **Apand**, Gummow J referred to case law advancing from one precedent to the next. His Honour discussed the situation where a case did not fall within a recognised category and was one for the creation of a new category. His Honour referred to `salient features" which combined to constitute a sufficient relationship to give rise to a duty of care "with" allowance for the operation of "control mechanisms". As a matter of policy in this instant case the "control mechanisms" are called for and should on his Honour's approach be applied.

813 At p 96, Kirby J observed that even if it be accepted that to some extent considerations such as "foreseeability" and proximity are labels masking deeper policy choices "they were rational labels". His Honour also appears to have agreed that whilst the references to "fair, just and reasonable" (as considerations relevant to the existence of a duty) may not constitute a "rule" or "test" as such, they did provide an approach of methodology which obliges the decision maker to face squarely considerations of policy questions". His Honour appears to have placed weight on the importance of undertaking the policy analysis required at the third stage of the **Caparo** approach, reiterating that his approach (and that of **Caparo**) provides a methodology for deciding whether a duty of care exists in negligence cases (see also at 101-102 and further at 107). His Honour referred to the matter of "floodgates" and also (at 113) identified the policy reasons he regarded as excluding a duty of care, ultimately concluding that legal policy did not deny the existence of a duty of care in **Apand**.

814 In his reasons Hayne J (at 127-128) observed that to search for a single unifying principle lying behind what is described as a relationship of proximity is then "to search for something that is not to be found". His Honour considered that because of the lack of definition of terms like "proximity" and "fairness" that the law "in this area" should develop incrementally: see **Heyman** at 481; **Caparo** at 618; **X (Minors)** at 633.

815 In **Apand** there thus appears to be general acceptance that it is preferable for the law rather to develop novel categories incrementally. Such further view when applied to this case further leads me to the conclusion that in the circumstances of this case no duty of

care should be found.

816 There are no American or Canadian cases to which counsel has pointed suggesting a duty "of care" in circumstances such as the present. The Canadian case of **M (K) v M (H)** referred to in **Williams [No 1]** was a case concerning an intentional tort of trespass and fiduciary duty "of care" in Canada. The decisions in **Barrett** (in the Court of Appeal but not in the House of Lords) and **Prince** draw on principles arising in the relationship of parent and child. Next, the defendant advances an argument by reference to the moral duties of conscientious parenthood arguing that in cases concerning such support, policy or public interest militate against imposing, or it is not just and reasonable to impose, a duty. In my view the analogy with the parent-child relationship should not be ignored. In fact, I consider it has relevance, despite views to the contrary in the House of Lords in **Barrett**. Even if I am mistaken, such a view of itself would not cause me to deny the existence of a duty of care. I see no reason why in a case such as the present one, why the Board should be necessarily under a higher or different duty to that of a parent in similar circumstances, involving upbringing of a natural child.

817 At common law the duty to bring up a child to support and maintain has long been regarded as a moral one or even described as a "moral duty of imperfect obligation": **Bayely v Forde** (1863) LR 2 QB 539 at 569. Further, in the instant case there was no duty under the Act to educate the plaintiff, a matter already discussed. The law in Australia in respect of parent and child is set forth in **Hahn v Conley** supra per Barwick CJ (at 283):

"... I think that the view for which there is most judicial support and the view which commends itself to me is that the moral duties of conscientious parenthood do not as such provide the child with any cause of action when they are not, or badly performed or neglected".

818 Apart from motor vehicle cases, there may be cases of intentional wrong, for example, of assault by a father on a child: the Canadian case of **M** or against an adoptive father: cf **Stubbings v Webb** supra.

819 The case of the negligent motor accident case involving child and parent situation is one not arising from a mere "blood relationship" of parent and child but because of the facts that exist in the particular situation. As I have earlier said (but it is worth repeating in the particular context). The common law position in respect of torts within the family is discussed by Professor Fleming in **Fleming on Torts (Seventh (ed))** at 644:

"There is a consensus that the parents' duty to feed, clothe, maintain, educate and generally care for the child is not enforceable in tort, whatever its moral or other legal (for example sanctions criminal) sanctions".

820 The duties which the relationship cast on a parent to care for and protect the child are moral duties not enforceable by action in tort. The occasions when a child can sue its parent in tort are the result of specific situations in which the parties find themselves: see also **McCallion v Dodd** [1966] NZLR 710 per McCarthy J at 270 and **Rogers v Rawlings** [1969] Qd R 262.

821 Thus the duty which a parent owes in a child's upbringing and its incidents of feeding, clothing, educating, looking after and guiding or indeed, giving a child love and affection, involves not a legal duty, the breach of which gives a right of action against a parent.

822 Where the alleged negligent act involves an exercise of ordinary parental discretion or conduct or decision making with respect to bringing up the child and how in what manner such is to be done then ordinarily the law does not interfere. In my view there is nothing in **Bennett v The Minister** supra that is inconsistent with the view stated. In **Bennett** the action ultimately had as its source the defendant committing a negligent act in one of its institutions where the plaintiff was being cared for resulting in the loss of a chose in action to the infant for his injury. The action sprang out of a particular situation. In one sense the case arose (on a "tracing back") to a specific particular situation of the type accepted by the common law and illustrated in **Hahn**. The duty arose in a more limited context involving an actual obligation to ensure the plaintiff suffered no economic loss by not being advised of his rights, and the loss of a chose in action. It was not such a case as the present of an action arising from in effect an ongoing "upbringing" relationship extending over eighteen years.

823 In my view, if there be an analogy, with the parent-child relationship, (and my decision does not turn on this) such is further or alternatively, an additional reason for denying a duty of care. That decision does not ultimately of itself turn upon this analogy argument, although it assists in reaching my decision.

824 For all the reasons given in my judgment, no duty of care should be imposed. The plaintiff's case in negligence thus fails because of this absence of a common law duty of care for reasons stated.

Breach of Duty of Care:

825 It is necessary to address the issue of breach of duty in the event that I am in error in concluding that there is no common law duty of care and for reasons given, and to be given there was no breach of duty in any event.

826 The plaintiff asserts that at common law there is a non-delegable duty of care arising out of a special relationship between the defendants and the plaintiff. That said, Mr Hutley does not appear to suggest that this is so in absolute terms or applies in all cases. He relies upon such cases as **Burnie Port Authority v General Jones Pty Limited** [1994] HCA 13; (1994) 179 CLR 520; **Kondis v State Transport Authority** [1984] HCA 61; (1984) 154 CLR 672; **Ramsay v Larsen** [1964] HCA 40; (1964) 111 CLR 16. For the sake of completion of authority I would add the views of Toohey and McHugh JJ in **Northern Sandblasting Pty Ltd v Harris** (1997) 188 CLR 313 in also basing their judgment on the presence of a personal or a non-delegable duty. The matter of whether there is or would be a non-delegable duty in the circumstances is by no means clear. The plaintiff's mother asked the Board to take control of the plaintiff under s 7(2). The plaintiff may have become a ward under s 13A by a Children's Court committal. With respect to the plaintiff, the Board has a power to board out under s 11D(2) and place a ward in a foster parent home. The Board may place a ward in an apprenticeship or in employment under s 11A(1). The Board may keep or place the ward in a home under s 11 of the Act. That was not the situation in this case. The Board may discharge its obligations in different ways In the circumstances of this case where there was placement at Bomaderry and Lutanda I thus have some reservations as to whether it can be said that there was necessarily a non-delegable duty created and remaining on foot for all purposes and in all circumstances. Further, in terms, the special relationship cases do not seem to apply to that of parent or child, or between a person in loco parentis and a child ward (or at least for all purposes) or a body adopting the role of a parent or guardian in relation to the child. The non-delegable duty cases arise from special relationships arising in particular situations such as hospital

and patient, school and pupil, employer and employee and in the further category found by Toohey and McHugh JJ in **Harris**. They have not as I have observed, extended to a child-parent relationship situation, or to one such as the present. It has not been affirmatively held that a parent-child category is to be assimilated to traditional categories of special relationships giving rise to non-delegable duties, although the groups are not fixed: **Harris** per McHugh J.

827 It is not necessary finally to determine whether there was a non-delegable duty of care in the circumstances because of my view about there being an absence of duty and further or alternatively, in any event absence of breach of any duty. However, despite my reservations I am prepared to assume that there is a non-delegable duty of care for the purposes of, in the alternative, a consideration of breach of duty.

828 I have made certain findings in respect of the state of knowledge in respect of the ten year period 1942-1952. On one view it might be considered that those findings are particularly relevant to the matter of the existence or otherwise of a duty of care in respect of the period 1942-1952 so far as perhaps denying the existence of the element of foreseeability of injury in respect of that period. The matter has not in terms been so formulated by the defendant. The proposition advanced by the defendants is that, not only do the facts not support any such claim, but that there has to be a foreseeable risk of injury.

829 Were it necessary to determine the matter consistent with my earlier finding in respect of "state of knowledge" in the period 1942-1952 I would be disposed to the view that there was, for this further reason, no duty of care in that period. A finding of no duty in respect of that period would have consequences in terms of also considering issues of breach and causation as well, as, perhaps damages, if there was an entitlement to recover such.

830 That said, in this case, the state of knowledge (or its absence) argument appears to be capable of being treated as particularly relevant to the matter of breach of duty (if a duty exists) and on the issue of reasonable care. In **Maloney** supra Barwick CJ particularly made the point that "retrospect, increased knowledge or experience embraced in hindsight has no role to play in determining what is reasonable". Accordingly, in this case it seems to me that my finding as to state of knowledge in the period 1942 to 1951, should rather be taken into account on the issue of breach of duty as opposed to existence of a duty as such. In saying this I do not misunderstand the argument that if there is no duty to take the relevant care because of lack of relevant and reasonable knowledge, then it is difficult to conceive how there can be a breach. Nevertheless, that said, it seems to me that at the end of the day treating the absence of knowledge (in part) as being particularly relevant to breach in practical terms achieves a similar result.

831 The plaintiff's case is essentially of negligence by omission. Under the Act the statutory duties are stated in general "permissive" terms, or in terms of duties. The scope of the duty of care there is (if one) imposed by the common law will be that of reasonable care. The projected scope of the duty must be tested not by hindsight but by foresight. In defining the measure of the duty of care a court is not only determining an element essential to the ascertainment of the rights of the parties, it is giving effect to the standards which persons or bodies must reach and possibly even insure against: see **Romeo** per Kirby J at 479 applying **Cekan v Haines** (1990) 21 NSWLR 296.

832 What constitutes reasonable care is an objective and impersonal test. It is the "standard of the reasonable man" per Fullagher J in **Anderson's** case supra cited in **Cook v Cook** [1986] HCA 73; (1986) 162 CLR 376 at 382. What is a reasonable

standard of care will be influenced by differing community standards depending upon when the events took place. In this case I am concerned, and so much is accepted by the parties with standards of the 1940's and 1950's. A duty to act reasonably is not that of an insurer. What is reasonable must be judged in the light of all the circumstances. Under the law, the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost of averting the danger will loom large. These matters bear upon what the reasonable response of the defendants may be to the fact that the injury is reasonably foreseeable. Whilst there are a number of factors that go towards judging what reasonable care on the part of particular defendants required, in the end what is reasonable is a question of fact (for the jury or judge) to be judged in all the circumstances of the case.

833 The point as to reasonable care is made by Barwick CJ in **Maloney v Commissioner for Railways** supra to which some reference has already been made:

"It is, in my opinion, proper to remark at the outset that the respondent's duty was to take reasonable care for the safety of his passengers. It is easy to overlook the all important emphasis upon the word "reasonable" in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect. The likelihood of the incapacitating occurrence, the likely extent of the injuries which the occurrence may cause, the nature and extent of the burden of providing a safeguard against the occurrence and the practicability of the specific safeguard which would do so are all indispensable considerations in determining what ought reasonably to be done. Of all these elements, evidence is essential except to the extent that they or some of them are within the common knowledge of the ordinary man. The fertile but unqualified imagination of counsel or judge can never be a substitute for such evidence."

834 It is to be remembered that events "long in the past were once in the future". These events took place in the 1940's-1950's. The happening of the "accident" fixes the relevant time for the examination of the requirements necessary to satisfy the ("employer's") duty of care: **Quigley v The Commonwealth** supra.

835 In **Maloney**, Jacobs J noted on the circumstances of that case, the absence of any evidence as to the extent of the burden which provision of sliding doors would place on the defendant and of the practicability of installing them in all the circumstances including the maintenance of a railway service. His Honour also referred to the need to measure the degree of risk against the standard of care expected of the Commissioner to eliminate or minimise that risk. There was no such evidence. No attempt was made to prove how frequently persons fell from moving trains. As his Honour observed the case for the appellant assumed that the degree of risk was not immaterial, proceeding on the basis that because there was a risk there was a duty to take positive steps to eliminate it. In some ways this has been the approach adopted in the instant case by the plaintiff.

836 In the present case when it comes to measuring the standard of care of the AWB, it is appropriate to observe that no attempt was made by evidence to prove how frequently if at all, babies more or less on birth, voluntarily given up by their mothers and placed initially in Bomaderry and then transferred to a such as Lutanda, or even to a Board Home under s 11 of the Act, or placed in a charitable depot or home under s 11(2) of the Act, or even as a fostered boarder in the care of a foster parent under s 11(3) (or any of these combinations) had ever developed an alleged disorder of attachment or alleged Borderline Personality Disorder or otherwise at any time, or at all. No evidence was led as to the number of

children from Lutanda (if any) who had developed either or both disorders or other disorders. Former children whose evidence I accept, were called. They gave evidence of good care and of proceeding through life in a normal way (without any mental or psychiatric disorders). What evidence was adduced would suggest that no Lutanda child in its many years of operation (apart from the plaintiff's allegations) had developed either or both disorders or any psychiatric disorder. On the evidence Lutanda had been operating for many years as a children's place of care under the **Child Welfare Act** since 1930. Both in respect of Lutanda, and in respect of the Home at Bomaderry, which was also in existence in the 1930's, no evidence of any child suffering from any disorder or either of the disorders alleged by the plaintiff was lead by the plaintiff. The weight to be given to an "accident free history" involves a question of fact to be determined in the light of all the circumstances. In this case I give it considerable weight: **Bankstown Foundry Pty Ltd v Braistina** [1986] HCA 20; (1986) 160 CLR 301 at 309.

837 My findings of fact, my reasons generally negative any breach of duty. Further, what has not been addressed by the plaintiff is the cost that would have been incurred in the measures necessary to prevent all equivalent accidents of like kind and risk: **Romeo** per Kirby J at 481. Similarly, I have also discussed the evidence in terms of the elimination of the alleged risk relied upon by the plaintiff and, in effect the lack of availability in terms of reasonableness or even practicability, of such means for completely eliminating the risk (even in a case involving a natural mother).

838 It is appropriate to consider the test for ascertaining whether a breach of duty of care of the defined scope has occurred. In **Wyong Shire Council v Shirt** [1980] HCA 12; (1980) 146 CLR 40 Mason J at 47-48 stated the relevant test. His Honour said (at 47-48):

"In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. Magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

839 In **Public Trustee v The Commonwealth of Australia** supra, Mahoney JA said:

"However, in a practical sense, when a claim for damages comes before a court for determination, the court knows - it will be identified in the plaintiff's claim and established by evidence - the act or default which is said to constitute the breach. In such a case, the court looks back to that act or default and must decide whether that act or default was a breach of duty because a reasonable man: in truth, the court: see Davis Contractors Ltd v

Fareham Urban District Council [1956] UKHL 3; [1956] AC 696 at 728 per Lord Radcliffe; would not have done it. See generally Phillis v Daly (1988) 15 NSWLR 65 at 72, 76-7. Accordingly, in the ordinary case coming before the court, what the court must, in a practical sense, decide is: whether the defendant did what he is said to have done: and (if he did) whether that act or default is a breach of his duty to take care."

840 His Honour also observed a tendency in practice to equate error with negligent error, but noting the distinction between the two. In the instant case I have found no error or even negligent error on the part of the Board.

841 In **Romeo** Kirby J said (at 480):

"Insufficient attention has been paid in some cases ... to the practical considerations which must be balanced out before a breach of the duty of care may be found. It is here, in my view, that courts have the authority and responsibility to introduce practical and sensible notions of reasonableness (I would add whatever may be the views of experts and others) that will put a brake on the more extreme and unrealistic claims .... It is quite wrong to read past authority as requiring that any foreseeable risk of injury however remote must be guarded against ...."

842 This passage perhaps also reflects the views in **Maloney** supra.

843 As to the subject of the expense of the taking of alleviating action, it has also been increasingly recognised that courts should bear in mind as one factor that resources available for the "public service" are limited and allocation of resources is a matter for bodies accorded that function by law: see **Romeo** per Kirby J.

844 Under s 7(1)(a) of the Act the matter of general use of moneys voted by Parliament, and other funds and how such are to be disbursed is a matter stated in terms of duty. Section 5 also deals with appointment of staff to administer the Act for the benefit of all persons covered by it and not merely children.

845 For all these reasons, if there be a duty of care, no breach of duty has been established.

Causation:

846 It is necessary to consider the issue of causation in the event that I am wrong in my conclusion that there is no duty of care and no breach of duty of care. Having regard to what I have said, and propose to say the plaintiff fails on the issue of causation as well, no claimed Borderline Personality Disorder or any other psychiatric disorder. injury, harm or damage was caused by any default or negligence of the AWB.

847 Causation is a question for the tribunal of fact to determine, applying common sense to the facts of the particular case: see **March v E. M Stramare Pty Ltd** [1991] HCA 12; (1991) 171 CLR 506; **Bennett v Minister for Community Welfare** supra; **Chappel v Hart** (1998) 72 ALJR 1344; **Romeo v Conservation Commission** supra. In reaching their decision as well in the matter of causation, a trial judge must have regard to all the facts, to all the circumstances, to all of the evidence and not merely to the views of the experts. In a case such as the present where the plaintiff is claiming damages for negligence occasioning personal injury, causation is in effect proved by adopting a hypothesis that the injury would not have been suffered by the plaintiff without the

negligence of the defendant. In **Romeo** Kirby J said (at 482):

"Where a breach of duty has been shown it is still necessary for the plaintiff to prove on the balance of probabilities that such a breach caused or materially contributed to the damages. The plaintiff must show that if the defendant had fulfilled its duty as defined, doing so would have resulted in the avoidance of the damage and loss to the plaintiff. The question is hypothetical."

848 As Kirby J also noted it is easy to be wise after the event and to conceive of precaution that could have been taken. The common sense answers will differ according to the purpose for which the question is asked. Thus commonsense answers to questions of causation will often arise for the purposes of attributing responsibility to someone to make the guilty of an offence to blame them for something that has happened, or to make them liable in damages: cf **Environment Agency v Empress Car Co** [1998] UKHL 5; [1998] 2 WLR 350 (per Lord Hoffman), a decision also applied in **Chappel v Hart** supra. Causation in equity for breach of a fiduciary obligation involves a different test: see **O'Halloran** supra.

849 In seeking the cause of any event the purposes of the law, both civil and criminal, is to attribute legal responsibility to some person. The question of causation for the tribunal of fact is not a philosophical or scientific question, but a question to be determined by the tribunal of fact applying its commonsense to the facts as it finds them.

850 In **Prince's** case, the majority of the New Zealand Court of Appeal observed (at 277):

"Causation including weighing the respective inferences of nurture and nature in shaping the child and affecting his or her life's prospects and qualification of loss are likely to be speculative, if indeed justiciable." [my emphasis].

851 The same issues arise in the present case. In my view, my decision in the instant case confirms the correctness of this view and the difficulty associated with questions of causation in cases such as the present.

852 On the issue of causation, where the damage has resulted from a negligent failure to act, or an omission in a general sense, there may be greater difficulty in proving causation: see **March** supra per Mason CJ at 514. It is often difficult to demonstrate what would have happened in the absence of alleged negligent conduct on the part of the defendant, causation being a question of fact for the court, is an issue the court alone has to address. Further as a general rule a failure to act is not negligent unless there is a duty to act: **Heyman's** case per Gibbs CJ.

853 In **St George Club v Hines** (1961) 35 ALJR 106 at 107 it was said:

"In an action of law a plaintiff does not prove his/her case by showing that it was possible that his injury was caused by the defendant's default ("breach of duty") ... nor does proof of default followed by injury show that the defendant caused the injury as Viscount Simonds said in Quin v Cameron & Roberton Ltd [1958] AC 9 (at 23), post hoc ergo propter hoc is a fallacy in respect of breach of a statutory regulation as it is in respect of any other event in life."

854 Further, if the harm would have occurred notwithstanding the failure to perform the alleged duty then the alleged omission or failure is not the cause of the damage; cf **Quigley** supra; **Duyvelshaff v Cathcart & Ritchie Limited** (1973) 47 ALJR 410. In that situation

the necessary causative link between omission or failure to act and harm is not established.

855 In the instant case the plaintiff alleges that the necessary chain of causation can be traced back to the conduct of the AWB, arising not from any single particular situation, but rather extending over the period commencing in 1942 and ceasing in 1960. It is said to be founded upon a general course of conduct by omission, with the damage developing as a result of the cumulative effect of essentially negligent omissions. The Borderline Personality Disorder is particular asserted to be due to failure in parenting for which the defendant AWB is liable. These submissions are rejected.

856 In order to succeed the plaintiff's case must show negligence, or default or breach of duty (assuming a duty of care) causing harm. Absent proof of default or breach of duty causing harm, her action fails.

857 The defendants' position in respect of the matter of Borderline Personality Disorder appears to be essentially that it conceded (at T 615) that Dr Waters made a diagnosis of Borderline Personality Disorder in 1991; that Dr Ellard stated he "did not dispute that diagnosis made by Dr Waters" and that "in 1996 she ceased to have or ceased to satisfy the diagnostic criteria." They also submitted "nobody knows precisely what is wrong with her now".

858 The plaintiff asserts that there were childhood manifestations of attachment disorder and that had these been recognised by an "expert", the condition would have been "reversible" and that she would not also have developed substance abuse "disorder". For reasons already given I reject that argument.

859 I have made findings of fact in relation to the absence of such manifestations. I have further referred to the report of Dr Cooley in 1960. If contrary to my findings, any manifestations were present during the plaintiff's childhood then failure to recognise them at any time would at most be error and not negligent error.

860 Further, it is claimed the alleged disorder of attachment and/or Borderline Personality Disorder is the product of maternal deprivation, because of the mother giving up the plaintiff as a baby to the Board, for reasons no doubt valid to her. There is merit in the defendants' argument that this was a "given" with which other people including those who retained their own children had to face.

861 Next, if the condition was caused or contributed to by disruption of a bond with Sister Saville (at Bomaderry) or further or alternatively, as a result of disruption with Miss Atkinson (at Lutanda), both disruptions were inevitable. Any relationship by their nature and in the circumstances could not be permanent let alone semi-permanent.

862 Next causation raises itself as an issue in another way. The plaintiff asserts that AWB officers should have attended at Lutanda "at least once a year" (and more frequently in earlier years and particularly so when she was approaching the age of a teenager or in teenage years) and that with such attendants, different things would have happened including involvement of the Child Guidance Clinics. In the light of my findings and reasons given, this submission is rejected. Additionally; it involves unproved speculation.

863 Further, the plaintiff's case that if she had been seen by a Child Guidance Clinic a diagnosis of mental disorder would have been made and effective form of treatment would allegedly have been instituted and/or successful is based inter alia on assumptions of fact

and history, which I have rejected as well for reasons already given and the findings made.

864 In view of the plaintiff's strong criticism, Lutanda and its staff are entitled to have me state that no criticism of it or its staff including any failure to take "proper" care is warranted or justified on the evidence before me. A similar observation is made in respect of the UAM Home at Bomaderry. Although neither are sued, each is entitled to have its good name and reputation, in a difficult situation involving the upbringing of a child in an institution, preserved. The Board if it had a duty to take reasonable care, discharged its duty. No default on its part caused "harm". No negligent omission or acts on its part caused the plaintiff's alleged psychiatric disorder or any injury, harm or damage. Even if there be a duty of care, and/or breach, causation is thus not proved or established.

865 For all these reasons, even assuming a duty, and a breach of duty, the plaintiff's case on causation also fails.

The Result

866 The plaintiff's case on liability fails. There should be a verdict and judgment for the defendants.

Damages:

867 At the trial I indicated that even were I to conclude that the plaintiff should not succeed, I would endeavour to assess damages. Such assessment involves not merely very real speculation, but also consideration of many imponderables.

868 I have, despite my views on all aspects of liability, despite my findings of fact made in respect of liability and on liability evidence, and despite my view that any assessment is highly speculative, nevertheless sought to perform a contingent assessment, in case I am in error in any of these views. I do so only upon a hypothesis (and not otherwise) that I am in error in finding no duty, no breach, no causation and that the claim is not too speculative.

869 Thus, what I have written on the subject of damages, must not be understood or read, as suggesting any inconsistency with any of my findings of fact on the issue of the liability, or suggesting error in respect of my findings of fact on the issue of liability. Next, my assessment of damages involves hypothesising and making assumptions, inconsistent with what I have found on the liability issue. The assessment too, and on the further assumption that any assessment is not highly speculative. What I have said is said so as to avoid any misinterpretation of my reasons for performing any assessment exercise.

870 I have not been confronted with an assessment task of this nature before. It involves a somewhat novel claim for damages, extending back in some respects on the plaintiff's claim to the commencement of her life in 1942 and continuing thereafter, and still continuing into the future. The task of performing any "contingent" assessment at all, because of the issues, is a formidable, indeed extremely difficult one.

871 Next, any assessment in this case as I have indicated, is really largely speculative and provides some practical confirmation for what the majority of the New Zealand Court of Appeal said in **Prince** at 277:

"Causation, including weighing the respective influences of nurture and nature in shaping the child and affecting his or her life's prospects and quantification of any loss are likely to be highly speculative if indeed justiciable." [my emphasis]

872 The nature of the claim, its size and its magnitude are reflected in the following passages with Ms Adamson for the plaintiff (at T 757):

"**HIS HONOUR:** The plaintiff's case is I got a borderline personality disorder and everything that has occurred to me ranging from substance abuse, to Methedrine, getting caught up with Roslyn Norton's cult in Kings Cross, all the bad people I met, prostitution, illegitimacy, everything that has occurred in her life is related to that and if she had never developed that borderline personality disorder life would have been different, she would have been a totally different person. She would have been a normal person who would have achieved the potential she achieved later on in life. To quote Ms Adamson's words the other day, she would have found her prince and life would have been different. That is the proposition, I think I have fairly put it.

ADAMSON: You have your Honour."

873 Even had liability been established the plaintiff's case in these terms is rejected. It involves a speculative proposition. Indeed, one may go further and suggest that it is not merely a proposition that is essentially speculative in terms of the evidence, but one which is likely in terms of human experience to be also considered as speculative. Be that as it may, it is also a proposition that does not reflect the uncertainties of life itself or matters of chance and possibilities of the type discussed in **Malec v J. C. Hutton Pty Limited** [1990] HCA 20; (1990) 169 CLR 638. Next, the proposition as formulated in no way reflects even questions of loss or opportunity. The "ifs" of the plaintiff's life also involve many imponderables.

874 Next, on the issue of damages as well, the opinions and views of experts are to be considered in the same way as their views on liability. Their views may or may not be helpful, or may be undermined by inadequacy of facts to support them. Their views may also be based upon speculation, the individual expert's own inference of fact, and personal views of the credibility of the plaintiff. Their opinions may even go beyond what may legitimately be said to be their expert opinion: see **HG**; **Ahmedi**; **Public Trustee v The Commonwealth**.

875 Causation in damages involves issues of fact for the court to determine. They are not merely issues for the "experts" and involve matters for close consideration, analysis and decision by the court.

876 I have already indicated my inability to accept the experts' views on liability, and some of those reasons for so concluding apply as well, to the matter of "contingent" damages.

877 The plaintiff's proposition as referred to, namely that without negligence she would have been a "totally different person", is not one I accept. There is no warrant for concluding she would have been a different person or gone through life differently, or that life's experiences would, even in terms of chance or opportunity, have been significantly different.

878 In any event the proposition ignores perhaps the very issue namely, assuming that a Borderline Personality Disorder and/or some other psychiatric disorder was caused by default of the AWB, of what was its consequences for the plaintiff in terms of harm, loss and damage.

879 The matter of speculation as to damages is further emphasised because of a difficulty

in determining for compensation purposes, a commencement date for assessment and the extent to which, if at all, harm arose before 1951, and thus may have occurred even at different times.

880 That said, I turn to the hypothetical or contingent assessment issues.

881 At common law a plaintiff who has been injured by the negligence of the defendant should be awarded such sum of money as will, as nearly as possible, put them in the same position as if they had not sustained the injuries: **Todorovic v Waller** [1981] HCA 72; (1981) 150 CLR 402 at 412. In a case based on negligence it is necessary to consider what damage the injured party has sustained due to negligence.

882 In **Target Holdings Ltd** supra, Lord Browne Wilkinson said (at 432):

"At common law there are two principles fundamental to the awards of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. ... Under both systems (equity as in common law) liability is fault-based: the defendant is only liable for the consequences of the legal wrong done. He is not responsible for damage not caused by his wrong ...".

883 In the instant case the matter of any assessment is further complicated by the fact that the Borderline Personality condition is not said to be the product of a particular episode or identifiable event occurring at a particular time in the period 1942 to 1960 whilst the plaintiff was under the Board's control. The situation is quite unlike that of a single identifiable event, followed by injury, whether physical and psychological, or by even psychological or psychiatric injury alone. Here the plaintiff in one sense is asserting negligent conduct by neglect (omission) during her upbringing over a long period of time (1942 to 1960) with perhaps, further or alternatively a cumulative effect said to have been capable of being remedied or reversible at different ages by remedial actions. The complication may be particularly illustrated by the evidence of Dr Lal. On the matter of cause, Dr Lal rather suggested that a "contributory factor" to the ultimately diagnosed Borderline Personality Disorder (or its equivalent in nomenclature) back in 1962, was the "contribution" made by each separation. In this case there was the transfer by the mother of the child to the Board's control. Next there was a further transfer after a period of four and a half years at Bomaderry which broke the relationship or attachment and bonding or interaction with Sister Saville. There was a further interruption again to the plaintiff's relationship with Miss Atkinson at Lutanda when Miss Atkinson retired. As I understand Dr Lal's evidence these transfers and interruptions were also capable of contributing to a Borderline Personality Disorder. On the plaintiff's own case it is said that these interruptions or any of them are said to be attributable to any negligence or lack of good faith on the part of the defendant AWB.

884 An issue perhaps also arises as to whether an assessment may rather involve, in part, damages for an increased effect on a condition arising from an alleged default: cf **State Rail Authority of New South Wales v Howell** (NSWCA 19 December 1996, unreported). Another complication arises from the fact that the plaintiff according to Dr Waters, as at 1997. no longer suffered from Borderline Personality Disorder. He considered she had shed the criteria according to DSM-IVTM but that as at March/April 1999 a "new" condition of psychosis had arrived, not hitherto seen in the "already complex psychiatric history". There can be little doubt of the complexity of the plaintiff's psychiatric

history, a matter giving rise to further problems in any "contingent" assessment.

885 In this difficult case, if damages are to be awarded, they should at most be confined to a period 1962 to 1997 and not otherwise. Any assessment is complicated further because the plaintiff has formulated the claim without real discrimination in terms of the various causes of the plaintiff's ill health. All are the subject of claim.

886 The contingent assessment involves difficult causation issues, even putting to one side an issue of foreseeability: see **Kavanagh v Akhtar** (1998) 45 NSWLR 588. The test of reasonable foresight is not in itself a test of causation. It marks the limits beyond which a wrong doer will not be held responsible for damages responsible from his/her wrongful act. In **State Rail Authority of New South Wales v Wiegold** (1991) 25 NSWLR 500 Samuels JA (at 517) discussed the test of reasonable foreseeability as a test for remoteness of damage: see also **Mount Isa Mines Ltd v Pusey** [1970] HCA 60; (1970) 125 CLR 383.

887 Further, the plaintiff's case as put, is that she has no "real responsibility" for any of the matters the subject of the claim for damages including alcoholism, drug addiction, criminal offences, (and other matters) and that someone else is to blame for these, in this case, the defendants. Ms Adamson, submitted that what the defendants' breach of duty had caused was, in effect to convert the plaintiff "from something she would not have been into a person totally different who would not have been confronted with life's problems". She said at 620:

"[Exactly], for example she may have married and had three children but the first would not have been conceived in the course of prostitution. The second would not have been conceived from sexual encounters at the Fraser Hospital, North Ryde".

888 This submission, which should be rejected. It also further highlights the difficulties in the path of the plaintiff's case on damages. This last submission raises not only issues of causation (and remoteness), but perhaps as well aspects of policy of the type for example, envisaged in **CES & Anor v Superclinics** (1995) 38 NSWLR 47 (a case concerning loss of chance and whether public policy precluded the recovery of damages). In that case there were significant hypothetical situations to be considered as well.

889 It is also convenient to refer to Mr Hutley's submissions (at T 601-605) where he argued the plaintiff had received none of life's benefits. This he said included her free University education and welfare support in the 1980'-1990's, her marriage, and her three children. He submitted that the plaintiff was in effect to be compensated for all "life's detriments" without identifying them, or discriminating between them. It was in effect, enough to merely prove a Borderline Personality Disorder and on its proof the defendants become liable in the way submitted. The following exchange took place (at 602-603):

"**HIS HONOUR:** ... I want to find out the ambit of your claim. You say the ambit of this claim is that the defendant is responsible for every detriment that has occurred to this [plaintiff] in the course of her life.

HUTLEY: Subject to that, life's detriments, that she would have had other than detriments of any child and there can be risks of that and this".

890 These excluded detriments I should note were not identified. The "that and this" was also not identified.

891 Mr Hutley submitted at the same page, that the plaintiff should be compensated, for example, because at one stage she became a prostitute, because she became a drug addict, and an alcoholic, as well as because of her attempts to commit suicide, her admissions to hospital in 1962-1965, and her sexual interests. The AWB, he alleged, created "her tragic life" and the Board should pay for all of the "incidents" of tragedy. I reject these submissions in terms so argued. Putting to one side the matter of admissions to Hospital, I do not accept in terms of causation (assuming negligence to have been found) that on the evidence, such matters have been proved to have been caused by the defendants' alleged default (and there was no default). I would here observe that even if her life had been "different" she would still have been exposed to life's problems and misfortunes. Indeed, it has not been proved to my satisfaction that her life would have been different. It is highly speculative to suggest otherwise. It is essentially speculative to even really suggest that even some of life's experiences or happenings would not have occurred if she had been a "different person". Next, in respect of her one marriage to Mr "K", whilst it is not suggested that the act of marriage was to be "attributed" to the defendants, because during the marriage the plaintiff had a Borderline Personality Disorder, the "tragic situation" it was submitted was "likely to contribute to a mistaken relationship". Mr Hutley accepted (perhaps not surprisingly) that no one "could tell" whether falling pregnant was a consequence of the Borderline Personality Disorder (T 605). I find it was not. I find it was not caused by it. The plaintiff on this matter, as on very many matters has not proved the defendants should be held in some way responsible in damages, even had liability been established.

892 The plaintiff in effect submits that as a consequence of her Borderline Personality Disorder, many of the her "problems", indeed if not all, are causatively related to her disorder and therefore compensable. This proposition if advanced in such terms, is one that I do not accept in terms of causation.

893 The plaintiff claims that the diagnosis of Borderline Personality Disorder is not in dispute back in 1962-1965. That is not accepted by the defendants. The defendants stated that the only matter it conceded is that Dr Waters made a retrospective diagnosis of Borderline Personality Disorder in 1991, and that Dr Ellard said that he "did not dispute the diagnosis made by Dr Waters", who also had said that by 1998, the plaintiff had ceased to satisfy the diagnostic criteria (T 615).

894 In further submission the plaintiff's counsel stated that it was not being suggested that she behaved as a "100 per cent automaton". Nor could she be in my view merely because of the possessing of an alleged Borderline Personality Disorder. It would also ignore common sense to suggest otherwise. The plaintiff also relies upon the various historical happenings to prove that under the diagnostic criteria for Borderline Personality Disorder (DSM-lll or DSM-IVTM) that the plaintiff had Borderline Personality Disorder. This in some respects, reflects some post hoc reasoning. She submitted there is a diagnosis of Borderline Personality Disorder therefore those historical happenings are characteristics of the disorder and without more are to be compensated. This proposition I reject. For example, the plaintiff submitted (at T 617) that because substance abuse disorder (a description and explanation for drug abuse and/or alcohol abuse) is one of the "characteristics" of the Borderline Personality Disorder, that such was occasioned by the defendants, and therefore it is to be compensated without further inquiry, in accordance with principles of causation and foreseeability of damage. Mr Hutley (at T 810) put the case that drug addiction is an acknowledged symptom or sequelae of this condition. I reject the proposition.

895 Whilst on one view it might be thought that junior counsel for the plaintiff was putting the case for damages on an "all or nothing basis", Mr Hutley ultimately accepted that a possible approach to the assessment of damages was to evaluate the loss of opportunity "to evaluate the chance that life would have taken a different turn" (at T808). This I consider is the more correct approach, even had the plaintiff been entitled to recover any damages and is reflected in my hypothetical assessment. If I be wrong that any assessment is also highly speculative, I would conclude in all the circumstances that there was but a relatively small chance of the plaintiff's life taking "a different turn". Mr Hutley argued (at T 809) that "our case as pleaded is that all these things were caused by the [Borderline Personality Disorder]". I reject that submission.

896 Mr Hutley (at 810) correctly accepted and acknowledged that children coming from the most loving devoted homes with the best of parents and who do not develop psychological or psychiatric conditions commit crimes and become drug addicts "without having a Borderline Personality Disorder". That said, his proposition was that one would discount damages by reference to the chance that drug addiction "was not associated". In my view drug abuse or substance abuse disorder has not been proved to have been caused by any default of the defendants. He also accepted that if I was against him in inferring that every misfortune arose from the default of the defendants or that where there were doubts, then one would apply **Malec** supra, and that it would be open to me to assess and conclude that the "plaintiff had a good chance of a good life". I reject this submission in the terms asserted. His ultimate proposition (perhaps a change from that initially advanced by Ms Adamson) thus appears to accept that I can look at each "misfortune" not only in terms of "causation", but also in the context of issues of chance raised in **Malec**, and that a finding of a Borderline Personality Disorder per se does not mean everything is to be compensated.

897 The nature and extent of the plaintiff's claim is set forth in the plaintiff's Actuaries Report (exhibit "L") of 17 April 1999. The claim is for the sum of 1.9 million to $2.5 million plus general damages. In addition there are claims for interest on general damages and claims for exemplary and aggravatory damages. The report assumes birth on 13 September 1942 and future life expectation of 26.4 years. It assumes that the AWB's negligence caused a Borderline Personality Disorder, and also a substance abuse disorder compromising her working life earning capacity from 1960 to date. The report advanced by the plaintiff's Actuary, contains the calculations of loss made on the basis of two "scenarios":

" **Scenario A Scenario B**

Past Loss of Income $563,081 $364,300

Interest on Past Loss of Income $638,214 $462,256

Future Loss of Income $366,310 $195,170

Loss of Employer Financed Super. $66,441 $30,529

Past Care $340,090 $340,090

Past Medication $12,287 $12,287

Future Care $342,061 $342,061

Future Medical Services $20,449 $20,449

Future Medication $7,038 $7,038

Cost of Fund Management $150,138 $114,559

$2,506,109 $1,888,739".

898 To these heads are to be added general damages and interest. As I have said there is claimed exemplary and aggravatory damages. On any view the claim as formulated is for very significant and large damages to be awarded.

899 It is important to remember that a further question was later raised for consideration of the Actuary in a Fax from the plaintiff's solicitors. In a further report of 19 April 1999 the Actuaries reported that assuming Ms Williams' life expectancy was reduced by five to ten years the figures for Scenario A and B would need to be adjusted as follows:

" Scenario A Scenario B

Future Care $295,978 $242,556

Future Medical Services $19,264 $17,890

Future Medication $6,090 $4,991

Cost of Fund Management $130,628 $82,514".

900 The plaintiff's two scenarios referred to, reflect different potential levels of income. Scenario A assumes a promotional path from August 1960 to 31 July 1974 as a Nurse's Aide; from August 1964 to 3 November 1985 as a Registered Nurse; Generals from 4 November 1985 to 12 September 1992 as a Nurse Educator (with Diploma) under Public Hospital Nurses' State Award and since 13 September 1982 as a Co-ordinator, Aboriginal Health Service and caring to age of 65. Scenario B assumes earnings of average weekly earnings for a female in accordance with Bureau of Statistics figures.

901 Next, in respect of earnings, an assumption is made that the plaintiff would have taken two years leave from the workforce commencing three months prior to birth of each of three children who were born on 4 September 1963; 13 June 1967 and 7 August 1973 respectively.

902 In an actuarial report 30 April 1999 (exhibit 11) tendered on behalf of the defendant, Mr McLeay, Chartered Accountant challenged the plaintiff's actuarial report. He said that the potential earnings were overstated, there were incorrect calculations of the applicable marginal taxation. No consideration had been given for absences of work. The calculation of superannuation was wrong. No allowance had been made for repayment of social security. He commented that the plaintiff rarely stayed at a place of employment for any long period. He noted the plaintiff's first child was born in 1963, that the plaintiff never completed nursing training and worked as a nurse's aide intermittently. Later two other children were born. He also rejected the two scenarios advanced in the plaintiff's actuarial report. He also noted that the plaintiff had received extensive social service payments throughout most of her life including Abstudy benefits (which appears to be factually correct). No allowance had been made for academic courses undertaken or whether she would have undertaken courses to be a nurse. Calculations under scenario B assumed full

time employment but overlooked demands of motherhood in the 1960s and 1970s availability for the workforce. Indeed, his conclusion was that it would be extremely difficult for any expert to state with reasonable certainty the potential earnings for the plaintiff from 1960 to date. As to this matter I would here observe that I agree, despite Dr Waters, the plaintiff's expert psychiatrist, attempting to do so in a report prepared just prior to trial and tendered in the plaintiff's case. Apart from Dr Waters lack of qualifications to express views on economic matters, "retrospectively" to 1960 (although he did not see the plaintiff until 1991) or otherwise, the evidence does not support Dr Waters' attempt to do so. I regard Dr Waters' views as being unqualified and unhelpful on this point as well: see **HG**.

903 I would add that in my view merely to have the Borderline Personality Disorder without proof of more, does not prove incapacity or its measure in the past or at all.

904 There are claims, inter alia, for loss of earnings. Interest on loss of income is also claimed prior to 1 July 1972 at a rate of 5% and since 1 July 1972 at Supreme Court rates.

905 In respect of past value of care, the claim is made on a commercial rate basis, for a partial period. The current commercial rate is $17 per hour. Past care is claimed on the basis of three hours per day, five days a week apart from periods of hospitalisation from 25 March 1962 to 31 December 1984, six hours per week from 1 January 1993 to 30 June 1997; and from 1 July 1997 at four hours per day five days a week apart from periods of hospitalisation. The claim for past care is again "retrospectively" supported in terms by Dr Waters, (in a recent report prepared in 1999). Apart from the fact that there is a paucity of evidence of actual care being provided during past periods, claims for care were still made on the basis of Dr Waters' report. On the matter of care generally, I also find Dr Waters' views unhelpful. The matter of care, or its reasonableness, cannot be merely resolved by expert medical witnesses (none of whom in fact treated the plaintiff) but are matters too, calling for close scrutiny and decision by the Court.

906 Future care is calculated on the basis of four hours per day five days per week from 19 April 1999 at $17 per hour for 26.4 years.

907 As regards the cost of medication this is calculated upon the basis of a monthly visit to a general practitioner for the remainder of her life at $40 per visit, forty counselling sessions over the next two years at $150 per session. For past medication from 1963 to date including Mogadon, Fortral, and Rohypnol, a claim is made together with a claim for interest. Proof of need (due to default causing injury), causation, of reasonableness, of actual expenditure or liability to pay in the past, has by no means been established. Relevant proof is somewhat vague.

908 Fund management costs are claimed on the basis of either scenario A or scenario B supra.

909 If the plaintiff's case is accepted on negligence and breach, (and it has been rejected) then the damage on the plaintiff's case first occurred between 1942 and 1960. The plaintiff's case is that childhood manifestations of an attachment disorder manifest themselves before the age of five or six (in this case I find they did not). That said, the Borderline Personality Disorder it is claimed cannot be diagnosed before the age of eighteen (T 749). I have found that it was not present in 1960 as suggested by Dr Waters (ie it would have been present by "adolescence"). I have already found neither it or any other psychiatric disorder was present (nor had manifested itself in or prior to 1960).

910 The matter is further complicated by not merely "a complex psychiatric history", with suggested "recovery" from the alleged borderline personality disorder in 1996-1997 (albeit since then her health has deteriorated) but also the fact that since March of this year the plaintiff has been suffering from a new psychiatric condition described essentially as one of "psychotic reaction", a "new condition" not previously seen in the plaintiff over her already "complex psychiatric history" (Dr Waters 8 April 1999). Dr Waters (at T 125) accepted the possibility of genetic predisposition to psychosis. It is not suggested that such a psychosis in terms is an incident of the Borderline Personality Disorder, which had ceased to meet the DSM-IVTM criteria according to Dr Waters in 1997, or thereabouts. In his report of that date Dr Waters said:

"She manifests a psychotic reaction, principally to the stress of the upcoming court case, but contributory factors include substantial recent weight loss and possibly also cannabis use".

911 The cause of the very substantial weight loss and its consequences have not been the subject of acceptable medical evidence in terms of explanation or cause. The cannabis use I do not accept as being caused by any alleged negligence of the defendants or further that the plaintiff has discharged the onus in showing it was. Further, the subject of alcoholism (and its cause and consequences) raises another matter. The plaintiff is a recovered alcoholic. Her mother was an alcoholic and a very heavy user of alcohol during most of her life. Dr Waters when asked whether alcoholism could be part hereditary said (at T 124) that this was a controversial subject, and that there "is evidence" that there is an inherited component to alcoholism but in a fairly complex way. In 1989 there was a diagnosis of the plaintiff's mother by a psychiatrist, the diagnosis being of schizophrenia and probable alcoholic hallucinosis (a psychosis-biological condition). I conclude, indeed, I find on the evidence, that the plaintiff's own alcoholism particularly during a ten year child rearing period was not caused by any default (even if found) of the defendants. It is not responsible to pay damages for it. Nor has the plaintiff discharged the onus in establishing that it was.

912 In report dealing with whether proceedings should be heard (as they were, and there was no application for an adjournment), Dr Waters considered that the plaintiff "remained extremely vulnerable to further breakdowns whenever the case is heard such are the pressures which it induces in her". In his report of 20 April 1999, Dr Waters referred to the plaintiff's condition as "being in a state of active psychosis associated with paranoid ideation". As I understand the evidence a psychosis is different to a personality disorder.

913 The case has been heard, presumably the stress of "the upcoming court case" no longer exists as a factor. That said, the unresolved question of the substantial weight loss remains. There are also the significant physical factors present complicating the case as well.

914 The report from the Illawarra Aboriginal Medical Service ("the IAMS") reveals that the plaintiff had attended the IAMS since October 1986. She had a history of hysterectomy, migraine, drug abuse, psychiatric illness, asthma and anxiety attacks. No cause for weight loss had been identified in that report. There were complaints of back pain to that Service.

915 Thus, there are considerable problems and difficulties in computing "damages" in a case such as the present where events commenced in 1942 and the case is heard in 1999. Indeed, the matter is further complicated by the fact that the damages claim is not for physical injury arising from an identifiable specific happening in terms of time. The claim for

damages (and equitable compensation) is for psychiatric and psychological damage, the alleged consequence of a general course of conduct or an accumulation of conduct occurring between 1942 and 1960 and allegedly continuing thereafter. It is not divided into different periods (see my reasons on liability) This is not a case where psychiatric illness has supervened on physical injuries: cf: **Kavanagh v Ahktar** supra. The case particularly involves a claim for psychiatric injury per se and for ill health, in all its physical and psychological respects. That said, **Kavanagh's** case (applying **Nader v Urban Transit Authority** (1985) 2 NSWLR 501) is of relevance as I have earlier indicated.

916 In my view, the mere statement that a person has a Borderline Personality Disorder of itself tells the Court very little. It does not inform the court whether on particular occasions acts, conduct or behaviour are to be necessarily attributed to it, nor does it prove such behaviour is not the consequence of voluntary or rational decisions. The expression "disorder" (at least in terms of explanation of particular conduct or behaviour) of a case may not always be the subject of close scientifically rigorous analysis even by the experts. Care should be taken that the focus of the trial not shift so as to become preoccupied within the mere existence of a condition rather than analysing and considering its effects and consequences. Causation is a question of fact for the Court as a matter of common sense. A diagnosis, for example, or classification of Borderline Personality Disorder is an early step in an assessment of damages, care still should be taken that a mere disorder diagnosis, or diagnostic label be not misused or misunderstood or used as an explanation without more, for all happening events misfortunes or other occurrences in life of the person with such a an alleged disorder.

917 As I have said, the presence of Borderline Personality Disorder (like any other disorder) is not a reason, a basis or excuse for blaming everything that occurs upon it, for example, criminal conduct or criminal activity the result of rational and voluntary decisions of a person to participate in it: see **Wiegold** at 516-517 or for denying individual responsibility for one's behaviour and conduct. Nor does it deny a need to examine a happening or event to determine whether it was voluntary, an act of individual responsibility, or was the product of an alleged Borderline Personality Disorder then existing, or is to be considered to be due to some other explanation or cause. Individual responsibility has not been "wholly" abolished by the law of torts: see **Wiegold** at 516-517. The mere presence of a disorder does not of itself provide excuses, or non excuses, for actions or inaction. Individual responsibilities for actions and behaviour, and personal acceptance of such is not excused or denied, nor is the responsibility or voluntariness of ones actions, including actions or omissions in the criminal law to be denied. As to the causal relationship between the mere presence of a mental disorder and the commission of a criminal offence (here the plaintiff committed offences in the earlier first half of the 1960's) cf **R v Engert** (1995) 84 A Crim R 67 where there was no causal relationship between the presence of a disorder and the commission of the offence). In the criminal law as to voluntariness see **R v Falconer** [1990] HCA 49; (1990) 171 CLR 30 and **Wiegold** supra. As to causation in the criminal law and its "purpose": **Royall v The Queen** [1991] HCA 27; (1991) 172 CLR 378. As to causation in the civil law of negligence: **March v E. M. Stramare Pty Ltd** supra. Further, causation is not simply a factual question but a normative one, with questions of policy and value judgment entering into consideration: **Wiegold** at 511.

918 I have very carefully read (and re-read) the evidence, including the considerable volume of material touching upon the plaintiff's admissions to hospital between 1962 and 1965. I have carefully considered other material not considered by the other experts. I have had regard to my lack of satisfaction as to the reliability and credibility of the plaintiff on

significant matters and my findings of fact including those on liability which I do not qualify or resile from. In the relevant contemporaneous medical notes are recorded diagnoses and in my view accurate diagnoses reflecting in my view the then current psychiatric nomenclature in place in the field of psychiatry and the then existing criteria for diagnostic purposes. Those notes also reveal matters not the subject a sufficient detail consideration and attention in the medical reports, or which in my view have indeed, in some ways been given inadequate consideration in all the circumstances.

919 Next, as I have sought to indicate, mere classification of itself, of a disorder is not, determinant of its impact, or effect, on the level of functioning of the person suffering from it at any time or any place, or indeed, a necessary guide to an individual's responsibility or degree of control over his or her conduct, behaviour or actions on particular occasions. On the issue of causation I may have regard to the lay evidence - what is said by way of admissions by the plaintiff to others and to all the evidence as well, in determining what are the damage consequences flowing from a particular psychiatric classification, which unless critically and carefully considered and analysed, may of itself create a some what erroneous or even distorted view of a case, and provide false unreliable inaccurate or unhelpful accounts or explanations of past or present events, as well as an unreliable guide to the future.

920 It is for me as a matter of commonsense in terms of causation, (and if necessary foreseeability) to determine when, where and under what circumstances any impairment, disability incapacity or loss or damage, has been caused by breach of duty (had such been found). As I have said, mere proof of the "disorder" is the beginning, but not the end of the matter.

921 Th experts called on behalf of the plaintiff have in some ways approached the matter of scientific causation by proffering an authoritative sounding explanation, that is a Borderline Personality Disorder, as substantially the explanation for the events of the plaintiff's life with in effect nothing counting against this proposition. Nor has there been an attempt, or adequate attempt by the experts to fully explore the plaintiff's behaviour history and conduct in its several respects. It has been rather assumed that the explanation in all its respects is to be found in the claimed Borderline Personality Disorder and that is enough.

922 With great respect to the experts who seek to provide by reference to a psychiatric disorder, explanations for events, past and present and for future happenings, the role of the Court on the matter of causation is a different one. I have touched upon its role earlier. That said, there is no harm in repeating my remarks. Questions of causation are answered in the legal framework in which they occur. Here the framework is in the law of negligence in the civil law. There is also the need to start any legal inquiry as to causation from an understanding of the scope of the duty found to be breached. Where negligence is in issue causation is essentially a question of fact to be answered by reference to commonsense and experience (of the tribunal of fact) and one which considerations of policy and value judgment necessarily occur: see **March v E. M. Stramare Pty Ltd** supra; **Chappel v Hart** supra; **Kavanagh v Akhtar** supra. In the civil area as the cases make clear, the purpose of finding causation in civil negligence is to attribute responsibility in a civil action. As I have already mentioned, reasonable foresight is not itself a test of causation. It marks the limits beyond which a wrong doer will not be held responsible for damage resulting from his or her wrongful act.

923 Next, it is to be remembered that causation is not necessarily negated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more

immediate cause of the loss or damage than the defendant's negligence or default: **Medlin v State Government Insurance Commission** [1995] HCA 5; (1995) 182 CLR 1 at 13; **Akhtar** supra. That said the voluntary and deliberate conduct by the plaintiff is not to be ignored either in terms of her actions or behaviour. Mitigation of damage principles may also have a role to play. So do matters not only of chance: but also of personal predisposition and vulnerability: cf **Wilson v Peisley** (1975) 50 ALJR 207.

924 In **Wiegold** supra, a case involving an issue of a defendant's liability to pay damages for personal injury, where it was claimed that some of the damages were affected by criminal conduct on the part of the plaintiff, Samuels JA (with whom Handley JA agreed) discussed the conceptual distinction between reasonable foreseeability as a test for both remoteness of damage and causation, citing **Chapman v Hearse** [1961] HCA 46; (1961) 106 CLR 112. Samuels JA said at 511:

"Causation is not simply a factual question; it is also a normative one. This proposition clearly emerges from the decision of the High Court in *March v E. & M. H. Stramare Pty Limited*. Hence it follows that the issue whether the appellant's negligence was a cause of the respondents criminal conduct is to be determined not simply by reference to factual considerations but to considerations of policy."

925 His Honour (at 515) concluded in that case that it was an error to hold that the appellant's negligence caused the respondent to turn to crime, and that it was strictly not necessary to express a firm view upon the issue of remoteness of damage. Further, in discussing the matter of reasonable foreseeability, he was nevertheless of the view that the consequences of the criminal conviction were not in the event reasonably foreseeable. That said (at 517) his Honour concluded that the defendant should not be held responsible for the losses the plaintiff sustained as a result of "a rational and voluntary decision to engage in criminal activity ... that the losses ... fall outside the limits for which the wrong doer should be held liable".

926 These remarks and observations are in point in the instant case particularly in respect of the criminal offences (including imprisonment for one) in the 1960's and their effect on damages. Earlier in **Barnes v Hay** (1988) 12 NSWLR 337 (a case preceding **March's** case) the Court of Appeal was also called upon to consider the issues of foreseeability and remoteness and further the issue of causation in the context of an assessment of damages. An issue also arose whether part of the loss was caused by the defendant's negligence. At 352, Mahoney JA noted that a real difficulty in the law of causation was in the formulation of the verbal principle, the "formula". That said Hope and Priestley JJA (at 339) considered that where some principle of causation applied, its resolution still required the exercise of "judgment with different judges arriving at different results". This latter approach is consistent with the view that causation is a question of fact and very much for the trial judge.

927 So far I have been speaking of common law causation and not causation in equity: see **O'Halloran** supra (a case particularly involving the trustee fiduciary duty type of case or one analogous in the circumstances to such). With respect to Equity, Principles of causation, remoteness and foreseeability as well as "novus actus" may well be different: **O'Halloran**; **Makaronis** supra. As I earlier said, I am relieved from dealing with the matter of equitable compensation by the plaintiff's concession that "Equity would follow the law in quantifying equitable compensation by the same measures as are used in the assessment of common law damages"" For this reason in my assessment of damages I forbear from looking at and considering the matter of equitable compensation separately.

928 Mr Barry (for the defendants) also submitted that when it came to determining causation in relation to the plaintiff's alcoholism and drug dependence, even more difficult questions arise. First, he submitted that drug taking is a criminal offence and the policy of the law is that there should also be no compensation for the commission of criminal offences: see **Wiegold** supra. The same proposition he submitted applied to the plaintiff's claim based in part upon her conviction and imprisonment for offences including for the serious offence of bestiality. Mr Barry argued that on the issue of alcoholism there was evidence that the plaintiff's mother too was an alcoholic, (throughout her life or a large part thereof and that the report of Dr Heiner in 1989). He argued that the plaintiff's own alcoholism was somehow caused by "her" personality disorder was not established. He further submitted:

"[The plaintiff] may have been that way in any event. She may have been that way if she had gone to the Cootamundra Girl's Home at the age of 12. She may have been worse off if she had gone to Cootamundra Girl's Home because other girls may have identified her as being "white" and singled her out for prejudicial treatment as well".

929 Dr Waters also gave some evidence on this matter well (at T 135). That said the plaintiff did not reunite with her mother until 1973, and the mother had no role in her upbringing.

930 Mr Barry also submitted that matters such as drug addiction were not compensable even if caused by the defendants' conduct. I consider that on the facts of this case such drug addiction has not been proved on the facts or established as having been caused in any event by default or of the defendant. He also further submitted that in any event some damage to the plaintiff's psychological health was, in any event, likely because of abandonment of the plaintiff by her mother and disrupted nurturing of her earlier years for reasons beyond the control of the Board. There would have been, it is submitted, some interruption in nurturing irrespective of default. There is substance in these submissions which I accept.

931 In reply, the plaintiff has submitted that no factor was identified by the defendant which was "causally unrelated to the plaintiff's Borderline Personality Disorder" (including also that the plaintiff was depressed because her son was in gaol). I reject this submission in the terms stated.

932 As to the matter of the criminal offences, legal questions aside, as a purely factual matter I am entitled to look to what appears to be the circumstances surrounding the commission of an offence: see **Wiegold** at p 512. Indeed, looking at the actual factual context in which the plaintiff's offence(s) in the 1960's (including that of attempted bestiality followed by imprisonment) took place such, I conclude that they were not causatively the responsibility in law, or in fact of the AWB. I reiterate that causation is as much a normative question as it is a factual one. I find the reasons of Samuels JA in **Chapman v Hearse** supra, of assistance, informative and applicable when it comes to dealing with the offences to which pleas of guilty were entered. In the present case it has been shown that there were pleas of guilty and sentencing by courts of law. The plaintiff was found by a court to have voluntarily committed the acts. In the circumstances it would, on the facts as well, be unrealistic or contrary to common sense to find that the defendant caused the plaintiff to engage in criminal conduct. In any event such has not been proved by the plaintiff.

933 Next, I am not prepared to find that the (illegal or otherwise) abuse of drugs and the claimed substance abuse disorder (however, it be described) was caused by any alleged

negligence of the defendants. Further or alternatively, it has not been established that it has been. The alcohol abuse claim as I have said is subject to the same findings. The defendant is not responsible for it (even if negligent). The plaintiff has also not discharged the relevant onus.

934 In this case it will be necessary to look at a number of other matters in their factual context setting to determine whether the defendant is to be made liable for all or any problems and misfortunes asserted by the plaintiff.

935 Mr Hutley further advanced the plaintiff's case as follows. The question to be determined was whether the plaintiff's mental illness and its "consequences" was foreseeable as to make the defendant liable for it. He submitted that even in respect of drug or alcohol abuse there was no reason in law, policy or otherwise excluding drug or alcohol abuse from the ambit of such consequences even where abuse included illegal activities. I have rejected this submission, for reasons given.

936 The plaintiff's case also is that she suffered attachment disorder and Borderline Personality Disorder as a result of the AWB's negligence, that the plaintiff had abused substances since her late adolescence as a result of Borderline Personality Disorder. I reject this submission. Mr Hutley submitted that although the plaintiff no longer meets the diagnostic criteria for Borderline Personality Disorder, she continues to abuse substances. Mr Hutley submitted that Borderline Personality Disorder and the associated substance abuse had compromised the plaintiff's life in all respects, including an inability to form relationships, to earn a living and to look after herself. I reject these submissions in the terms stated.

937 Further to the extent that it is asserted that substance abuse is caused by a Borderline Personality Disorder, I do not have to accept his experts' views in this case. Further the factual foundation for such opinions have not been established.

938 I also have regard to the plaintiff's behaviour and company kept and criminal activities in 1960-1962, a period of some turbulent behaviour in her life, not in my view due to any alleged default of the defendant. Reference in the plaintiff's affidavit evidence as to early involvement with drugs and alcohol is significantly limited. As regards her conduct in the period 1960-1962 she was not forthcoming as to details when questioned by Dr Waters. Notwithstanding this, when the period 1960-1962 is looked at, on all the evidence available including the plaintiff's own limited affidavit evidence, the matter of substance abuse and the commencement of alcohol abuse may be better understood in context.

939 Another matter that I should mention in this most difficult task of assessment relates to further heads of damage. It is impossible to assess damages for pain and suffering and loss of amenities of life by any process of arithmetical calculation.

940 I now turn to consider the specific heads of damages.

General Damages:

941 The plaintiff's case is that when she left Lutanda she was psychiatrically damaged to the extent that she could not partake of community life. I reject this submission in the terms asserted. Apart from my view that this proposition is not one that I accept in the terms stated, it is not one that I accept having regard as I have said to the terms of Dr Cooley's report which reveals and discloses no psychiatric disorder. I am not prepared to accept

that in 1960 the plaintiff had a psychiatric disorder, or further or alternatively, clinical or other manifestations of it. As to the situation before 1960, I have reached a similar conclusion for reasons given by reference to the evidence that I have accepted and the findings and inferences based thereon.

942 The plaintiff asserts that she was destined at eighteen to spend much of her time in institutions (and clearly she spent time in 1962-1965 in one such institution). She claims that she was unable to mother her three children, she could not participate in social activities and unable to lead a normal life. She became a prostitute, developed a drug addiction, became an alcoholic, committed criminal offences, was in and out of employment. She was unable to relate to others because of her emotional deprivations. She suffered ongoing pain and unhappiness. She claims she has had a lifetime of problems and misfortunes.

943 As regards general intelligence, I find the plaintiff in 1960 was rated as of average general intelligence (see Dr Cooley). I also find that she probably completed the Intermediate Certificate and that when she left Lutanda she had the same educational advantages and opportunities as did others in the community having the same or similar educational qualifications. She appeared to have been qualified to embark on a career of nursing had she wished to do so, yet had "declined" or refused to do so although assisted by the Parole Officer, Ms Barnett in 1962. In fact she left employment after a few hours at a hospital where the employer had shown a willingness to employ her as a nurse's aide and to assist her to do a nurse's course. I do not accept the plaintiff broke parole or left the job because of any psychiatric disorder or its consequences. It was her decision, and in my view one involving individual responsibility.

944 The plaintiff left Lutanda on 30 July 1960. A job as a domestic was arranged by Lutanda. There is some evidence to suggest she was placed in that job. She left it after six days. The court records reveal that on 30 August 1960 she was arrested and that "she had been living with a criminal and pervert". He had been keeping her. In August 1960 she was charged with stealing from Woolworths and she admitted the offence "saying she had no money". This is the explanation for her stealing that I accept. She was referred to Dr Cooley who, on 1 September 1960 gave a report including the absence of reference to a psychiatric condition. I do not find this offence in fact to have been caused by any breach of duty on the part of the defendant or caused by the presence of any Borderline Personality Disorder or any other psychiatric disorder. As to the diagnosis consistent between 1962-1965 of the psychiatrists I accept that the diagnosis as stated in terms then stated, whatever may have been later "retrospect" or changes in psychiatric nomenclature or in DSM criteria changes or otherwise. The finding that I further make is that they were the correct psychiatric diagnosis in 1962-1965, and I accept the "consistent" accuracy of each of the stated diagnosis ie of each admission in 1962-1965. Those diagnosis accorded with psychiatric nomenclature at the time.

945 However, for the purposes of assessing damages, I am prepared with reservations, to accept as I said with respect to Dr Waters' evidence, that the plaintiff according to modern psychiatric nomenclature was suffering from a disorder consistent with Borderline Personality Disorder from 1962 to 1997. I do not accept it was caused by the defendants' default or negligence. That still leaves open to determine what consequences flow from it and the impact of it upon her life, conduct, behaviour and development in life. There are many speculative matters here to be considered, as well as identification of consequences.

946 As I have stated, I accept the views of Dr Cooley and drawing the inference that the

plaintiff in 1960 then had no diagnosed or diagnosable psychiatric condition, otherwise she would have said so.

947 In December 1960 and January 196l the plaintiff was convicted of offensive behaviour. On 28 April 1961 the plaintiff was convicted of the offence of attempted bestiality (28 March 1991) and sentenced to a gaol term. She pleaded guilty to the charge. The offence should in my view be seen in the context of the plaintiff's association with Roslyn Norton, and the plaintiff's involvement in her black mass, pagan and witchcraft activities and the "bad company" the sexual freedom generated by such associations.

948 As to the plaintiff's behaviour between 1960-1962 I accept the views of Ms Barnett, her Parole Officer. The following paragraph appears:

"Eileen Williams' work record has been satisfactory but she rarely stayed at her place of employment for any length of time. From the time she left the orphanage it is alleged that she periodically drifted into the company of Bohemian elements of the Kings Cross area and has intimately associated with men who were no more than bad companions. She also admits that she has attended celebrations of black mass."

949 I do not accept the defendant is causatively responsible for these matters save for perhaps movement from employment ie unsettled employment. That said, it is really a matter of speculation or judgment.

950 The plaintiff's life style appears to have been the product of her voluntary behaviour. Further prostitution for money, for pleasure or to get revenge on her father was not caused by any breach of duty of the defendant. Hatred towards men as an excuse for prostitution, was not in my view caused by any alleged default of the defendant. If prostitution was caused by the wish to do it for money or to get back on her father this too would not be the responsibility of the defendant: see also **Havenaar v Havenaar** [1982] 1 NSWLR 626. In that case Hutley JA (when discussing the consumption of alcohol as a voluntary act for most people) said (at 628):

"The concept of voluntariness in a world of universal causation has been challenged but the legal system is built upon the retention of some measure of individual responsibility and it has not been wholly abolished in the law of torts." [my emphasis]

951 This passage was cited with approval by Samuels JA in **Wiegold** at 517.

952 Upon her release from prison on 2 November 1961 on parole (terminating 27 March 1962) the plaintiff found employment initially at a nursing home. The matter of a nursing course was apparently considered. The plaintiff it appears was keen to work as a nurse. It appears that the plaintiff left her job at the nursing home (breaking parole) and her whereabouts between 7 November 1961 and 12 February 1961 were unknown. On 12 February 1962 she was arrested for soliciting. It was believed she had been living as a prostitute since the previous November. The plaintiff said she couldn't stop herself from being a prostitute. In March 1962 (when seen by Ms Barnett) the plaintiff was three months pregnant to some unknown person, I do not find in the circumstances that this pregnancy was caused by any suggested breach of duty by the defendant whether as an incident of prostitution (also not caused by any alleged default of the defendants) or otherwise.

953 In February 1962 she met a Mr Thomas (aged 29) with whom she was living as his wife. He wanted to marry her. He was not the father of the child. The plaintiff said to Ms

Barnett she had a strong sex drive and they were sexually incompatible. She had returned to prostitution. In my view these matters have nothing to do with the defendants! On the Monday evening before 1 March 1962 the plaintiff came to see Ms Barnett about medical help.

954 Ms Barnett observed that the plaintiff was of average intelligence but her social history showed some marked absence of "socially accepted moral standards". In the circumstances this was not caused by any breach of duty by the defendants or in my view, due to any lack of teaching and care at Lutanda. I find that between 1962-1965 the change in jobs, the commission of offences, her life as a prostitute, her conduct, her sexual life, her pregnancy, her relationship with Mr Thomas, were not caused by any default of the defendants (assuming such had been found by me), and the defendants are not responsible in damages for such conduct.

955 The plaintiff had eight admissions to the North Ryde Psychiatric Centre between 25 March and 26 May 1965. The records on proper examination provide information of considerable value to the Court in terms of assisting it in arriving at a decision on all the evidence. The following contents are taken from the Hospital's report to her solicitors (15 June 1989):

"**Re: Joy Eileen WILLIAMS - 13.9.1942**

The abovenamed has had 8 admissions to this hospital dating from 25.3.1962 to 26.5.1985.

Details of her admission are as follows:

1. 25.03.1962 - 08.12.1962

2. 01.02.1963 - 21.02.1963

3. 18.05.1963 - 14.08.1963

4. 28.08.1963 - 30.08.1963

5. 11.12.1963 - 13.12.1963

6. 04.03.1964 - 06.03.1964

7. 11.03.1964 - 11.06.1964

8. 19.05.1965 - 26.05.1965

Diagnosis at the conclusion of each one of these admissions was Sociopathic personality, Prostitution and Sexual Deviation.

She was initially referred by a Parole Officer due to her multiple emotional conflicts and her strong resentment towards any form of authority. Ms Williams had asked for medical help herself and had expressed a keen desire to do something about her condition.

Copy of Report concerning Ms Williams from her Parole Officer dated 1st March, 1962 is enclosed.

On admission she was found to be three months pregnant and subsequently had a baby

while in hospital. She was treated with Largactil 200 mgs. q.i.d., due to her disruptive behaviour. There were no details or reports of any psychotherapeutic treatment she had while in hospital. She was discharged 12.12.1962 while she was absent without leave. [my emphasis]

Her second admission was precipitated by para-suicidal attempt with Largactil tablets. On admission she was unco-operative and showed marked ambivalence and dependency traits. She was again discharged while absent without leave. [my emphasis]

Her third admission she presented for voluntary admission as she felt she could not cope and had nowhere to live and had expressed suicidal feelings. She was accompanied by her 9 months old child who was subsequently placed in a home for adoption. As on previous admissions she went absent without leave and was subsequently discharged. [my emphasis]

Her fourth admission was a referral from an official of Rainbow Lodge. He felt she was unable to stay there any longer due to anti-social behaviour. She had been stirring up other inmates and had threatened suicide when not given her own way. On admission she was extremely resentful for being hospitalised. She had multiple scars over both her forearms and she stated it was from trying to commit suicide. She claimed to have been addicted to Methedrine about 30 tabs. a day since 1960 but states that she had not been taking any for the past few months. She was treated with Largactil for her disruptive behaviour and was subsequently discharged to Gladesville Hospital.

Her fifth admission she presented voluntarily as she felt she could not cope and had self-inflicted cuts to her left forearm and right wrist. She had asked for re-admission as she felt she could not cope on her own.

Her sixth admission she was transferred from Ryde Hospital following an overdose of tablets. According to the patient she took the overdose to attract attention. She expressed guilt feelings about having abandoned her baby.

She had presented for re-admission for the seventh time for further treatment and further attempts for rehabilitate herself. According to the discharge summary there was some improvement in her behaviour during her two months stay. She left the hospital to take up a post as a Mother's Help.

Her last admission was again at her own request after taking an overdose. She went absent without leave two days later and was subsequently discharged. [my emphasis]

There are no records of any further admissions since 16.05.1965. As she has not been seen by any of our staff members since then I am unable to comment on her prognosis.

Yours sincerely,

R. Kaneyson

Director of Clinical Services"

956 Working through the cause of each and every one of the matters involves considerable difficulty. If damages are to be awarded, in my view, as a matter of value judgment, I would award an amount of damages during the period of hospitalisation for some of the matters, the subject of treatment, and accept that some of the matters, without detailing them, are

compensable.

957 The hospital records (1962-1965) include references to lack of co-operation, resentment, overdosing to attract attention, addiction to Methedrine, being discharged for being absent without leave, overdosing on drugs, being irresponsible, practicing bestiality, marriage to Kevin Thomas to "legitimise the baby", hatred of men, prostituting herself for money, prostituting herself to get revenge on her father (4 May 1962), prostitution for pleasure, manipulations to obtain benefits-power, or in order to get her "own way". As I have said it is difficult to see why I should hold that these matters should be regarded as being caused by any breach of duty, if any. Further, points to note from the records of an association with Roslyn Norton (whom she met at 17) who "described vividly sex with animals" to her (1 June 1963); being on Methedrine since 18; and having sexual intercourse since age of 17 (Hospital history 1.2.1963). I do not regard these matters as being the responsibility of the defendant, even if liable. There are references to living with men, and to the plaintiff being unsettled in jobs. In May 1963 she was admitted and described as a hostile sociopathic girl who had "social aberrations". The hospital records reveal anti-social behaviour, and threatened suicide if she did not get her own way (30 August 1963). She worked in factories and resigned. Why she did so is by no means clear, nor are explanations simply to be found. She claimed to have done a nursing course for ten months. As noted, in August 1963 there is a history of three years of drug addiction to Methedrine about "30 tabs a day". It is known what the plaintiff's lifestyle was. In December 1963 there was an admission. The plaintiff was eight months pregnant. She had a fight with a boyfriend, there were superficial cuts inflicted and described as "manipulative to get into hospital". In March 1964 there is a case history note referring to the plaintiff saying she had "overdosed to attract attention - thinks it is a guilty feeling I have about my baby I should have kept her". In May 1965 the plaintiff described her job as a nurse, but also was editing a magazine. The notes in 1965 refer to a "constellation of symptoms"

958 I have studied these reports and the hospital notes with some care. They are but briefly touched upon and referred to in the reports of Dr Waters. They have not been seen by Dr Lal. They were not even seen or studied by Dr Katz or Mrs Bull called as "experts" in the plaintiff's case. Nor did either or both of these persons see the plaintiff anytime. In making detailed reference to the details of the plaintiff's position in the 1960's I do so because it is part of her case that substantially these problems, matters and behaviour were attributed to the defendants' default.

959 The Unit Summary Sheet (A1 - p 209) summarised previous admissions as follows:

"1. 25.3.62-8.12.62 Sociopathic Personality Prostitution

Dr. Yeomans A.W.OL.

2. 1.2.63-21.2.63 Sociopathic Personality Sexual deviation

Dr Yeomans Disch.

3. 18.5.63-14.8.63 Sociopathic Personality Prostitution

Sexual deviation

Dr Yeomans Disch.

4. 28.8.63-30.8.63 Sociopathic Personality Prostitution

Dr Chong Gladesville

5. 11.12.63-13.12.63 Sociopathic Personality Disorder

Dr Hill Disch.

6. 4.3.64-6.3.64 Personalty Trait Disturbance other

Dr Palme Disch.

7. 11.3.64-11.6.64 Sociopathic personality Prostitution

Dr Hennessy Disch.

8. 19.5.65-26.5.65 Sociopathic Personality Prostitution."

960 With respect to damage, the matter of the admissions and their cause is by no means clear. I am prepared to accept that some of them may have been caused in the legal and factual sense by a breach of duty had such a breach been found but it is by no means an easy task to do some 34 to 37 years after the event, and further in the context of changing psychiatric terminology or nomenclature.

961 Turning to other matters, the evidence shows that on 4 September 1962 the plaintiff's daughter Julia Ann was born and in 1963 she was placed for adoption. The birth and adoption were not caused by the defendant's breach, if any.

962 In 1964 the plaintiff took a job as a mother's help. In 1964 she was convicted of stealing. Between 1966 and 1968 the plaintiff went to New Guinea to live with Mr "K". On 13 June 1968 the plaintiff's second daughter was born. The pregnancy and birth on any view was not caused by breach of any duty. Mr "K" whom she had apparently met in Macquarie Hospital (he was an employee) was the alleged father of the second child. In June 1969 he was ordered to pay maintenance. Her daughter subsequently became subject to a Children's Court order. This is a matter particularly commented upon in Child Welfare Records on or about 1 May 1980, twelve years later (see the later entry in the records). There is no evidence that any alleged psychiatric disorder caused the trip to be taken to New Guinea, the pregnancy and birth of the second child or prevented her travelling or from staying in New Guinea for two years or that there was any disorders at this time for which the defendant should be held liable.

963 In July 1970 the plaintiff applied for a Housing Commission flat. Her application form said she was not working and was having out-patient treatment at Caritas House for a psychiatric condition. On 27 September 1971 it appears that Rachel, the plaintiff's daughter was discharged from Lutanda. In March 1972 it is alleged that Mr "K" had applied to Lutanda to again accept Rachel.

964 In 1972 the social worker at Prince of Wales Hospital reported that the plaintiff had come to see her about Rachel. She expressed fears of being physically violent with the child.

965 Again in 1972 there was the matter of admission of Rachel to Dr Barnardo's Homes that was explored. A social worker (Miss Mackay) also saw the plaintiff in 1972 and obtained a history of the plaintiff being "a quarter caste aborigine and is rather dark olive skinned". She was described as being obviously "disturbed" and quite "irresponsible". The

reason for being disturbed has not been really addressed. It is not clear why the defendant, even if liable, should be responsible causatively for this personal irresponsibility. The plaintiff was described as "a married-mother", and that she had a divorce pending. She had also had a de facto relationship for six years which broke up shortly after Rachel was born. The de facto relationship, the entry into it, or its break up is not in my view attributed in terms of responsibility to the defendant.

966 In another report on "Home of Ward" (29 November 1973) reference is made to the son Benjamin (DOB 7.8.1973) then described as being the plaintiff's second illegitimate male child, to a different father. The child had been committed to State care because the plaintiff had difficulty in coping with him. The plaintiff was said to have been unable to manage Ben as a baby. The child Ben had been committed to the care of the Minister on 16 November 1973 by the Children's Court following complaint of neglect and incompetent guardianship. The child had previously been surrendered for adoption on three occasions by the mother but she had revoked the consent. In November 1973 concern was expressed about possible physical harm to Ben from his mother. I do not see why the defendant should even assuming default, be taken to have caused these difficulties or problems, or be responsible for such in damages.

967 In 1973 the plaintiff met her mother for the first time through an organisation called Link-up. Between 1973 and 1975 the plaintiff's mother came to live with the plaintiff and Rachel for two years. They moved to Nowra so that the plaintiff's mother could live with them. In 1974 the plaintiff's income was a supporting mother's benefit [my emphasis]. However, in May 1974 the plaintiff appears to have obtained some part time work as a cleaner. In 1974 in form(s) relating to her son Ben, the plaintiff declared her only income to be her DSS benefit.

968 In 1974 correspondence took place with politicians, concerning the plaintiff applying for return of her child, Ben. On 15 August 1974 there is recorded a meeting between Ms Williams and one Ms Isabel Andrews. It commenced "every one gathered for aforementioned confrontation". It was noted that Ms Williams was erratic, vacillating, self-centred and that Benjamin was well placed with foster parents!

969 On 9 April 1974 it appears that Ms Williams was allegedly interviewed by a TV Channel in respect of the application for restoration of the child Benjamin (Defendants' Bundle of Documents 189). This took place after a meeting between the plaintiff and the supervising District Officer. In October 1974 another memo (14 October 1974) relating to Benjamin appeared (p 197). I quote:

"The mother's behaviour does not appear to indicate any mental disorder but rather a passive demonstration against the department".

970 Subsequently in March 1975 it was recommended by the Department of Youth and Community Services ("DYCS") that a trial restoration of the child, Ben to the mother under close supervision take place. In 1975 the plaintiff moved to a Housing Commission home and placed Ben with foster parents. There is a Housing Commission report that the plaintiff was often drunk according to neighbour's complaints. In December 1976 Ben was discharged from State control. I do not see why the defendants in terms of causation should be held to be responsible for these problems, even were default to be found.

971 In 1975 the mother was having counselling sessions. In a report on the "Restored Ward" - Family Case Work one Morri Young (21 November 1975) referred to seeing "Mrs

Thomas" (Ms Williams' married name) in the office. The following entry appears:

"Mrs Thomas in the office. There seemed nothing obviously wrong but I think that Mrs Thomas came in to size up her new officer (victim). She talked for about half an hour about the negative side of the Department (Child Welfare) especially the male officers. She did confide in me that she had successfully manipulated most of the previous officers and because of my apparent youth I would be no problem." [my emphasis]

972 This conclusion which I accept would suggest it was an occasion of deliberate intended manipulation for gain or purpose, not for attention (from carers or otherwise). It appears to have been voluntary, rational and deliberate conduct.

973 In 1977 there is evidence of the plaintiff having a drinking problem. Again in November 1977 the son Ben appeared in Yasmar Children's Court and the plaintiff was given eighteen months' probation for "incompetent guardianship". In January 1979 the daughter Rachel overdosed. In 1979-1980 the plaintiff had drinking problems and problems coping with her son and left her children unsupervised whilst she worked as a casual taxi driver.

974 In July 1978 (Vol A2 - 379) the plaintiff overdosed with Serapax. She was examined. Contact was made with Miss Stricker (social worker) at the Prince of Wales Hospital who had been working with the plaintiff. There is a record that Miss Stricker was no longer working with the plaintiff due to her failure to keep regular appointments. The cause of the overdosing, is not to be attributed to default of the defendant, or to be the subject of responsibility by the defendant. It has not been proved to my satisfaction.

975 In 1977 the Family Casework Report" revealed that Joy and Ben were seen on a date unspecified. The plaintiff was questioned as to her ability as a mother including her emotional turmoil with her son Ben, her drinking habits, and her leaving the children at night. Counselling as directed was to be continued.

976 On 25 March 1978 (a Saturday night) a caseworker, Miss Kemp was actually called out to see Ms Williams. The plaintiff was convinced she should give up her five year old son. The following passages appear in the caseworker's report:

"Mrs Thomas is a very knowing manipulative lady, who wanted to play games with me, the system etc. She was very evasive when she was asked why she had reached her decision at this particular time and would tell me only what she wanted me to hear".

977 In my view her manipulations were not due to any alleged disorder.

978 In February 1981 Ben appeared in the Children's Court and was placed on probation. Again in May 1981 the plaintiff and her family moved to a Housing Commission property in Nowra. Whilst the plaintiff had an operation she placed her son with the UAM at Bomaderry (indicating ongoing dealings with the UAM by whom she had been looked after in their Children's Home at Bomaderry between 1942 and 1947). The plaintiff was a heavy drinker in 1981. Drinking and instability was described in 1983. In 1984 the plaintiff signed a temporary fostering care order for her son, Ben. Her then alcoholism I do not accept as being caused by any default of the defendant.

979 The Report Form (Child Welfare, 2 August 1983) reveals that Ben had court appearances for neglect and incompetent guardianship in November 1973, December 1977 and February 1981. Rachel has an appearance at Yasmar in July 1980 on a charge under the **Child Welfare Act**. The Department of Community Affairs did a psychological

assessment on Ben in respect of his absence from home in August 1982. The most significant person in Ben's life was said to be his mother's "de facto", then aged 21.

980 A report form in May 1982 referred to Ms Williams receiving counselling from the Health Commission. It was said "her relationship with Chris a sailor aged only about 20 was in itself potentially a source of many problems as well as being symptomatic of other problems being experienced by Ms Williams". Rachel was said to be a source of concern both at home and at school. These difficulties I do not attribute to being caused by the defendants' breach of duty even if one was established.

981 The Department of Social Security ("DSS") Records (Exhibit "A") reveal Disability support pension payments since 30 November 1995 to date. At one stage sickness benefits were paid in 1991. An Abstudy tertiary supplement (post graduate) was paid from January 1993 to 30 December 1993 with Abstudy throughout 1995 and 1996. In 1996 the plaintiff embarked upon the degree course at Wollongong University for a degree of Master of Indigenous Health.

982 In a letter from the Department of Social Security, pension payment from 1981 to 1989 are revealed in different annual sums. In 1989-1990 there is no record in any pension or benefit microfiche.

983 Records show the plaintiff worked with the Department of Education from 31 January 1989 to 14 August 1991 resigning with stress. The cause of the "stress" is not identified. It does not appear to have prevented University studies, nor did any suggested psychiatric disorder if present apparently do so. Yet, in 1991 she graduated with an Associate Diploma in Adult Education in May; 1992 with a Bachelor of Arts; in May 1993 with a Master of Creative Arts. She completed an Associate Diploma in Social Sciences in 1995.

984 It was in 1985, that significant changes began to take place in her life. Dr Waters gave evidence that because she became involved in Aboriginal affairs, activities and University life, her sense of aboriginal identity proceeded dissolution of her personality disorder by half a decade. She commenced a Bachelor of Arts Degree at Wollongong which continued into 1986. In April 1986 the plaintiff sought a housing transfer to Wollongong because she was studying at the Wollongong University with her income being a pension and Abstudy. The plaintiff was offered short term employment as a Projects Officer in the Aboriginal Education Unit. In 1987 she did her final year of her BA degree. According to Dr Waters he obtained a history of the plaintiff being involved in aboriginal activities and pursuing her Aboriginal interests. Whatever psychiatric disorder or condition, if then present and operating, apparently did not preclude such involvement in those matters.

985 In 1987-1988 the plaintiff corresponded with Lutanda receiving "documents" in 1987. An earlier report form (again Child Welfare records in the son Benjamin's matter) of 1 May 1980 may be noted.

986 There is evidence that in November 1993 the plaintiff was granted an Abstudy supplement. She was accepted into a TAFE course in 1993 having graduated as a Bachelor of Arts in May 1992. Another Abstudy grant was sought in 1996 to permit her to do a Masters Degree. Any disorder did not prevent her studying, nor were the academic results the product or incident of any suggested Borderline Personality Disorder or any disorder allegedly present. It is not suggested such inhibited her capacity to study.

987 In 1991 the plaintiff started to resume regular contact with her daughter Julie-Anne.

She was also awarded an Associate Diploma in Adult Education by UTS (Sydney). In September 1991 she was advised that she would be paid a sickness benefit from September.

988 In December 1991 the plaintiff attended the Illawarra Aboriginal Medical Service. She complained of headaches and depression. The cause of the headaches and depression is not established. She was given drugs (16 December 1991). On 31 December 1991 the plaintiff complained of headaches. A past history of alcohol dependency was recorded. There was discussion about the use of Pethidine.

989 In March 1993 the plaintiff ceased studies due to illness. On 11 May 1993 the plaintiff was awarded a Master of Creative Arts from the University of Wollongong. In 1995 the plaintiff commenced studies for an Associate Diploma in Social Sciences (Community Welfare) from Wollongong TAFE. Any illness did not appear to prevent her from studying. In 1995 Dr De Silva reported the plaintiff complained of backache, migraine and stress and was given scripts. These conditions were not in my view caused by any suggested default of the defendant.

990 In December 1995, a Dr Mackay completed a report for DSS in respect of a disability pension certifying her as being unfit for work and the plaintiff signed a "DDS form" applying for a pension. A report in January 1996 by Dr Carner dealt with the plaintiff's health, she also had problems of emphysema and debilitating arthritis which in my view were not caused by any suggested default of the defendant.

991 In 1997 Dr Waters stated that his overall impression was that Ms Williams no longer suffered Borderline Personality Disorder. He considered she had shed every one of the "criteria". Indeed, he said (at 106) that she fell short of the threshold for Borderline Personality Disorder sometime prior to 1997.

992 During 1997 reports of the plaintiff's health were received from the Illawarra Centre dealing with complaints of migraine. The cause is unproved. The plaintiff in 1997 decided she did not wish to move to a house but wished to move to a retirement village. It was about this time that Dr Waters (applying DSM-IVTM criteria) considered that the plaintiff did not satisfy the majority of the criteria for Borderline Personality Disorder.

993 A report of Dr Glenn (19 September 1995) was tendered in the plaintiff's case. It does not appear to have been considered by any of the plaintiff's medico legal experts. The report was in the following terms:

"**EDUCATION:** Was to age tertiary level with Master of Creative Arts.

WORK HISTORY: Last worked for the Department of Education on 14/8/91 ceasing due to **stress** [my emphasis]

(As already pointed out the cause of which has not been proved).

COMPLAINTS: Arthritis in a variety of joints which causes pain on holding a pen to write but does not impede use of a keyboard.

Personality disorder from maternal separation in infancy which has apparently ameliorated over years.

Depression which has in the past been worse but is still active and causes her to be deeply

sad she says beyond tears. She is attending a Paul Aaron for counselling weekly at TAFE. She sleeps a lot and has nocturnal disturbed sleep.

DISABILITY RATING: 20%.

WORK CAPACITY: She is unfit for work in the open market but may manage a few hours possibly as a student.

GENERAL ASSESSMENT: This woman is 53 and has an undetermined personality disorder and depression said to be due to maternal separation in infancy. She has a long history of alcoholism which has been avoided since 1988. She has depressive symptoms. It is noted that more recent data was requested and it would be helpful however it was felt unlikely to be forthcoming unless she were to be reviewed by an independent observer, which if required could be arranged. On the basis of data provided she is 20% disabled and unfit to work in the open market."

994 It appears to me the 20% disability rating appears to have been for her "composite" problems of a physical and psychological then found to be in existence.

995 In April 1999 Dr Twomey reported seeing the plaintiff. He received a history that the plaintiff "drank because her mother drank", that one of the daughters "was the third of a stolen generation" (a history that I find is not correct). Such a statement should also be seen in the light of Dr Waters' view that part of the alcohol problem may have been hereditary. He noted a history of drug abuse since 1960 and that the plaintiff was using amphetamines and methedrine. The plaintiff had back pain, mild hypertension, weight loss, chronic disc disease, hypoglycaemia which (in my view) were not caused by the defendant's alleged default. The plaintiff was then suffering from a multitude of problems. The history from the Illawarra Aboriginal Medical Service from 1991 may be summarised in terms of hysterectomy, migraine, drug abuse, low back pain, psychiatric illness, asthma and anxiety attacks. In the evidence there is reference to stress. As I have said there is the considerable unidentified weight loss referred to for which no cause in given.

996 Evidence reveals that Dr Lal, the treating psychiatric specialist has been treating her since her recent admission on 23 March 1999. He thought the plaintiff had a likely diagnostic "label" of "manic disorder", she possibly suffering from a substance (marijuana) disorder or a brief psychotic disorder (which he "discounted"). He obtained a history of the plaintiff having been smoking marijuana on a daily basis till her admission. It was important to see what would happen in the future. He described Methedrine as a barbiturate prescribed to cause sedation. She had a history of having abused alcohol. For fifteen years at one stage of her life there was a history of drinking herself into unconsciousness. He did not diagnose any depression (contrary to Dr Waters). The plaintiff may or may not have had an anxiety disorder - he could not determine that whilst she was acutely psychotic. Psychosis he said, was predominantly a biological condition. In the 1960's Largactil was used for a number of conditions one of which was psychosis. (The plaintiff was given Largactil at North Ryde in 1962-1965). He did not see reports in 1962-1965. Her florid mental illness may have had an organic base (T 182). In forming his views he relied particularly upon the history to Dr Waters. One of the underlying problems was substance abuse. He said that her present condition was distinct from Borderline Personality Disorder (p 185).

997 On 8 April 1999 Dr Waters reported that the plaintiff had been admitted to hospital with a clinical diagnosis of psychotic reaction. This was as I have said, a new condition "hitherto

not seen in the plaintiff over her already complex psychiatric history". She manifested a psychotic reaction principally to the stress of the upcoming court case but contributing factors include substantial recent weight loss and possibly also cannabis use. His view "was" that complete recovery would take place in a few weeks.

998 At the time of the trial the plaintiff was in hospital suffering from a new condition or psychotic re-action against a background of what Dr Waters said had already been "a complex psychiatric history"! I agree with this last statement.

999 When dealing with the matter of general damages, I propose to make some observations on the matter of care and treatment. As heads of damage they will be also dealt with separately.

1000 An affidavit of Rachel Williams (DOB 13 June 1968) has been filed (14 April 1999). Ms Williams also gave evidence. She had recollections of her mother (and grandmother) drinking a lot of alcohol in about the period of 1975, and of her mother working in two jobs between 1974 and 1979. Her mother in addition to drinking used to or consumed a lot of pills.

1001 As a child, Rachel recalled cashing pension cheques for her mother. She would help her mother and take care of her brother. She and her brother spent time in children's homes. In 1979 they moved to another flat, and her mother kept drinking and taking pills. They moved to Nowra in 1980. The mother formed a relationship with a man by the name of Chris. The mother would drink and Chris would be violent to her. When drunk her mother was vindictive and cruel. At Nowra they lived on social security benefits. These matter, I do not regard as being matters for which the defendants are responsible even if default was established.

1002 The daughter had no contact with her mother for four years when her mother moved to Wollongong to go to University. The mother obtained a job as Regional Aboriginal Community Liaison Officer with the Department of Education in the 1980's. The daughter said her mother said started to go downhill when she left the job. She attended "AA". In the last eight to ten years she lost "an enormous amount of weight". In April 1992 Rachel stayed with her mother in a "filthy flat" for two weeks. She cleaned the place. Her mother was "now" on marijuana (see also the history of Dr Lal).

1003 A Ms Leonie Burley, an enrolled nurse employed by the Illawarra Aboriginal Medical Service described attending the plaintiff's flat since August 1997. She described the plaintiff's flat as untidy, the plaintiff's personal care as poor and complaining of inability to cope. There has been "rapid" deterioration in her mental and physical condition since about August 1998. This is subsequent to the time when Dr Waters considered that the plaintiff no longer answered the majority criteria for Borderline Personality Disorder. The cause of this deterioration is complex and I am unable to find that the cause was due to any alleged default of the defendant.

1004 Ms Lovegrove, her "aged carer", was employed since March 1999 (before her admission to hospital) to assist the plaintiff two hours per week. She assisted on a "voluntary basis" for about 5-7 hours per week from 3 March 1999. Another carer assisted the plaintiff on a voluntary basis for two hours per week. She said the plaintiff was on a pension. She described the plaintiff as very thin. She helped with shopping and tidying up. Ms Lovegrove expressed the opinion (prior to the plaintiff's admission to hospital, that the plaintiff needed 20 hours domestic assistance per week. Her qualifications to express such

an opinion were not revealed. I do not accept her evaluation of need in those terms, or that such can be attributed to any suggested default of the defendant.

1005 Dr Twomey (13 April 1999) described the plaintiff as being a voluntary patient in a psychiatric ward at Shellharbour Hospital. She had been excessively anxious and was concerned about her son in gaol. Her weight had dropped in the last two to three years from "98 kg to 47 kg". She has been diagnosed as having "hypoglycaemia" (the cause of which had not been established). He did not undertake extensive investigations of weight loss or hypoglycaemia. The plaintiff appears thus to have lost almost half her weight since 1997, and the issue was not addressed in terms of causation. I do not accept that the weight loss was due to any default of the defendants.

1006 In a report from Dial-an-Angel of 12 April 1999, reference is made (at 2) to the plaintiff since 15 July 1995 having required assistance and care from the Illawarra Aged Care Services.

1007 A Mr Paul Aarons from the Illawarra Applied Psychological Services provided an estimate of the cost of therapy from 19 December 1995 to November 1996. The costs of one and a half hour consultations (on average once a week) had been met by "TAFE". There had been some out of time consultations between December 1995 and June 1996. He estimated ongoing therapy at forty private consultations per year at $120, ie $4,800 per year. His report deals with costs but is really silent on other matters. What services he has provided all these years, their purpose and why and who was referred for treatment is not clear. Likewise, what is said as required to be provided, and reasons for such is also left vague and uncertain.

1008 The visits to Mr Aarons and the reasons for such raise debatable issues. In Dr Walker's report of 22 October 1997 (the first time sexual assaults at Lutanda were "ever" mentioned) there is a history given by the plaintiff of starting to see Mr Paul Aarons at a time she was attending a "child protection course" as part of her studies in about 1994. She recalls being very distressed by some of the course work which involved watching videos about abusive institutions and also by class discussions in which people talked about "some of their own experiences". The many years of frequent attendance upon Paul Aarons are not satisfactorily established in terms of proof of having been caused by default of the defendant. Further or alternatively, it has not been established in terms of "reasonable" need due to alleged injury caused by any default of the defendants: **Sharman v Evans** [1977] HCA 8; (1977) 138 CLR 563.

1009 The plaintiff seeks to recover the costs of these consultations. It is not clear why she should recover any significant sum on the material before me. The claims are not in the way formulated, made good.

1010 As to loss of earnings or earning capacity and ability to work and working habits, this is a matter too addressed by Dr Waters (at p 4 of his report of 22 October 1997). I do not accept his qualifications to express views or opinions on economic loss. It is these views substantially relied upon by the plaintiff in her claim for loss of earning capacity founded as they are upon speculation, evidence unproved, assumptions and hypothesis. The foundation for the views is not established. His views are not supported by my findings or by my views as to the reliability of the plaintiff. I do not accept his view "that the plaintiff (who he first saw in 1991) would have pursued a successful career without interruption apart from periods of childbearing". As I have said, the factual foundations for such are not proved, apart from Dr Waters lack of qualifications to express such a view. The plaintiff's

case for loss of earning capacity is faced with considerable evidentiary problems as well as for reasons, inter alia, advanced by the defendant's actuary. If any modest sum should be awarded on this evidence it should reflect value judgment and not, impossible, mathematical calculation.

1011 Generally, on the matter of the plaintiff's claim for the cost of care, there are the views recently expressed by Dr Waters that I regard as unhelpful.

1012 In a report of 20 April 1999 Dr Waters referred to the materials that he relied upon as including an affidavit of Rachel Williams, affidavits of a Ms Burley, Ms Lovegrove, and a Ms Heine. He also relied upon reports extending back to 1991. On this basis he considered he was able to deal with the need for care for five periods including extending back to 1965, a period of 26 years before he first saw the plaintiff in 1991. He did not consider himself handicapped, disqualified or inhibited from expressing retrospective views on the eve of the hearing (ie 20 April 1999) in terms of preparing a report on the "need for care". I do not consider his approach to be one that I should accept having regard to all the evidence. Indeed, I do not accept his approach including, the "retrospect" approach to this assessment of need. What is reasonable need is for me to decide in all the circumstances. Further there is relatively little evidence of any actual care provided in the period claimed, at least before 1997. The evidentiary foundation for any claim for care apart from isolated periods has not been properly established. Dr Jones in the undated report does not refer to it. It is perhaps surprising that Dr Waters did not address the issue before 1999, when he did so at the plaintiff's solicitor's request.

1013 In terms of my assessment, the matter of composite medical problems and difficulties and the respective role of each also creates difficulties for the plaintiff's case. She has lost a great amount of weight, is in a poor physical condition with the cause still being explored. The prescription for care by Ms Burley or Ms Lovegrove is not supported. They first became involved in 1997. There is no adequate report from Dr Jones dealing with the subject of care. He (or his practice) was sin a position to provide such if appropriate from time to time since 1965. Who recommended care, when and why, including the need for future care is not clear. Further, the declining capacity in the plaintiff since 1997 also seems to be at a time when the Borderline Personality Disorder was said not to have been present, albeit there was a substance abuse problem in existence. There is little evidence as to past need for care. Dr Waters' future assessment, is but speculative and not founded on evidence that I accept. Further, the plaintiff has not discharged the requisite onus of establishing that the defendant if liable, should on the evidence be responsible for any future care. There has been no real attempt in the plaintiff's case to discriminate between that alleged to be due to that default of the defendants and that which is not. The plaintiff's case in some ways can be stated in the terms that all "her" medical problems are the responsibility of the defendant. The plaintiff carries the relevant onus on matters of damage even if liability is established. The matter of past care and future care calls not for finite calculations but some value judgment. Dr Ellard (19.4.1999) appears to have accepted that the plaintiff has a psychosis. He suggested it had a number of explanations perhaps more than one. He referred to problems with prescriptions of medication since 1991 and diagnosis of drug abuse on several occasions. He thought that drug abuse was the cause. On the evidence I do not find the psychosis (or drug abuse) was due to injury caused by the alleged fault of the defendants, assuming I had found such.

1014 I find Dr Waters' views on the need for care since 1965 of little assistance. Whilst accepting his view in respect of 1986 to 1992 (as being lacking in evidence), I do not accept his view that the plaintiff between 1965 and 1999 had any significant needs for

Griffiths v Kerkemeyer care.

1015 Dr Waters has had not had regard to the views of Dr Glenn (or Dr Lal) in terms of his assessment and current receipt of monies for disabilities for all her many conditions. He did not suggest a care need. He understandably, did not have regard to the whole of the evidence to which I must and should have regard. Dr Glenn in 1995 did not suggest any need for care. He assessed a total disability for work in the open market of 20% due to all conditions physical and psychiatric. I do not see any reason to disagree with his then assessment for all conditions. His independent view at the time I accept. That said, there are multiple causes for that assessment. Nor upon reading Dr Jones' undated report do I find that on any occasion from 1986 onwards he had recommended care. I do not accept Dr Waters' evidence as furnishing a proper evidentiary basis for care assessment.

1016 Apart from the situation since 1997 (at a time when the criteria for Borderline Personality Disorder was said to have been no longer present) when some care in fact has been provided to the plaintiff for complex and composite reasons, but for which there was then little contemporaneous expert evidence diagnosing "a need", there is really limited evidence of any actual care having been provided in fact, save in terms of some assistance by the daughter during part of her childhood. Even then the care provided was during a particular period of the alcohol abuse.

1017 In making a contingent assessment of damages, I would not assess damages as commencing prior to the plaintiff's first hospital admission in 1962, nor extending past 1997, despite the ongoing presence of a suggestion of drug abuse, which I do not accept on the evidence should be found to be due to any default of the defendants, had liability been found. I would have assessed general damages in the sum of $50,000. This assessment is contingent, as I have already said. It assumes, contrary to my view, that the plaintiff suffered some damage at the default of the defendant, It further assumes that I am wrong in my general view that damages may be so speculative that they cannot be assessed at all. The assessment also reflects the view that the diagnostic criteria for Borderline Personality Disorder were not present with respect to the plaintiff in 1997.

Past Interest

1018 Interest on the award of damages should be computed on the basis that any hypothetical award for general damages is in respect of a period that commenced in 1962.

1019 Because of the long period involved extending back to 1962, I grant liberty to the parties to apply in respect of an interest claim. The parties should endeavour to reach an agreement on "contingent" interest to give effect to my reasons. Since the period is so long, consideration may have to be given to the particular application of the principles in **MBP (SA) Pty Limited v Gogic** [1991] HCA 3; (1991) 171 CLR 657 applied in **Metropolitan Meat Industry Board v Williams** (1991) 24 NSWLR 54.

Care

1020 I have already discussed some of the relevant matters when addressing the subject of general damages. It was a convenient course to follow. The principles relating to the assessment for care (past present and future) do not need to be restated. They are to be found in the decision of the High Court in **Griffiths v Kerkemeyer** [1977] HCA 45; (1977) 139 CLR 161. In this case I am prepared to accept that there was prior to 1997 perhaps some "need" for care (incapable of mathematical calculation) from time to time actually met

by the plaintiff's daughter, Rachel, in a somewhat vague and general way when she was a girl. The identity of the person who provides the care and services does not affect existence of the need or the plaintiff's entitlement to compensation for the proved loss giving rise to the need: see **Kars v Kars** [1996] HCA 37; (1996) 187 CLR 354. A review of the whole of the evidence, and the findings made as I have indicated, casts very considerable doubt on whether a case of needed care (even apart from the general absence of actual provision of such) has been proved at all in consequence of any injury, even were default to be established. As I have said there is a paucity of evidence as to actual care in fact provided at any time before 1997 let alone proof of any reasonable need for such. What is recoverable is the reasonable cost of services to address the loss evidenced by need and involves considering whether it was reasonably necessary to provide services to meet an injury caused need. By way of value judgment I would have awarded a modest sum of $10,000 to meet the matter of past need. The issue of need since 1997 is rejected for reasons already discussed. There is no medical evidence I accept supporting need. it in terms of what may have been caused by any hypothetical default of the defendant(s) since 1997, or on the evidence into the future.

Economic Loss

1021 It is not possible to attempt to achieve accuracy. To assess any loss other than in general terms would involve seeking to provide an accurate mathematical precision not reflecting the difficult hypothetical assessment of damages. Arithmetical calculation of past losses in this case cannot be achieved. Any attempt to be precise, is on the evidence made extremely difficult. I have decided value judgment in respect of any past assessment called for.

1022 The plaintiff claims that maternal deprivation and Borderline Personality Disorder made it unlikely that she would be able to engage in regular continuous employment or to have sufficient psychological health to do further study (except that she did in the 1980's and 1990's). I reject this assertion and claim. It is not one established or supported by the actual evidence. It is not one that is to be attributed to any claimed default of the defendants. The plaintiff was able to study both when working and when she was not. The plaintiff asserts that she endeavoured to work as a nurse's aide but was not psychologically fit for such work, that but for the Board's negligence she would have trained as a nurse and worked as a nurse subject to periods of child birth and rearing. It is argued that economic loss should not be assessed by reference to her family or sibling situation, although why such, is or may be irrelevant as a matter of principle is not made clear. Her alleged Borderline Personality Disorder did not appear to compromise her intelligence (see the Binet test by Dr Cooley in 1960) nor her capacity for higher training as indicated by her later education and qualifications. The educational results which I accept, included the Intermediate Certificate. They revealed a capacity from the time the plaintiff left Lutanda to work as a nurse's aide and to be trained as a nurse I do not accept that the plaintiff was denied a chance, or even a chance to any significant extent of progressing in life, or really lost the opportunity of being employed in a market reasonably open to her with her qualifications in consequence of any alleged default of the defendant.

1023 The plaintiff may have perhaps lost some periods of employment from time to time in the past but it is difficult to determine such on this evidence extending so far into the past. The plaintiff's psychiatric history too has been complex. The economic loss is that to be found due to default of the defendants on the hypothesis it is liable. Even were the situation to be considered in terms of **Malec** chances, the loss of opportunity to claim past loss would in my view looking at all the evidence, not be of real significance. The claim for

economic loss save for perhaps specific periods of hospitalisation is difficult to accept and I do not accept it. Next, the cause of the "stress" as a reason for ceasing work is not identified. I also take into account as well, the fact that in the 1980's and 1990's the plaintiff was involving herself in study and other activities, and was not precluded from doing so by any claimed psychiatric disorder.

1024 I do not ignore **Malec**. I do not overlook Dr Glenn's assessment of 20% "total disability pension entitlement for a complex composite condition with many physical and mental components".

1025 However, when I look at the plaintiff's history in terms of causation, I do not conclude that save for interrupted periods of unemployment particularly during periods of medical or hospital care until 1997 that the plaintiff has really made good her claim for loss of earnings in the past. Alternatively, she has not established any loss as being due to the defendants' default, She was not by any alleged default of the defendant injury denied employment prospects, prospects of pursuing nursing avenues or prospects within her qualifications. She did not lose an opportunity to earn in a labour market reasonably open to her. I find that no default caused or prevented the plaintiff in 1960 (or indeed 1962) from pursuing a career involving training as a nurse or from pursuing a career which her education and intelligence had permitted her to do so. If she wanted to she could have done so.

1026 I would have assessed a sum of $35,000 (reflecting very much a value judgment) as being the amount for past economic loss, had the plaintiff been entitled to a verdict. The parties are to bring in interest calculations, if they wish to reflect these views of past loss of earning capacity.

Loss of Superannuation

1027 The claim for loss of employer funded superannuation is rejected essentially for reasons already given.

Past Present and Future Expenses (Medicine, Counselling etc)

1028 This is a matter I have addressed in general terms when discussing the hypothetical assessment of general damages.

1029 The need for counselling has not really been established. What services have in fact been provided, or on whose recommendation, is not made clear. Why counselling over the years has been needed is by no means clear. Default aside, reasonable need has not really been established on the evidence: **Sharman v Evans** supra.

1030 There is a claim for past medication (since 1963), ongoing medication, counselling sessions and a monthly visit to the doctor. I generally reject these claims in terms of causation and need. The plaintiff requires medical assistance for complex medical problems. The purpose of ongoing counselling and reason for such is not clear.

1031 The medical evidence touching on these matters is somewhat scant. There is no acceptable evidence and none from Mr Aarons (the counsellor) as to what he has been doing for the past years. There is no evidence as to the purposes or benefits of counselling or why it is required in the future. In so concluding I have had regard to all the evidence since 1960 (almost 40 years). I have had regard to my findings and to the limited evidence from the Illawarra Health Centre. I have regard to the views of Dr Waters, who is not a

treating expert. Doing the best I can I propose to allow the sum of $5,000 for past expenses. Again this is a reflection of a value judgment.

Cost of Fund Management

1032 The principles relating to the allowance of such a cost are discussed by the High Court in its decision in the **Nominal Defendant v Gardikiotis** [1996] HCA 53; (1996) 186 CLR 49 per Gummow J. Causation and need are required to be met. They are not in the instant case. The claim should be rejected even were default established.

Exemplary and Aggravatory Damages

1033 It is difficult to see any basis on which this claim was even advanced at all. It has somewhat emotive arguments advanced in support of it. The claim and arguments are rejected.

1034 The case is put that the plaintiff's life has been impoverished not by a casual act of negligence on the part of the ephemeral tortfeasors but by alleged deplorable conduct of a statutory body who had held itself out as the statutory guardian to have regard to the plaintiff's welfare for a decade. This argument, (including the factual foundation for it) should be rejected as should the claim based upon it. There was no such conduct on the part of the Board in any respect. It is my finding that there was no negligence and that reasonable care has been exercised by the Board. In any event even if I be wrong, mere negligence does not establish any entitlement.

1035 The law in respect of an award of exemplary and aggravatory damages is to be found in **Lamb v Cotogno** [1987] HCA 47; (1987) 164 CLR 1 (at 8). The difference between aggravated damages and exemplary damages was discussed in **Trend Management Ltd v Borg** (1996) 40 NSWLR 500 per Mahoney P at 503 and by the High Court in the recent decision on the vexed question of exemplary damages in **Gray v Motor Accident Commission** [1998] HCA 70; (1998) 73 ALJR 45: see discussion in 73 ALJ at 402.

1036 The suggestion for example that there is any conduct of a sufficiently reprehensible kind, as to award damages to punish and deter needs merely to be stated to be rejected. Here the Board in 1942 took over control of the plaintiff because her mother was unwilling or unable to be involved in her upbringing. Doing what was reasonably appropriate in the circumstances it placed the plaintiff with experienced carers (the UAM at Bomaderry). There she received care, comfort, devotion, attention, welfare support, maintenance and protection. There was an advancement of her interests. The plaintiff was also transferred to Lutanda for her benefit, welfare, protection and advancement. There too, she received dedicated support, attention, maintenance and care. The Board properly discharged its statutory functions. It performed its statutory duties with reasonable care. Even if I am wrong and there was negligence, there is no conceivable basis for damages to punish or deter the defendants or to award aggravatory damages as compensation. Further, even if the upbringing or care was not "good enough" (and it was), or was even reflective of negligent error (which it was not). The plaintiff's claim is without merit, and is rejected.

1037 Had the plaintiff been entitled to any damages at all, they would have been assessed by me in the total amount of $100,000 plus interest. In respect of interest, if they consider it appropriate then interest calculations should be performed by them and I grant liberty to apply.

1038 I conclude this assessment by again stating that it has been performed contingently and only upon the basis stated at the commencement. My contingent assessment reasons apply only in the event that I am in error in respect of my liability findings of fact in one or more respects on the issue of liability, and if I am also in error as to the highly speculative nature of an assessment. Nothing I have written on the matter of assessment, should be construed as suggesting any inconsistency with what I have said on the issue of liability.

Orders

1. Verdict and judgment for the defendants.

2. The plaintiff is to pay the defendants' costs.

3. Liberty to apply to all parties to put any further submissions

on the matter of "contingent" interest.

4. The Exhibits may be returned.

LAST UPDATED: 26/08/1999
